THE

ALL INDIA REPORTER

1942

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

CALCUTTA SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. (1942) 1 & 2 CALCUTTA
(2) 75 & 76 CALCUTTA LAW JOURNAL
(3) 43 CRIMINAL LAW JOURNAL
(4) 197 TO 203 INDIAN CASES

CITATION : (29) A. I. R. 1942 CALCUTTA

PUBLISHED BY
D. V. CHITALEY, B. A., LL. B., ADVOCATE,
NAGPUR. C. P.
1942

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NAGPUR.

CALCUTTA HIGH COURT

1942

S. N. Das
Advocate High Court
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Srinagar.

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Jammu & Kashmir

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Calcutta High Court

(29) A. I. R. 1942 Calcutta 1

EDGLEY AND BISWAS JJ.

Hafiz Mohammad Fateh Nasib — *Appellant*

v.

Sir Swarup Chand Hukum Chand, Firm and another — *Respondents.*

Appeal No. 234 of 1934, Decided on 28th May 1941, from original decree of Sub-Judge, First Court, 24-Parganas, D/- 31st May 1934.

(a) Adverse possession—Plaintiff out of possession basing claim mainly on adverse possession — Finding that plaintiff was bona fide purchaser for value alone is not sufficient to entitle him to decree—He can succeed only on strength of his title.

Where in his plaint the plaintiff who is out of possession does not claim that he was bona fide purchaser for value and bases his case mainly on adverse possession of the disputed property, the finding that he was a bona fide purchaser for value alone would not be sufficient to entitle him to a decree. He can only succeed on the strength of his own title. [P 9*c*,*d*]

(b) Mahomedan law — Wakf — Public and private wakf — Test — Wakf held public and valid.

For the validity of a public wakf the property dedicated by the wakif should be substantially dedicated to charitable purposes, and if it is regarded as a private wakf, the ultimate benefit must be reserved for the poor or for some religious, pious or charitable purpose of a permanent character as laid down by the Mussalman Wakf Validating Act. [P 10*c*,*d*]

J created a wakf in 1876 for the purpose of maintaining a mosque and a burial ground and also for certain pious purposes. The income of the dedicated property was stated to be Rs. 1360 per annum. The deed provided that the original mutwallis should be *J* himself and his wife and should receive respectively Rs. 40 and Rs. 30 per mensem. The only allowance of a purely secular character, which was contemplated under the deed, was one of Rs. 30 per mensem during the life of *J's* son *U*. The wakif further stated, "If my said wife or my said son *U* dies, the moneys on account of their monthly allowances will merge in and revert to the wakf, and be applied in the pious acts mentioned, thereby increasing the amount of expenditure thereon. Properties will be purchased with the surplus of the wakf funds and the profits thereof spent in pious acts." In 1880, after the death of his wife, *J* executed a second wakfnama by which he appointed himself as the sole mutwalli of the wakf properties during his lifetime, and provided that after his death he should be succeeded in that capacity by his son *U*. *J* died in 1884 and was succeeded as mutwalli by *U*. In 1908 *U* executed a wakfnama in which he set out in detail a list of the various properties which had been made wakf by his father *J* and included therein two properties which he himself added to the endowment in favour of the mosque built by his father. He made certain provisions for the future appointment of mutwallis and also for certain expenditure in connexion with pious and charitable purposes. It was his intention that expenditure connected with such purposes which had been expressly prescribed in his father's wakfnamas should be continued, although certain additional items were mentioned, e. g., oil, candles and a carpet for the mosque, provision for the sacrifice of a cow at the time of Bakrid, Rs. 500 per annum for charity, Rs. 500 per annum for distribution to the poor on the occasion of Bakrid and Rs. 250 per annum for giving feasts to the poor. He further made provision for the payment of allowances to the members of his family and for sundry expenses of a secular nature. With any surplus remaining after defraying all the expenses of the wakf estate, other properties were to be purchased and included in the wakf estate :

Held that the wakf created by *J* in 1876 was a public one and perfectly valid and the wakf of 1880 was nothing but a re-affirmation of the previous wakf of 1876. [P 10*h*]

Held further that the wakf created by *U* in 1908 was also valid : ('16) 3 A I R 1916 P C 86, *Rel. on.* [P 12*b*]

(c) Res judicata— Decision on point without jurisdiction is not res judicata.

No adjudication on a point with reference to which a Court has no jurisdiction can operate as res judicata : 28 Mad 42 (P C) and ('40) 27 A I R 1940 P C 222, *Rel. on.* [P 13*a*]

(d) Civil P. C. (1908), S. 92 — Declaration as to validity of wakf and that suit properties belong to wakf is beyond S. 92 — Court can grant relief even if some of reliefs claimed could only be obtained under S. 92.

The reliefs by way of declaration as to the validity of a wakf and that the suit properties belong to the wakf are matters beyond the scope of S. 92 and the Court has jurisdiction to grant relief in respect of the same even if some of the reliefs claimed could only be obtained in a properly constituted suit under S. 92 : ('28) 15 A I R 1928 P C 16, *Rel. on.* [P 13*f*]

(e) Civil P. C. (1908), S. 11 — Several issues framed — Decision on issue which supports ultimate decision in case is res judicata between parties—Decision on issue not supporting ultimate decree—It cannot operate as res judicata.

Where several issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as res judicata between the parties to the suit : 24 Cal 900 ; ('14) 1 A I R 1914 Cal 352 ; ('30) 17 A I R 1930 Cal 810 and ('15) 2 AIR 1915 Mad 864, *Rel. on;* ('25) 12 A I R 1925 Cal 996 and 17 All 174, *Not approved ;* ('27) 14 A I R 1927 P C 128, *Expl.* [P 14*a*]

Therefore, a decision on one of the issues to the effect that the wakf is invalid which supports the ultimate decree that the suit should be dismissed operates as res judicata. [P 13*h*]

If a decision on an issue does not support the ultimate decree, such decision cannot operate as res judicata between the parties to the suit : 11 Cal 301 (P C); 13 Cal 17 ; 18 Cal 647 ; ('22) 9 A I R 1922 P C 241 and ('24) 11 A I R 1924 Cal 600, *Rel. on.* [P 14*c*]

Consequently a mere expression of opinion as to the invalidity of a wakf even if it can be regarded as finding cannot operate as res judicata in favour of the defendant when it does not support the ultimate decision that the declaration sought by the plaintiff with regard to the validity of the wakf should be refused. [P 14*g*]

(f) Civil P. C. (1908), S. 11 — Co-defendants — Res judicata — Conditions requisite for applicability of, stated—Pro forma defendant proper party — Principle of res judicata applies even if no relief was sought against him.

In order to apply the rule of res judicata as between co-defendants in a previous suit, three conditions are requisite : (1) There must be a conflict of interest between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and (3) the question between the defendants must have been finally decided : ('31) 18 A I R 1931 P C 114; ('32) 19 A I R 1932 P C 161 and 11 C L J 461, *Rel. on.* [P 16*e*]

Even a pro forma defendant is ordinarily bound by a decree which has been obtained in his presence. A decision in a former suit to which the pro forma defendant was a proper party, which affects the interests of the pro forma defendant operates as res judicata in a subsequent suit between the same parties even if no relief was claimed against the pro forma defendant : ('35) 22 A I R 1935 P C 139, *Rel. on ;* 165 I C 662 (Cal); 64 C L J 3 ; 12 Cal 580 (F B) and 25 Bom 589, *Not foll.*; 15 Mad 264, *Approved.* [P 17*b*,*c*]

(g) Appeal —Pro forma defendant's interests prejudiced — He is competent to appeal.

Any party to a suit adversely affected by a decree can appeal from it and consequently, if a pro forma defendant considers that his interests with reference to the subject-matter of the suit have been prejudiced, an appeal filed by him would be competent : 9 C W N 584, *Rel. on.* [P 17*d*,*e*]

(h) Civil P. C. (1908), O. 2, R. 1 — Suit to declare wakf valid — Prospective mutwalli named in wakfnama is proper party.

In a suit to declare a wakf valid, the person named as a prospective mutwalli by the wakif in his wakfnama is a proper party. His addition as a pro forma defendant is valid. [P 18*a*,*b*]

(i) Evidence Act (1872), S. 44 — Previous judgment—Party alleging collusion on part of his predecessor in previous suit—Onus.

Where a party to the subsequent suit alleges fraud or collusion on the part of his predecessor in interest in the previous suit, the onus to establish such fraud or collusion lies on him : ('37) 24 A I R 1937 P C 1, *Rel. on.* [P 19*c*]

(j) Civil P. C. (1908), S. 11, Expl. 6—Wakf —Suit for declaration that wakf was valid — Prospective mutwalli *A* impleaded as pro forma defendant bona fide upholding validity of wakf —Subsequent suit in respect of same wakf— Mutwalli *B* appointed by *A* in his will impleaded as defendant—*A* must be deemed to be litigating in representative capacity on behalf of wakf— *B* must be taken to be person claiming under *A* within S. 11, Expl. 6—*A* and *B* must be deemed to be litigating under same title—*A* held bound by decision in suit in which he was pro forma defendant.

In the suit for a declaration that the wakf was valid the prospective mutwalli *A* who was impleaded as a pro forma defendant bona fide upheld the validity of the wakf. By his will *A* appointed *B* as mutwalli of the suit wakf. In the subsequent suit questioning the validity of the same wakf *B* was impleaded as a person interested in the wakf and also as he claimed to be the actual mutwalli of the wakf under *A's* will :

Held that (1) *A* must be deemed to have been litigating in a representative capacity on behalf of the wakf : ('15) 2 A I R 1915 P C 124, *Applied.* [P 19*d*]

(2) *B* who was in the subsequent suit upholding the wakf as a person interested in the wakf and also as a person claiming to be the de facto mutwalli must be taken to be a person claiming under *A* within the meaning of S. 11, Expl. 6. [P 19*d*,*e*]

(3) Both *A* and *B* must be taken to be litigating under the same title and the fact that *A* was only a prospective mutwalli and *B* claimed to be a de facto mutwalli did not make any difference : ('24) 11 A I R 1924 P C 247 and ('22) 9 A I R 1922 Cal 321, *Applied.* [P 19*e*,*f*]

(4) *A* must be treated as bound by decision on question of validity of wakf in suit in which he was pro forma defendant as the decision affected

his interest to the same degree as that of the plaintiff : ('16) 3 A I R 1916 P C 78, *Ref.* [P 20*b*]

(k) Limitation Act (1908), Arts. 134-B, 144 and S. 28—Transfer by mutwalli of wakf property—Limitation under S. 28 cannot run until alienor ceases to be mutwalli by death or otherwise.

In the case of the transfer of the wakf property by the mutwalli, limitation under S. 28 cannot run until the alienor ceases to be a mutwalli by death or otherwise : ('22) 9 A I R 1922 P C 123 ; ('33) 20 A I R 1933 P C 75 and ('37) 24 A I R 1937 Cal 305, *Rel. on.* [P 21*c*, *d*]

(l) Adverse possession—Wakf — Person appointed mutwalli under wakfnama repudiating mutwallishiip—He can claim wakf property by adverse possession—Limitation runs from date of such possession.

Where the person appointed a mutwalli under a wakfnama never accepts the mutwallishiip and, in fact, avails himself of the earliest opportunity to repudiate it, he cannot be regarded as being under any fiduciary disability in the matter of possessing adversely to the wakf estate : ('37) 24 A I R 1937 P C 185, *Rel. on.* [P 21*g*]

In such a case limitation begins to run from the date on which the person claiming adversely obtains possession of the property : ('30) 17 A I R 1930 Cal 673 and ('40) 27 A I R 1940 P C 116, *Rel. on.* [P 22*g*]

(m) Adverse possession—Nature of—Proof—Principle that adverse possession will be limited to area of which actual possession has been enjoyed—Applicability.

Possession to be adverse in law must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The adverse possession need not be shown to have been brought to the knowledge of the owner. It is sufficient that the possession was overt and without any attempt at concealment, so that the person against whom time was running ought, if he exercised due vigilance to have been aware of what was happening. The fact of possession may be continuous, though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription. The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible : ('35) 22 A I R 1935 P C 36 and ('34) 21 A I R 1934 P C 23, *Rel. on.* [P 23*b*, *c*]

Exclusive adverse possession for a sufficient period may be made out in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time : ('17) 4 A I R 1917 P C 18, *Rel. on.* [P 23*c*]

The application of the general rule that title by adverse possession will be limited to that area of which actual possession has been enjoyed must depend upon the facts of the particular case : ('31) 18 A I R 1931 P C 186, *Rel. on.* [P 23*e*]

(n) Adverse possession — Land — Proof — Compact plot of land — Part let out to tenants and part vacant — Nature of possession sufficient to establish adverse title stated.

The proper test to be applied in the case of adverse possession in respect of land is whether the plaintiff for a period of 12 years or more exercised such dominion over the property as to justify an inference of fact that he was in possession of the whole. It is not necessary that he should prove affirmatively that he had actually been in physical possession of every square inch of the land, but it should be considered whether the acts of possession which had been proved would legitimately show that the plaintiff had enjoyed dominion over the property in the manner in which such dominion is normally exercised : ('31) 18 A I R 1931 P C 186 and ('34) 21 A I R 1934 P C 23, *Rel. on.* [P 23*h*; P 24*a*]

In the case of adverse possession relating to a compact plot of land, part of which had been let out to tenants and part of which was vacant, it would be sufficient for the plaintiff to show that for a period of 12 years or more he held the tenanted land through tenants who had attorned to him or through licensee whom he had permitted to remain on the land and that, in respect of untenanted land, he had asserted his possession from time to time in some suitable manner, for instance, by taking or selling the produce of such land. Mere interference with his possession by the rightful owner would not be sufficient to show that he had been dispossessed unless such interference had resulted in his being definitely ousted from any portion of the land : ('17) 4 A I R 1917 P C 18, *Rel. on.* [P 24*b*, *c*]

Even if he had been dispossessed from a certain portion of the land by another trespasser and ultimately recovered possession, such dispossession would not be deemed to constitute a break in his possession : 22 Bom 733, *Rel. on.* [P 24*d*]

Dr. Sen Gupta, Jogesh Chandra Sinha and Md. Asir — for Appellant.

Atul Chandra Gupta, Kushi Prasun Chatterjee and Khetra Mohan Chatterjee — for Respondents.

Edgley J. — This appeal is directed against the decision of Mr. Basanta Kumar Roy, Subordinate Judge, first Court, 24-Parganas, dated 31st May 1934. The plaintiff firm, Swarup Chand Hukum Chand, had instituted a suit for the recovery of khas possession of the plaint land and for the recovery of mesne profits in respect thereof on the basis of their purchase of the suit land at a sale held at the instance of the Official Assignee on 22nd January 1931. The property in suit comprises premises Nos. 2, 2/1, 2/2 and 3 Rowland Road, Ballygunge, and this property had been mortgaged to the plaintiffs by Mahananda Nandy on 28th January 1927 as security for the sum of Rs. 1,30,000. Mahananda Nandy subsequently became insolvent and his property vested in the Official Assignee on 14th June 1928. The property in suit has a long and somewhat complicated history. Therefore, it is necessary for the purpose of this appeal to set forth the salient facts. Admittedly, the suit land originally belonged to a man named Juman Mistry. The relationship of the members of Juman

a Mistry's family to each other is shown in the following genealogical table :

ETBARI MALI, deceased

Juman Mistry d. 1884 M. Sundan Bibi (2nd wife)		Sham Mistry deceased
		Nandu Jamadar deceased
Umer Ali Sarkar d. Sept. 1911	Aberjan Bibi d. 1934 M. Rakhibuddin	Karim Bux
b Ayesha Bibi deceased (died before her father)	Samiruddin	Aminuddin
Saiyad Abdul Alim Abed d. 17th May 1928.	Muhammad Yusuf, Muhammad Yakub, Muhammad Yunus	

Juman Mistry dedicated a portion of his property to religious purposes by a wakfnama on 28th January 1876. By this deed Juman Mistry appointed himself and his second wife, Sundan Bibi, to be the mutwallis of the wakf estate. The deed purported to be c irrevocable, and in it the wakif stated that his son, Umer Ali, was not fit to be a mutwalli of the properties comprised therein. Juman Mistry made due provision in the deed for the appointment of future mutwallis. Some time after the execution of the wakfnama, dated 28th January 1876, Sundan Bibi died and, on 21st June 1880, Juman Mistry executed a second wakfnama. By this deed he appointed himself as the sole mutwalli of the wakf properties during his lifetime, and provided that after his death he should be succeeded in that capacity by his son, Umer Ali. He also appointed his son- d in-law, Rakibuddin, for the purpose of assisting Umer Ali in the management of the wakf. Juman Mistry died in 1884 and was succeeded as mutwalli by Umer Ali. Admittedly, Rakibuddin never acted as mutwalli in respect of the wakf estate.

Juman Mistry left certain secular properties which were partitioned in 1888 between his daughter, Aberjan Bibi, and his son, Umer Ali, under a deed of partition, dated 5th April 1888. The property in suit fell to the share of Umer Ali by virtue of this deed of partition, and admittedly remained secular property until 1908 in which year, on 11th November, Umer Ali executed another wakfnama whereby he purported to add to the wakf estate which had been created by his father certain properties of his own including the property in suit. He provided that he himself should be mutwalli of the wakf e estate during his lifetime, and that after his death his sister, Aberjan Bibi, and a relation named Samiruddin, should succeed him as mutwallis. The deed contained a further provision to the effect that "on the death of either of the said two mutwallis my daughter's son Abdul Alim Abed, will be appointed in his or her place." Umer Ali died in September 1911, and in December of that year the names of Samiruddin and Aberjan Bibi were mutated in the municipal assessment register as mutwallis of the wakf estate on the application of Samiruddin. f

In 1912, Aberjan Bibi instituted Title Suit No. 36 of 1912, which initiated a long course of litigation regarding the wakf estate, which has not yet terminated. In that suit she asked for a declaration that the wakfnamas executed by Juman Mistry and his son, Umar Ali, were invalid, and she also asked for a partition with Karim Bux of the properties covered by those documents. The principal defendants were Samiruddin, Karim Bux (the father of Samiruddin), Amiruddin (Samiruddin's brother), Abdul Alim Abed and certain minor sons of Samiruddin. Shortly after she had filed her plaint, Aber- g jan Bibi withdrew her prayer for partition. The judgment of the learned Subordinate Judge who decided Suit No. 36 of 1912 is dated 6th September 1912. He held therein that the wakfnamas were invalid, the dedication for religious purposes was a mere pretence and the real motive was the protection of the properties from alienation. He decided, however, that the sum of Rs. 212 per annum for certain expenses in connexion with the mosque should be charged on the entire property. On 5th October 1912, an application for review of the above mentioned judgment was made and the decree of the h Court was modified by consent. This decree gave effect to the application for review, and it was decreed that the property in suit should be partitioned between Aberjan Bibi and Karim Bux and that certain specific properties should be set apart for the purpose of providing the expenses connected with the mosque and the burial ground. The effect of the decree was to declare all the remaining properties to be secular, and by its terms the property now in suit fell to the share of Aberjan Bibi as secular property. Aberjan Bibi put this decree into execution in 1913, and her receipt for delivery of possession is dated 2nd March 1913. She obtained the mutation of her name in

the collectorate records on 12th June 1913. Thereafter, on 22nd June 1913, Aberjan Bibi executed a hebabilewaj in favour of Badruddin, her husband's great-nephew, in respect of certain properties which included the property now in suit. The deed recited that Aberjan regarded Badaruddin with great affection and that the consideration for the deed was a tasry and a gold ring. Badaruddin obtained mutation of his name in the collectorate records on 18th February 1914.

The next important stage in the history of the litigation regarding the wakf estate of Juman Mistry and Umar Ali was reached in 1915, when Suit No. 190 of 1915 was instituted by Samiruddin, his minor sons and certain members of the Muslim public against Aberjan Bibi and the other parties to Suit No. 36 of 1912. Badaruddin and a lady named Neha Bibi were impleaded as transferees of the alleged wakf property and Abdul Alim Abed was impleaded as a pro forma defendant who was interested in supporting the wakf. The principal prayers were that the decree in Suit No. 36 of 1912 should be set aside as fraudulent and collusive, that declarations should be granted to the effect that the wakfnamas executed respectively by Juman Mistri and by Umer Ali in 1880 and 1908 were valid, that the property in suit was covered by those wakfnamas and that Samiruddin and Aberjan were the mutwallis of the said properties. Samiruddin also asked for joint possession of these properties with Aberjan Bibi. The learned Subordinate Judge delivered a lengthy judgment in the suit on 27th November 1916 in which the principal findings were to the following effect: (1) In so far as the plaintiffs sought a remedy for the maladministration of an alleged trust, the Court held that the suit was barred, having regard to the provisions of S. 92, Civil P. C.; (2) the wakfnamas executed by Juman Mistry and Umer Ali were held to be invalid; (3) it was held that Samiruddin was not insane during the pendency of Suit No. 36 of 1912, and that he was bound by the decree in that suit. On the above findings Suit No. 190 of 1915 was dismissed. Samiruddin filed an appeal to this Court against the decision in Suit No. 190 of 1915 (F. A. No. 9 of 1917). It appears however that on 6th August 1917 he applied for permission to withdraw the appeal on the ground that he had been advised that the chances of his success were very small,

as the disputed properties were not validly constituted wakf properties and that the decree in suit No. 36 of 1912 is a proper and valid decree binding upon the parties thereto.

This petition was allowed on the same date. It therefore appears that the position at the end of 1917 was that Aberjan Bibi had been successful in maintaining her contention that the properties which had been allotted to her on partition with Karim Bux were secular properties, and on the basis of her secular title to the property now in suit she had transferred this property to Badaruddin on 22nd June 1913. After 1917, Samiruddin appears to have taken no further steps for the purpose of asserting the wakf character of the property included in the wakfnamas executed by Juman Mistry and Umer Ali. Between 1918 and 1921 there are indications to the effect that Abdul Alim Abed, the grandson of Umer Ali, whose name had been mentioned in para. 5 in Umer Ali's wakfnama as a prospective mutwalli of the estate, was preparing to take steps in order to re-assert the validity of the alleged wakf. On 26th March 1918 and 7th July 1919 notices appeared on behalf of Abdul Alim Abed in the Calcutta Exchange Gazette, whereby the public were warned against having any dealing with Aberjan Bibi, Badaruddin or certain other persons with regard to the alleged wakf property. On 11th October 1919, Badaruddin filed a complaint against Abdul Alim Abed and some other persons to the effect that they had forcibly trespassed upon the premises at Nos. 2 and 3, Rowland Road. Further, on 11th September 1919, some kabuliats were executed in favour of Abdul Alim Abed in respect of certain items of property on the basis that the demised land was included within the wakf estate. Similar kabuliats were also executed in Abdul Alim Abed's favour by other persons on some subsequent dates.

In the meantime, on 22nd September 1919, an agreement was executed between Badaruddin and Anadi Kumar Nandy for the sale of the Rowland Road property at the rate of Rs. 1200 per cottah and earnest money was paid by the purchaser amounting to Rs. 5001. Admittedly, Anadi Kumar Nandy was the benamidar of the real purchaser, Mahananda Nandy, who was a partner in the firm of Messrs. Nalinaksha Ta and Co. On the basis of this agreement, a conveyance was executed by Badaruddin on 9th December 1912 the consideration for the sale being the sum of Rs. 1,36,975. Anadi Kumar Nandy executed a release in favour of Mahananda Nandy on 16th December 1919. On 28th May 1921 Abdul Alim Abed filed his Suit No. 150 of 1921,

a which was subsequently re-numbered as Title Suit No. 153 of 1922. The principal defendants were Aberjan Bibi, Samiruddin and the other parties to the Suit No. 36 of 1912, Badaruddin, Mahananda Nandy and various transferees from these persons. The plaintiff claimed that the decree in Suit No. 36 of 1912 had been obtained by fraud and collusion and that neither he nor any of the minor defendants had been made parties to the review petition and the petition of compromise which had been filed in that case, that the decree was consequently a nullity, and that the wakfnamas executed by Juman Mistry and by Umer Ali were b operative and created valid wakfs in respect of the properties mentioned therein. It was stated in the plaint that Abdul Alim Abed did not attain majority until 30th May 1918. The principal prayers in the suit were, therefore, (1) that a declaration should be made that the wakfnamas of Juman Mistry and Umer Ali were valid and binding documents, and (2) that the decree in Title Suit No. 36 of 1912 should be declared a nullity as it was obtained by fraud and collusion.

The judgment of the trial Court in Suit No. 153 of 1922 was delivered on 27th June 1927. The principal findings in that judg- c ment were as follows : (1) The decree in Suit No. 36 of 1912 had been fraudulently and collusively obtained and must be regarded as a nullity as against Abul Alim Abed ; (2) the decision in Suit No. 190 of 1915 with regard to the validity of the wakfnamas did not operate as res judicata as against Abdul Alim Abed ; (3) the wakfnamas executed by Juman Mistry and Umer Ali were valid and operative documents ; (4) Umer Ali had authority to nominate Abdul Alim Abed as mutwalli after Aberjan Bibi and Samiruddin both in respect of his own wakf and also in respect of Juman Mistry's wakf; d (5) the nomination of Abdul Alim Abed to act as a mutwalli after Aberjan Bibi and Samiruddin was good and valid and he was quite competent to institute Suit No. 153 of 1922. On the above findings the plaintiff was held to be entitled to the declarations for which he had asked.

Two separate appeals against the decision of the trial Court in Suit No. 153 of 1922 were taken to the High Court. The first of these appeals was F. A. No. 187 of 1927[1] and was filed on behalf of certain transferees from Aberjan Bibi, while the appellants in the other appeal (F. A. No. 196 of 1927[1]) were Aberjan Bibi and Badaruddin Ahmed. The e judgment of the High Court was delivered on 12th June 1930, by Sir George Rankin C. J. His Lordship agreed with the learned Subordinate Judge in finding that the plaintiff was not properly represented in Suit No. 36 of 1912, which had been collusively instituted. In this connexion, his Lordship said :

> As he was only one of the parties to the decree complained of, relief in the form of a declaration that the decree is a nullity as against him is, I think, proper and sufficient.

As regards the declaration to the effect that the wakfnamas, dated 21st June 1880 and 11th November 1908, were valid and operative, the learned Chief Justice held that f such a declaration could not be granted as against the transferees, having regard to the provisions of S. 42, Specific Relief Act, and he therefore allowed Appeal No. 187[1] by deleting from the decree of the Subordinate Judge the declaration, which it contained, to the effect that the towliatnamas of 21st June 1880 and 11th November 1908, were valid and operative, and created a valid wakf of the properties therein mentioned. Similarly, he refused to grant a declaration as regards the validity of the wakf in Appeal No. 196 of 1927,[1] which had been filed by Aberjan Bibi and Shaik Badaruddin. As regards the other main find- g ings contained in the judgment of the trial Court, the learned Chief Justice made certain observations in his judgment but he expressly stated that "they are not intended as decisions operating as estoppel between the parties." As regards the wakfnamas, his Lordship said :

> I am of opinion that the deed of 1876 was a valid one and that the deed of 1880 was in essence a mere affirmation of the previous deed and good as such. Both as to Juman's wakf and Umer Ali's wakf of 1908, I accept the conclusion of the Subordinate Judge as to their validity.

As regards the question whether the decision in the suit of 1915 operated as res judi- h cata on the question of the validity of the wakfs, the learned Chief Justice was of opinion that "the plaintiff was not bound by it as being a decision between co-defendants." His Lordship also expressed the view that Samiruddin was not litigating bona fide in the interest of the trust, and he was not prepared to hold that the decree of 1915 estopped the plaintiff from bringing the present suit with reference to the wakfnamas. He was also of opinion that "Umer Ali had no power under the Mahomedan law or under his father's deed to appoint any one as a remote mutwalli," and that in these circumstances the appointment by Umer Ali

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1. *Reported in* ('30) 17 AIR 1930 Cal 787 : 130 I C 369 : 58 Cal 474 : 53 C L J 91 : 34 C W N 1129, F. A. Shihan v. Abdul Alim Abed.

of Abdul Alim Abed as mutwalli in succession to Aberjan or Samiruddin was altogether bad. In the meantime, Abdul Alim Abed had applied to the learned District Judge of the 24-Parganas in Miscellaneous Judicial Case No. 132 of 1927, to be appointed as mutwalli of the estate, but, by his judgment dated 6th November 1927, the learned District Judge held that the application was not maintainable and that a suit under the provisions of S. 92, Civil P. C., provided a proper remedy in a matter of this nature. The application was therefore dismissed. In spite of the above mentioned decision by the learned District Judge of the 24-Parganas, Abdul Alim Abed executed a will on 15th May 1928, in which he stated that he was

> the sole mutwalli according to the terms of the wakfnamas in respect of the properties made wakf by Shaik Juman Mistry deceased and his son, Umer Ali Sarkar, deceased of Chakraberia.

He stated that his brother-in-law, Md. Fateh Nasib, had done his best to protect the wakf, and he appointed him to succeed him as mutwalli after his death. Abdul Alim Abed died on 17th May 1928. In the meantime, the firm of Nalinaksha Ta & Co., had borrowed the sum of Rs. 1,30,000 from Swarup Chand Hukum Chand on 28th January 1927 and had deposited with the latter the title deeds in respect of the Rowland Road property as collateral security for the loan, apparently with the intention of creating a first charge therein for the sum which had been advanced to them. The firm was adjudicated insolvent on 14th June 1928 and on 12th February 1941, the Rowland Road property was sold at a High Court sale and was purchased by the firm of Swarup Chand Hukum Chand, the plaintiffs in the suit, out of which this appeal arises. A conveyance was executed in favour of the plaintiffs by the Official Assignee on 26th March 1931.

Admittedly, Fateh Nasib had succeeded in obtaining possession of the Rowland Road property after Abdul Alim Abed's death in 1928 and had leased a portion of this property to the International Tyres and Motors Ltd., on 30th July 1929 with the result that the plaintiff firm were unable to obtain possession of the disputed property. They, therefore, instituted the suit out of which this appeal arises on 18th July 1931. Besides taking possession of the Rowland Road property, Fateh Nasib appears to have done his best to obtain possession of other portions of the property covered by the wakfnamas executed by Juman Mistry and Umer Ali, which remained in the possession of Aberjan Bibi and her transferees. For instance, in a suit which came before the learned Additional Judge of the 24-Parganas in connexion with Title Suit No. 84 of 1931 he sought to recover possession of premises No. 6/3, Ballygunge Circular Road and to obtain an injunction restraining Aberjan Bibi from interfering with his possession of the property (Ex. 76). The learned Judge found that it had not been established that Abdul Alim Abed had ever been in possession of any portion of the wakf properties, and that he could not confer any right upon Fateh Nasib as mutwalli in respect of these properties by executing a will in that behalf before his death. The suit was, therefore, dismissed.

In the meantime, by reason of the judgment of the learned District Judge of the 24-Parganas dated 6th November 1927 and that of Sir George Rankin C. J. in Appeals from Original Decrees Nos. 187 and 196 of 1927,[1] which was delivered on 12th June 1930, it became clear to those persons interested in re-asserting the wakf character of the property covered by the wakfnamas of Juman Mistry and Umer Ali that the proper course open to them was to take proceedings under S. 92, Civil P. C. This they did in October 1930 by instituting Suit No. 36 of 1930. In that suit they seem to have asked for Aberjan's removal from the mutwallishiip and for certain directions with regard to the administration of the trust. The judgment of the learned Additional Judge of the 24-Parganas was delivered on 25th August 1933. He held that the three towliatnamas constituted a valid wakf, and directed that Aberjan Bibi should be removed from her office of mutwalli of the wakf in suit and should render accounts for the period she had held such office. We are told that Aberjan died in 1934. Steps were not taken to appoint a mutwalli for some years, but on 30th April 1940, Fateh Nasib was admittedly appointed as mutwalli of the wakf estate by the learned Additional Judge of the 24-Parganas, and we are informed that an appeal is now pending in this Court against this order of the learned Judge.

In their plaint in the suit out of which this appeal arises, the plaintiffs seek to base their case on the adverse possession of the disputed property by their predecessors-in-interest beginning from 2nd March 1913 when Aberjan Bibi put into execution the decree which she obtained in Suit No. 36 of 1912. The plaintiffs then refer to the hebabilewaj executed by Aberjan Bibi in favour

of Badaruddin on 22nd June 1913, Badaruddin's exclusive and undisputed possession of the property in suit, his transfer thereof to Mahananda Nandy in the benami of Abadi Kumar Nandy on 9th December 1919, Mahananda's continued possession of the property and the subsequent mortgage in favour of the plaintiff firm on 28th July 1927. The plaintiffs then refer to the insolvency of the firm of Nalinaksha Ta & Co. in which Mahananda Nandy was a partner, to the proceedings taken by the Official Assignee and to the sale of the property in suit by the Official Assignee, which took place on 22nd January 1931. The plaintiffs contended that by reason of their purchase they had become entitled to the property in suit and to possession thereof, but they pointed out in para. 15 of the plaint that while trying to obtain possession they had found defendant 2, the International Tyres and Motors Ltd., in possession of a portion of the premises, namely, Nos. 2, 2/1 and 3 Rowland Road, under an alleged lease from Fateh Nasib. The plaintiffs were, therefore, only able to obtain possession of that portion of the Rowland Road property covered by premises No. 2/2 Rowland Road, which was in occupation of a tenant named Mahammad Sadek. In para. 16 of the plaint the plaintiffs admitted that Fateh Nasib had surreptitiously taken unlawful possession of the land in suit some time in the year 1928. The plaintiffs then asserted that Fateh Nasib claimed the disputed property as wakf property in his capacity as mutwalli appointed by Abdul Alim Abed under an alleged will, but they asserted, after referring to various judicial proceedings, that the property in suit was not wakf property and that Fateh Nasib could not claim to be in possession thereof as mutwalli. They therefore asked for a declaration of their title to the property in suit and for khas possession.

The case of Fateh Nasib as outlined in his written statement is that the property in suit was wakf property by virtue of the wakfnama executed by Umer Ali on 11th November 1908, that the decree which Aberjan Bibi had obtained in Title Suit No. 36 of 1912 was fraudulent and collusive, and that she was incompetent to pass any title to Badaruddin under the hebabilewaj, dated 22nd June 1913. Similarly, he contended that the subsequent transfer by Mahananda Nandy was invalid, and that, in any case, neither Badaruddin nor Mahananda Nandy had ever been in possession of the property in suit. On the other hand, he contended that Abdul Alim Abed had been in continuous possession of the wakf estate as mutwalli until his death on 17th May 1928, when he was succeeded as mutwalli by Fateh Nasib. In para. 30 of his written statement Fateh Nasib said that he

> has an indefeasible right to the property in suit as mutwalli of the said wakf estates. That Syed Abdul Alim Abed, who was the last sole mutwalli of the said wakf estates, had every right to nominate his successor on his death-bed by the will executed by him on 15th May 1928.

This defendant also contended that the decision in appeals from Original Decrees Nos. 187 and 196 of 1927[1] operated as res judicata against the plaintiffs with regard to the wakf character of the property, and that no title could devolve upon the plaintiffs by reason of the sale by the Official Assignee in the insolvency proceedings taken in this Court. Defendant 2, the International Tyres and Motors Ltd., generally supported Fateh Nasib in their written statement. The judgment of the trial Court was delivered on 31st May 1934 and the main findings therein are as follows: (1) The hebabilewaj executed by Aberjan Bibi in favour of Badaruddin on 22nd June 1913 was not a fraudulent and collusive transaction: (2) The purchase by Mahananda Nandy from Badaruddin was a bona fide transaction and for consideration: (3) The promissory note executed in favour of the plaintiffs by Mahananda Nandy and Nalinaksha Ta & Co. was for consideration and created a valid charge on the properties in suit: (4) The will executed by Abdul Alim Abed in favour of Fateh Nasib on 15th May 1928 was a genuine document, but the learned Subordinate Judge found at the same time that "Abdul Ali Abed was never the mutwalli of the estate of Umer Ali Sarkar and that he had no authority to appoint defendant 1 as mutwalli of the estate after his death on the basis of any will": (5) The wakfs created by Juman Mistry and Umer Ali were valid wakfs, although the learned Subordinate Judge held that the appointment of Abdul Alim Abed by Umer Ali as mutwalli was inoperative: (6) On the question of res judicata the learned Subordinate Judge stated "it is difficult to hold that the decisions in Title Suits Nos. 36 of 1912 and 190 of 1915 of the First Court of Sub-Judge, 24-Parganmas are conclusive as to the secular character of the property": (7) On the question of title, the finding was to the effect that the plaintiffs had a much better title to the property in suit than Fateh Nasib who claimed to be a trespasser, and that they had acquired a good title to this property as bona

a fide purchasers for value; (8) with regard to the question of limitation, the learned Subordinate Judge held that the suit was not barred, as the "plaintiffs' predecessors-in-interest, Badaruddin and Mahananda Nandy, were in possession of the suit lands upto June 1928 when Mahananda became insolvent": (9) He also held that it had not been established that Abdul Alim Abed was ever in possession of the disputed property as mutwalli or that he had acquired any title thereto by holding the office of mutwalli for six years; (10) the issue with regard to adverse possession was decided against the
b plaintiffs on the ground that there was no satisfactory and reliable evidence to prove that Mahananda Nandy was in exclusive possession of the entire land. On the above findings, the trial Court decreed the plaintiffs' suit, declared their title and directed that they should recover khas possession of the land in suit on ejectment of the defendants therefrom. Having regard to the above-mentioned findings, Dr. Sen Gupta on behalf of the appellant contends that the plaintiffs' suit should have been dismissed. He argues that, after it had been found that the wakfs were valid and that the plaintiffs and their predecessors had not been able to
c establish their title by adverse possession, it would follow logically that Aberjan Bibi could have transferred no title to Badaruddin by virtue of the hebabilewaj which was executed on 22nd June 1913 and consequently the subsequent transfers failed to pass title. He points out that in their plaint the plaintiffs did not claim that they were bona fide purchasers for value and that they based their case mainly on adverse possession of the disputed property. Dr. Sen Gupta rightly argues that, even if the plaintiffs be regarded as bona fide purchasers for value, this finding alone would not be sufficient to entitle them to a decree in a suit of
d this nature. Admittedly, they are out of possession, and it would therefore follow that they would only be entitled to succeed on the strength of their own title. It appears however that in effect the learned Subordinate Judge has decreed the suit merely by reason of the fact that, in his opinion, the defendants have not been able to establish a better title to the property than that of the plaintiffs.

Dr. Sen Gupta faintly urged that the hebabilewaj, dated 22nd June 1913, had not been properly proved and also that it had not been established by evidence that consideration had passed in respect of the transfer of the property in suit from Badaruddin to Mahananda Nandy. With regard to these e points however we may say at once that we are not in agreement with Dr. Sen Gupta's contentions. We have examined the evidence carefully, and we find with reference to the hebabilewaj that there were materials before the learned Subordinate Judge sufficient to satisfy him that the original could not be produced within a reasonable time. He was therefore justified in admitting secondary evidence of this document in view of the provisions of S. 65, Evidence Act. There is also satisfactory evidence on the record to show that this document was properly executed. Further, as regards the transfer to f Mahananda Nandy, we are of opinion that the evidence before the trial Court was sufficient to show that consideration passed in respect of this transaction. We are in agreement with the learned advocate for the appellant in thinking that, on the facts found by the trial Court, the suit should have been dismissed. In fact, Mr. Gupta, on behalf of the respondents, frankly admits that he is unable to support the judgment of the learned Subordinate Judge on the findings contained therein. He maintains however that his clients are entitled to succeed on certain points which have been g decided against them by the trial Court.

Mr. Gupta's main contentions are as follows: (1) The evidence shows that the wakfs created by Juman Mistry and Umer Ali were invalid and that the property covered by the wakfnamas was secular property and, consequently, the hebabilewaj, dated 22nd June 1913, and the subsequent transfers operated as valid conveyances; (2) in any event, the decision in Title Suit No. 190 of 1915 to the effect that the wakfs were invalid must operate as res judicata between the parties to the suit out of which h this appeal arises; (3) on the evidence the plaintiffs have been able to establish their title by adverse possession.

As regards the validity of the wakfs, the foregoing summary with regard to the protracted litigation in reference to this matter shows that different views have been taken by the various Courts in which this question has been raised. If it were open to the parties to the present suit to reagitate this matter, we would not be prepared to dissent from the opinion expressed by Sir George Rankin C. J. in his judgment in Appeals from Original Decrees Nos. 187 and 196 of 1927,[1] where his Lordship observed:

I am of opinion that the deed of 1876 was a valid one and that the deed of 1880 was in essence a mere affirmation of the previous deed and good as such. Both as to Juman's wakf and Umer Ali's wakf of 1908 I accept the conclusion of the subordinate Judge as to their validity. They satisfy the test laid down in 54 I A 372.[2]

In the case cited by the learned Chief Justice the Judicial Committee of the Privy Council were dealing with a wakf which had been created before the enactment of the Mussalman Wakf Validating Act, 1913. Their Lordships pointed out that :

Under the Act a wakf is not rendered invalid because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are ordinarily understood as charitable purposes, whereas, with regard to wakfs created before the passing of the Act, the test still is .... was there a substantial dedication of the properties included in the wakf to charitable purposes? The test may sometimes be difficult of application, and in applying it, the Courts, especially since the passing of the Act, will not be disposed to construe the provisions of the deed too strictly; but still the question must remain whether the properties included in the wakf have been substantially dedicated to charity, or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Mahomedan law of succession.

Retrospective effect was given to the Act of 1913 by the Mussalman Wakf Validating Act, 1930, with the result that a private wakf created by a Muslim for the maintenance and support wholly or partially of his family, children or descendants would now be regarded as valid,

provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Mr. Gupta's argument is to the effect that, if the wakf created by the wakfnamas executed by Juman Mistry and Umer Ali is regarded as a public wakf it does not satisfy the test laid down by the Judicial Committee to the effect that the property dedicated by the wakif should be substantially dedicated to charitable purposes, and that, if it is regarded as a private wakf, it fails to comply with the provisions of the Mussalman Wakf Validating Act, 1913, to the effect that the ultimate benefit must be reserved for the poor or for some religious, pious or charitable purpose of a permanent character. It may be noted that in this appeal we are directly concerned only with the validity of the wakf created by Umer Ali on 11th November 1908, as, before this date, the property in suit was admittedly secular property which had fallen to the share of Umer Ali as a result of a partition effected between him and Aberjan Bibi on 5th April 1888. But in discussing the validity of Umer Ali's wakf it is necessary to refer to the wakfnamas executed by Juman Mistry in 1876 and 1880, because some of their provisions have been imported into the deed which Umer Ali executed on 11th November 1908.

From its nature, the wakf created by Juman Mistry on 28th January 1876 (EX. A) was a public wakf for the purpose of maintaining a mosque and a burial ground and also for certain pious purposes which were detailed in the schedule annexed to the deed. The income of the property which was dedicated was stated to be Rs. 1360 per annum and Mr. Gupta's main criticism with reference to this wakfnama is that the allowances stipulated as payable to the mutwallis were excessive. In our view, there is no substance in Mr. Gupta's argument on this point. The two mutwallis appointed under this deed were merely to receive respectively the sums of Rs. 40 and Rs. 30 per mensem or Rs. 840 per annum. It is true that the deed provided that the original mutwallis should be Juman Mistry himself and his wife, but, even if strangers had been appointed to this office, it would have been necessary to make some suitable provision for their salaries. The only allowance of a purely secular character, which appears to have been contemplated under the deed, was one of Rs. 30 per mensem during the life of Umer Ali. Further, the deed contained a provision to the following effect :

God forbid, if my said wife or my said son dies, the moneys on account of their said monthly allowances will merge in and revert to the wakf, and be applied in the pious acts mentioned in the schedule thereby increasing the amount of expenditure thereon. Properties will be purchased with the surplus of the wakf funds and the profits thereof spent in pious acts.

There can be no doubt, therefore, that the wakfnama executed on 28th January 1876, created a valid wakf. The execution of the second wakfnama by Juman Mistry on 21st June 1880 appears to have been necessitated by the death of his wife, Sundan Bibi. Apart from the provisions relating to the appointment of Umer Ali and Rakibuddin to succeed Juman Mistry as mutwallis, this deed was, as observed by Sir George Rankin, "in essence a mere affirmation of the previous

2. ('27) 14 AIR 1927 P C 191: 103 I C 518 : 9 Lah 203 : 54 I A 372 (P C), Balla Mal v. Ata Ullah Khan.

deed." The property mentioned therein was
a substantially dedicated to charity, and it also contained provisions to the effect that any surplus income should be used for the purchase of properties, of which the profits would be spent for religious and charitable purposes.

In the wakfnama executed by Umer Ali Sarkar on 11th November 1908 the wakif sets out in detail a list of the various properties which had been made wakf by his father, and includes therein two properties which he himself added to the endowment in
b favour of the mosque built by his father at 4 Ballygunge, Circular Road. In para. 3 he makes certain provisions for the future appointment of mutwallis and also for certain expenditure in connexion with pious and charitable purposes. It seems to have been his intention that the expenditure connected with such purposes which had been expressly prescribed in his father's wakfnamas should be continued, although certain additional items are mentioned, e. g., oil, candles and a carpet for the mosque, provision for the sacrifice of a cow at the time of the Bakrid, Rupees 500 per annum for charity, Rs. 500 per annum for distribution to the
c poor on the occasion of the Bakrid and Rs. 250 per annum for giving feasts to the poor. In para. 4 he makes provision for the payment of allowances to the members of his family and for sundry expenses of a secular nature. In para. 5 he states :

> With any surplus that may remain after defraying all the above expenses of the wakf estate, other properties will be purchased and included in the wakf estate. The mutwallis shall not be entitled to make any objection thereto. On the death of either of the said two mutwallis my daughter's son Abdul Alim Abed, will be appointed mutwalli in his or her place. He will look after the wakf estate in the same manner. Thereafter, on the death of any mutwalli any one amongst the said heirs who will
> d be a fit person will be appointed to the office of mutwalli in his place, and will receive his monthly allowance every month as such mutwalli.

With regard to this deed, Mr. Gupta argued that Umer Ali in effect sought to create a new wakf by amalgamating certain properties of his own with those which had already been dedicated by his father. He also maintains that, if the wakfnama be regarded merely as a dedication in respect of his own properties, the benefit to charitable and religious purposes must be regarded as unsubstantial, having regard to the generous scale of allowances for members of Umer Ali's family, which are mentioned in para. 4 of the deed. We are not prepared to accept this argument. If the deed be read as a whole, it was clearly Umer Ali's intention
e to reaffirm the directions which his father had given with regard to expenditure from the properties which had been dedicated by him to religious and charitable purposes. The two items of property which were expressly dedicated by Umer Ali included the Rowland Road property now in suit, and some premises in old Ballygunge Road, which must have been of considerable value. There is no reason to suppose that the income of these two items of property alone was not sufficient for the purpose of defraying the additional items of expenditure in connexion with charity and religion which are men-
f tioned in para. 3 of the deed and also for meeting the allowances to members of Umer Ali's family detailed in para. 4 of the deed. These allowances amounted approximately to Rs. 200 per mensem, but in this connexion it must be remembered that, by reason of the provisions in para. 5 the mutwalli for the time being, if he happened to be one of the members of the family, would receive his monthly allowance in his capacity as mutwalli. The nature of the wakf created by Umer Ali was not unlike that of a similar deed which was considered by the Judi-
g cial Committee of the Privy Council in connexion with the case in 44 I A 21.[3] In that case their Lordships pointed out that :

> The trusts too are active trusts, troublesome to discharge, and the petty salary given to the trustees may accordingly well be held to have been given to them as remuneration for their trouble in this respect, and therefore as part of the expenditure on the charitable objects.

It was Umer Ali's intention that the persons mentioned in para. 4 should only receive allowances if any surplus was available after meeting the expenses of the mosque and the other expenses mentioned in para. 3. It seems to have been his intention that
h they should receive these allowances during their natural lives only and, this being the case, on their death, the wakf would benefit to the extent of any money saved by non-payment of the allowances. The amount of money to be spent on charity was not fixed, and, as observed by the Judicial Committee in 44 I A 21:[3]

> The income may fluctuate or decrease permanently, and the needs of the charity may expand .... The paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. It is the residue,

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3. ('16) 3 A I R 1916 P C 86 : 39 I C 235 : 40 Mad 116 : 44 I A 21 (PC), Mutu Ramanadan Chettiar v. Vava Levvai Marakayar.

which may be a dwindling sum, that is given to the
a family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound.

The provision to the effect that with any surplus, properties should be purchased and included in the wakf estate seems to have been intended by the wakif to be read subject to the condition attached to the corresponding provision in the wakfnamas executed by his father, namely, that the income of such properties should be expended for the religious purposes in connexion with which
b the wakf was originally established. This clause will, therefore, seem to operate as an ultimate dedication to religious and charitable purposes. In discussing the question of the validity of Umer Ali's wakf, we are not concerned at this stage with the provisions made for the appointment of future mutwallis. As far as the dedication itself is concerned, the deed appears to comply with the essential provisions of Mahomedan law with regard to such matters. We are not, therefore, prepared to accept Mr. Gupta's contention that the wakf was invalid. This leads us to the consideration of the second
c point put forward by Mr. Gupta to the effect that, as far as the parties to the present suit are concerned, they are estopped from reagitating the question of the validity of the wakf by reason of the decision in Suit No. 190 of 1915. In order to appreciate the true nature of the decision in Suit No. 190 of 1915, it is desirable to set out in extenso the prayers made in the plaint in that suit. These prayers are as follows :

(1) That it may be declared that the wakfnamah of 8th Ashar 1287, executed by the late Juman Mistry, and the wakfnamah of 26th Kartick 1315 by the late Umer Ali Sarkar are legally valid wakf-
d namahs. (2) That it may be declared that the properties of Schs. Ka and Kha and the properties Nos. 2, 3 and 4 of Sch. Ga and the properties Nos. 1 and 9 of Sch. Gha and the property of Schs. Una and Cha are under the said wakfnamahs the wakf properties of the mosque founded by Juman Mistry and described in Sch. Ka. (3) That it may be declared that plaintiff 1 and defendant 1 are the mutwallis of the said wakf properties. (4) That it may be declared that none of the defendants has any personal right in the said wakf properties. (5) That it may be declared that the decree in Suit No. 36 of 1912 is fraudulent and collusive and the same may be set aside. (6) That it may be declared that the said decree is not binding upon any one of the said plaintiffs. (7) That a decree may be given to plaintiff 1 for possession of the properties described in Schs. (Ka) and (Kha) and those in Items 2, 3 and 4 of Sch. (Ga) and those in Items 1 and 9 of Sch. (Gha) and those in Schs. (Una) and (Cha) as mutwalli jointly with defendant 1.
(8) That a receiver may be appointed in respect of the wakf properties during the pendency of this suit. e
(9) That the plaintiffs may be given a decree against the defendants for the costs of this suit. (10) That the plaintiffs may also be given a decree for any reliefs to which they may be entitled in justice and reason under the decision of the Court.

Twenty-one issues were framed by the Court, of which the most material for the consideration of the present question are Issues 2, 6, 7, 13, 14, 15 and 16 which are as follows :

Issue 2 : Has this suit been properly framed ?

Issue 6 : Has the Court jurisdiction to try this suit in view of the provisions of S. 92, Civil P. C. ?

Issue 7 : Is the suit maintainable without the sanction of the Advocate General of Bengal ? f

Issue 13 : Was a valid wakf created by any of the towliatnamas referred to in the plaint ?

Issue 14 : Was the second towliatnama of Juman Mistry a valid document? Could it operate in the face of the first towliatnama ?

Issue 15 : Were the various towliatnamas referred to in the plaint ever acted upon? Were the properties in suit ever treated as wakf? Even if they were, could it confer validity on the deeds, if invalid? Is defendant 1 estopped by conduct in questioning the validity of the wakf ?

Issue 16 : Is plaintiffs' suit a bona fide one? Are defendants 2 and 3 acting in collusion with the plaintiffs ?

It has already been mentioned that this suit was instituted by Samiruddin, his minor sons and certain members of the Muslim g
public against Aberjan Bibi and the other parties to Suit No. 36 of 1912. Abdul Alim Abed was impleaded as a pro forma defendant, and the plaintiffs' reasons for taking this course are given in para. 22 of the plaint, which reads as follows :

The minor pro forma defendant 6 in this suit is, under the provisions of the wakfnamah of the said Umer Ali Sarkar, entitled to be a mutwalli of the wakf estate after the death of the said Aberjan Bibi. It is necessary to have this suit decided in his presence. Consequently, he is made a pro forma defendant. The said minor, Abdul Alim Abed, is at present under the care of defendant 1 in this suit. As the interest of the said Aberjan Bibi is adverse to the interest of the said minor, she is not a fit h
person to be appointed his guardian. For this reason his uncle, Moulvi Saiyad Abdul Hakim, is made guardian.

Reference has already been made to the main findings at which the learned Subordinate Judge arrived in the judgment in Suit No. 190 of 1915, and Mr. Gupta contends that the finding in the judgment to the effect that the wakfnamas were invalid operates as res judicata between the parties to the suit out of which the present appeal arises. On this point, Dr. Sen Gupta's main contention is that the finding in question must be treated as connected with that part of the plaintiffs' case, whereby they sought to recover possession of the properties in the wakf,

and, as the learned Subordinate Judge held in connexion with issues 2, 6 and 7 that he had no jurisdiction to try this part of the case in view of the provisions of S. 92, Civil P. C., it follows that the question of the validity or invalidity of the wakfs was one with which he had no jurisdiction to deal, and that any finding at which he may have arrived on this point cannot possibly operate as res judicata in a subsequent suit. Obviously, no adjudication on a point with reference to which a Court has no jurisdiction can operate as res judicata: 28 Mad 42,[4] 45 C W N 204,[5] Halsbury, Vol. 13, Para. 493, Edn. 2. It is, therefore, necessary to examine in some detail the precise implications of the findings contained in the judgment of the learned Subordinate Judge.

From the prayers attached to the plaint it will be seen that the main reliefs which the plaintiffs were seeking were (1) a declaration with regard to the validity of the wakfnamas executed by Juman Mistry and Umer Ali and with regard to the wakf character of the property covered by those deeds; (2) a declaration to the effect that the decree in Suit No. 36 of 1912 should be treated as fraudulent and collusive and not binding on the plaintiffs; and (3) that Samiruddin should be given a decree as mutwalli for joint possession of the property in suit with Aberjan Bibi. It is true that, in discussing the considerations which arose in connexion with issues 2, 6 and 7, the learned Subordinate Judge, in the first part of this section of his judgment, used certain expressions from which it might appear that he was assuming that all the prayers made by the plaintiffs, except those which related to the decree in Suit No. 36 of 1912, fell within the scope of S. 92, Civil P. C. The remarks contained in the concluding portion of this section however seem to indicate that the learned Subordinate Judge was referring in particular to that prayer in the plaint, in which Samiruddin asked for joint possession of the property in suit with Aberjan Bibi. Thus he says:

> It is contended on the plaintiffs' side that the object of this suit does not come under any of the headings (a) to (h) mentioned in sub-s. (1) of S. 92. But I do not agree with the contention. For, this suit seeks to recover possession of trust property by the trustees. That prayer comes under the heading (c). Besides, one issue has been raised as to the competency of plaintiff 1 to act as a trustee. It is therefore clear that in this suit the direction of the Court is necessary for due administration of the alleged trust. Thus S. 92, Civil P. C., is applicable . . . . it seems to me that, in a suit where remedy is sought for the maladministration of an alleged trust, S. 92, Civil P. C., applies and this Court has no jurisdiction.

The final conclusion of the learned Subordinate Judge on this point is as follows:

> My findings on these issues therefore are that so far as the present suit is for the recovery of possession of property and the vesting of the same in the trustees, this suit is not maintainable by any of the plaintiffs.

It must be remembered that Suit No. 190 of 1915 was not framed as a suit under S. 92, Civil P. C. It was, of course, open to the learned Subordinate Judge, on the view of the law which he took rightly or wrongly, to have held that some of the reliefs claimed by the plaintiffs could only be obtained in a properly constituted suit under S. 92 of the Code. At the same time, having regard to the express terms of that section, it is difficult to hold that he intended that his finding should mean that he had no jurisdiction to grant declarations such as those which the plaintiffs sought, if they were able to establish their case. Such matters are clearly beyond the scope of S. 92 of the Code, and this seems to have been the view taken by the Judicial Committee of the Privy Council in 55 I A 96.[6] In our view therefore the final finding at which the learned Subordinate Judge arrived on issues 2, 6 and 7 should not be taken to mean more than it expressly states and, in this view of the case, the only prayer with reference to which it should be taken that the learned Subordinate Judge held that he had no jurisdiction was prayer No. 7. In this connexion, it may be observed that no direct issue was framed by the learned Subordinate Judge on the question whether Samiruddin was entitled to joint possession of the property in suit with Aberjan Bibi, and in our view he clearly had jurisdiction to try the issues relating to the validity of the wakfs. It follows therefore that the argument which has been put forward by Dr. Sen Gupta with reference to this matter must fail.

There can be no doubt that the decision of the learned Subordinate Judge who decided Suit No. 190 of 1915 to the effect that the wakfs were invalid was a decision with regard to one of the issues which supported his ultimate decree to the effect that the plaintiff's suit should be dismissed. Dr. Sen

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4. ('05) 28 Mad 42 : 32 I A 45 : 8 Sar 763 (P C), Vikrama Deo Maharajulu Garu v. Gunapuram Deenabhandhu.

5. ('40) 27 A I R 1940 P C 222 : 191 I C 7 : I L R (1940) Kar P C 460 : 45 C W N 204 (P C), Upendra Nath Bose v. Lall.

6. ('28) 15 AIR 1928 P C 16 : 108 I C 361 : 55 Cal 519 : 55 I A 96 (P C), Abdur Rahim v. Abu Mahomed Barkat Ali.

Gupta admits that, according to the view which has been accepted by this Court, where several issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as res judicata between the parties to the suit. The view which was taken on this point in 24 Cal 900[7] was followed by this Court in 19 C L J 34[8] and 57 Cal 872.[9] The same view was expressed by the Madras High Court in 38 Mad 158.[10] It is true that it seems to have been suggested by the learned Judges who decided the case in 41 C L J 396[11] that, where a matter was only incidentally decided in a suit, such decision would not operate as res judicata, but it is significant that when this case came before the Privy Council, 54 I A 238[12] their Lordships confirmed the decision of this Court on another ground and expressly stated that:

> They desire to guard themselves by saying that they must not be taken as adopting the grounds upon which the decision of the High Court was based. They express no opinion on any ground other than that which has been hereinbefore dealt with.

The view which was taken by this Court in 41 C L J 396[11] appears to have been similar to the view expressed by the Allahabad High Court with regard to findings which are incidental and subsidiary to the main question in the suit, 17 ALL 174,[13] but we consider that the opposite view which has been usually taken in this Court with regard to this matter is more consistent with reason and authority. On the other hand, there can be no doubt that, if a decision on an issue does not support the ultimate decree, such decision cannot operate as res judicata between the parties to the suit: 12 I A 23[14] at p. 34, 13 Cal 17,[15] 18 Cal 647,[16] 48 I A 49[17] and 39 C L J 40.[18]

Dr. Sen Gupta however argues that, even if the finding with regard to the invalidity of the wakfs in the judgment in Suit No. 190 of 1915 be regarded as a finding which supports the ultimate decree in that suit and the view which has been generally accepted by this Court with regard to such findings is correct, this question should nevertheless be regarded as concluded by the view expressed by Sir George Rankin C. J. in his judgment in Appeals Nos. 187 and 196 of 1927.[1] Reference has already been made to those observations and, in view of the fact that his Lordship expressly stated that they were not "intended as decisions operating as estoppel between the parties," they cannot obviously operate as res judicata with reference to the present suit. Dr. Sen Gupta however contends that in any case they should be regarded as findings which must be displaced by Mr. Gupta's clients. In support of this contention he places some reliance upon certain observations of Lord Dunedin in 48 I A 49[17] at p. 55. Obviously, a heavy onus would lie upon the respondents to establish by evidence that the wakfs were invalid, and we have already held that they have not been able to succeed on this point. Similarly, the onus would lie on them to show that the decision in suit No. 190 of 1915 with regard to the invalidity of the wakfs operates as res judicata in the suit out of which the present appeal arises. At the same time, however, we cannot hold that the observations contained in Sir George Rankin's judgment were ever intended by his Lordship to be findings. On the other hand, they are obviously mere expressions of opinion. Even if they would be regarded as findings, they would nevertheless not operate as res judicata in favour of the appellant as they do not support the ultimate decision in Appeals Nos. 187 and 196 of 1927,[1] which was to the effect that the declaration which the plaintiffs sought with regard to the validity of the wakfs was refused. Dr. Sen Gupta next argues that, having regard to the general principle relating to the doctrine of res judicata, the learned Chief Justice adopted a correct view when he stated:

> I am not therefore prepared to hold that the decree of 1915 estopped the plaintiff from bringing

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7. ('97) 24 Cal 900, Peary Mohun Mukherjee v. Ambica Charn Bandopadhya.
8. ('14) 1 AIR 1914 Cal 352 : 21 I C 979: 19 C L J 34, Rambehari Sarkar v. Surendra Nath.
9. ('30) 17 AIR 1930 Cal 810 : 129 I C 310 : 57 Cal 872, Mahammad Ismail v. Sharfutullah.
10. ('15) 2 A I R 1915 Mad 864 : 21 I C 258 : 38 Mad 158, Venkataraju v. Ramanamma.
11. ('25) 12 A I R 1925 Cal 996 : 88 I C 616 : 41 C L J 396, Gopal Jew Thakur v. Radha Binode Mondal.
12. ('27) 14 A I R 1927 P C 128 : 101 I C 873 : 54 Cal 770 : 54 I A 238 (P C), Radha Binode Mondal v. Gopal Jiu Thakur.
13. ('95) 17 All 174 : 1895 A W N 47, Shib Charan Lal v. Raghu Nath.
14. ('85) 11 Cal 301 : 12 I A 23 : 4 Sar 602 (P C), Rajah Bun Bahadur Singh v. Mt. Lachoo Koer.
15. ('86) 13 Cal 17, Nundo Lal Bhuttacharjee v. Bidhoo Mookhy Debee.
16. ('91) 18 Cal 647, Thakur Magandeo v. Thakur Mahadeo Singh.
17. ('22) 9 A I R 1922 P C 241 : 64 I C 231 : 48 Cal 460 : 48 I A 49 (P C), Midnapore Zamindari Co. Ltd. v. Naresh Narayan Roy.
18. ('24) 11 A I R 1924 Cal 600 : 79 I C 520 : 39 C L J 40, Dwijendra Narayan Roy v. Joges Chandra De.

the present suit (i. e., Suit No. 153 of 1922), with
a reference to the wakfnamas.

It must therefore be considered whether the question of the validity of the wakfs is now res judicata between the parties to the present suit with special reference to the provisions of S. 11, Civil P. C. If Mr. Gupta's clients are to get the benefit of S. 11, they must establish the following points: (1) That the question of the validity of the wakfs was directly and substantially in issue in Suit No. 190 of 1915; (2) that this matter was in issue in the former suit between the par-
ties to the present suit or parties under
b whom the parties to the present suit claim;
(3) that the parties in both suits were litigating under the same title; (4) that the Court which tried the former suit was a Court competent to try the suit out of which the present appeal arises, and (5) that the question relating to the validity of the wakfs was heard and finally decided in Suit No. 190 of 1915.

With regard to the first point, the issues which were framed in both the suits show clearly that the question of the validity of the wakf created by Umer Ali Sarkar was directly and substantially in issue in both suits. With reference to the second point, the
c suit out of which the present appeal arises is between the successors-in-interest of a transferee from Aberjan Bibi of a portion of the property covered by the wakfnama executed by Umer Ali in 1908 and Fateh Nasib who claims to be a mutwalli of the wakf estate by virtue of his appointment under the will of Abdul Alim Abed, which was executed on 15th May 1928. The principal plaintiff in Suit No. 190 of 1915 was Samiruddin who claimed to be co-mutwalli of the wakf property with Aberjan Bibi under Umer Ali's wakfnama of 1908, whereas the principal defendants included Aberjan Bibi and Bada-
d ruddin Ahmed to whom Aberjan Bibi had transferred the property now in suit by the hebabilewaj dated 22nd June 1913. As already stated, Abdul Alim Abed was impleaded as a pro forma defendant, in whose presence it was necessary to decide the matter, as he had been nominated as a prospective mutwalli of the wakf estate in the wakfnama executed by Umer Ali in 1908. In the suit of 1915 Abdul Alim Abed filed a written statement in which he supported substantially the plaintiff's case, and it follows, therefore, that in that suit the question with regard to the validity of the wakfs was in issue not only between Samiruddin and Aberjan Bibi but also between Abdul Alim Abed and Aberjan Bibi whose interests with regard to this
e matter were conflicting. There is no doubt that the plaintiffs claim under Aberjan Bibi and Badaruddin Ahmed in the present suit and, as Fateh Nasib claims to represent the interests of the wakf by virtue of the will executed by Abdul Alim Abed on 15th May 1928, it follows that he claims under Abdul Alim Abed and derives his title from him.

A peculiar feature of the present case, however, is that the persons from whom the principal parties to the present suit derive their title were co-defendants in Suit No. 190 of 1915, and it must, therefore, be considered whether this circumstance precludes the
f plaintiffs in the present suit from contending that the decision with regard to the invalidity of the wakfs in Suit No. 190 of 1915 operates as res judicata. On this point the learned Subordinate Judge who tried Suit No. 153 of 1922 held that it was not necessary in Suit No. 190 of 1915 to try the question of the validity of the wakfs as between the co-defendants after it had been decided that Samiruddin and his co-plaintiffs were not entitled to ask for the relief which they sought. He also held that, after the withdrawal of Samiruddin's appeal to the High Court, Abdul Alim Abed had no opportu-
g nity to test the finding of the first Court in Suit No. 190 of 1915 by filing an appeal himself. Reference has already been made to the opinion formed by Sir George Rankin C. J., on the question of res judicata in his judgment in Appeals Nos. 187 and 196 of 1927,[1] wherein he expressed the view that the plaintiff (that is, Abdul Alim Abed), was not bound by the previous decision "as being a decision between co-defendants."

In discussing the question as to the necessity for a finding with regard to the validity of the wakfs the learned Subordinate Judge who tried Suit No. 153 of 1922, referred to a passage in the judgment of Mookerjee J., in
h 11 C L J 461,[19] wherein the principle was laid down that, where an adjudication between defendants who had a conflict of interest between them was necessary to give the appropriate relief to the plaintiff and there was such adjudication, the adjudication which defined the real rights of the defendants inter se would be res judicata as between the defendants as well as between the plaintiff and the defendants. There can be no doubt as to the general soundness of this principle and when Sir George Rankin C. J., in his judgment in Appeals Nos. 187 and 196 of

19. ('10) 11 C L J 461 : 6 I C 554, Aghore Nath Mukherjee v. Srimati Kamini Debi.

1927[1] expressed the opinion that Abdul Alim Abed was not bound by the decision in Suit No. 190 of 1915 on the question of the validity of the wakf "as being a decision between co-defendants," he can hardly be taken to have meant that such decision cannot operate as res judicata in suitable cases. The principle enunciated by Mookerjee J., in 11 C L J 461[19] was accepted and to some extent amplified in several judgments delivered by the Judicial Committee of the Privy Council after the date on which the learned Chief Justice delivered his judgment in Appeals Nos. 187 and 196 of 1927.[1]

The first of these cases is that in 58 I A 158.[20] A suit had been brought by Munni Bibi to recover possession of a house at Agra from Tirlok Nath. The house formerly belonged to a person named Joti Prasad who was said to have given it to his wife, Mukundi, in 1864. The plaintiff disputed the validity of the gift and claimed title through Joti Prasad's son, Amarnath, while the defendant claimed to have succeeded to Mukundi's interest in the property. In a suit brought in 1909 in respect of this property, in which Munni Bibi and a predecessor of Tirlok Nath had been impleaded as defendants, it was decided that the property belonged to Amarnath and that the plaintiff might therefore legally attach the house in execution. The Judicial Committee held that the decision of 1909 was res judicata in favour of the appellant as between her and her co-defendant. Their Lordships pointed out that Munni Bibi was "at all events a proper party to the suit and had a right to be heard if she so desired." They also observed :

> It was only if the house belonged to Amar Nath that the plaintiff's suit could succeed; if it belonged to Mukandi he must fail. It was therefore necessary to decide between the conflicting claims of the defendants.

Their Lordships also held that the said decree was equally binding upon the respondents as reversionary heirs in the absence of proof that it was obtained by fraud or collusion. In discussing the doctrine of res judicata, Sir George Lowndes referred to S. 11, Civil P. C., and then pointed out that "it has been held by this Board on many occasions that the statement of it there is not exhaustive." After referring to the case in (1843) 3 Hare 627[21] at p. 638, his Lordship formulated three conditions as being requisite in order to apply the rule of res judicata as between co-defendants in a previous suit and stated :

> **In such a case therefore three conditions are requisite : (1) There must be a conflict of interest between the defendants concerned ; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and (3) the question between the defendants must have been finally decided.**

The same principle was followed by the Judicial Committee in 1932 in 59 I A 247.[22] In 1918 Ma Sein had instituted an administration suit against her brothers in which she claimed administration of her mother's estate on the ground that, according to Burmese Buddhist law, she was entitled to a fourth share therein. Although she claimed no relief against her sister Ma Pan, she impleaded her as a pro forma defendant. The sister, Ma Pan, filed no written statement but, at the hearing, gave evidence on behalf of the plaintiff in support of her claim. Ma Sein's suit was dismissed on the ground that Chinese Customary law applied and under it her brothers were entitled to succeed to their mother's estate. In a subsequent suit instituted by Ma Pan in 1927 she sued her brothers and Ma Sein and claimed the same relief as had been sought in the previous suit. Their Lordships of the Judicial Committee held that the subsequent suit was barred by the doctrine of res judicata. In discussing the previous suit, Lord Russell of Killowen pointed out that

> **to that suit all the alleged heirs were necessary and proper parties . . . . The plaintiff's only title to sue depended upon the answer to the question whether all the four children were heirs of the mother or whether only the sons were entitled to succeed to her property, and this, in turn, depended upon the answer to the question whether the succession to the mother's property was governed by Chinese Customary law or by Burmese Buddhist law. In a word, the question to be determined was one between the sisters on the one hand and the brothers on the other. The rights of each sister in regard to the mother's estate were identical ; they were either both of them co-heirs with their brothers or neither of them was entitled to any share . . . . It was argued that the doctrine of res judicata could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention.**

The principles laid down in the cases in 58 I A 158[20] and 59 I A 247[22] were followed by the Judicial Committee in 1935 in 62 I A 224.[23] In discussing the question whether

20. ('31) 18 A I R 1931 P C 114 : 132 I C 598 : 53 All 103 : 58 I A 158 (P C), Munni Bibi v. Tirloki Nath.
21. (1843) 3 Hare 627 : 15 L J Ch 441, Cottingham v. Earl of Shrewsbury.
22. ('32) 19 A I R 1932 P C 161 : 137 I C 328 : 10 Rang 322 : 59 I A 247 (P C), Maung Sein Done v. Ma Pan Nyun.
23. ('35) 22 A I R 1935 P C 139 : 157 I C 485 : 14 Pat 611 : 62 I A 224 (P C), Kedar Nath v. Ram Narain.

the decision in a previous suit was binding and operated as res judicata in a subsequent suit, their Lordships stated that :

> The Subordinate Judge held that the issue as to the validity of the sale was not res judicata between the plaintiff who was defendant 1 and the mahant who was defendant 2 in these suits, because the plaintiffs, who were the auction purchasers of other properties at the Court sale, had not sought for any relief as against the mahant who was defendant 2, but this ruling was given before the recent decisions of this Board as to res judicata between co-defendants which will be referred to later.

Their Lordships, therefore, by implication re-assert the view which seems to have been taken in 59 I A 247[22] that the fact is immaterial that the plaintiff in the former suit may not have sought for any relief against a person who is impleaded as a pro forma defendant. It may be noted at this stage that, in view of the foregoing observations of Sir John Wallis in 62 I A 224,[23] we are not prepared to accept the argument which has been put forward by Dr. Sen Gupta to the effect that the decision in Suit No. 190 of 1915 with regard to the invalidity of the wakfs would not operate as res judicata in view of the fact that the plaintiffs had claimed no relief against Abdul Alim Abed. In support of his contention on this point, the learned advocate placed some reliance upon a decision of this Court in 12 Cal 580[24] and two later decisions of Mitter J. in 40 C W N 1205[25] and 64 C L J 3.[26] In so far as these cases purport to decide that a decision in a former suit, which affects the interests of a pro forma defendant against whom no relief had been claimed, cannot operate as res judicata in a subsequent suit between the same parties, we are not prepared to follow them. We think that the law contemplates that even a pro forma defendant should ordinarily be bound by a decree which has been obtained in his presence. As pointed out by the Judicial Committee of the Privy Council, if a pro forma defendant is a proper party to a suit, he has every right to be heard, and it would follow that, if he refrains from putting his case before the Court, he does so at his own risk and he cannot afterwards complain if his rights in connexion with the subject-matter of the suit are placed in jeopardy by reason of his neglect. The law allows any party to a suit who is adversely affected by a decree to appeal from it (9 C W N 584[27]), and if a pro forma defendant considers that his interests with reference to the subject-matter of the suit have been prejudiced, an appeal filed by him would be competent. We are not prepared, therefore, to adopt the view of the law which has been taken by Mitter J. in the above-cited cases nor to follow the decision of the Bombay High Court in 25 Bom 589,[28] upon which the learned Judge particularly relied. Further, we may point out that the view taken in this Court in regard to this question in 12 Cal 580,[24] did not commend itself to the Madras High Court in 15 Mad 264[29] and we think that the former Full Bench decision must now be regarded as having been impliedly overruled by the Privy Council in the cases in 59 I A 247[22] and 62 I A 224.[23]

From the principles laid down by the Privy Council, it follows that, provided the remaining conditions requisite in order to apply the doctrine of res judicata are present, the mere fact that the question in issue in the former suit was between co-defendants is immaterial if in such a case the conditions which have been prescribed by the Judicial Committee of the Privy Council have been fulfilled. In order to see, therefore, whether the doctrine of res judicata may be invoked in a subsequent suit by persons whose predecessors had been impleaded as co-defendants in a previous suit or who were themselves co-defendants in such previous suit, it is necessary to consider the following points : (1) What was the relief claimed by the plaintiff in the previous suit? (2) Were the co-defendants proper parties to the suit? (3) Was there a conflict of interest between them ? (4) Was it necessary to decide that conflict in order to give the plaintiff the relief that he claimed ? (5) Was the question in issue between the co-defendants actually decided. These points will now be examined with special reference to the suit in connexion with which the present appeal arises. (1) As regards the first of these points reference has already been made to the prayers contained in the plaint in Suit No. 190 of 1915. (2) There can be no doubt that Abdul Alim Abed was a proper party to Suit No. 190 of 1915 as he was vitally interested in maintaining the validity of Umar Ali's wakf-

24. ('86) 12 Cal 580 (F B), Brojo Behari Mitter v. Kedar Nath Mozumdar.
25. ('36) 40 C W N 1205 : 165 I C 662, Gajanan Agarwalla v. Hamidar Rahaman.
26. ('36) 64 C L J 3 : 40 C W N 1208, Rakhal Das Ray v. Haridas Sarkar.
27. ('05) 9 C W N 584, Krishna Chandra v. Mahesh Chandra.
28. ('01) 25 Bom 589 : 3 Bom L R 179, Ramdas v. Vazirsaheb.
29. ('92) 15 Mad 264, Madhevi v. Kelu.

nama. He had a right to be heard with reference to this matter if he so desired. Order 2, Rule 1, Civil P. C., states :

> Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Abdul Alim Abed had been named rightly or wrongly by Umer Ali as a prospective mutwalli of the wakf, and one of the main points in dispute in Suit No. 190 of 1915 was the validity of Umer Ali's wakfnama. The object of O. 2, R. 1 of the Code would have been frustrated if Samiruddin's contention on this point had failed and, at some later date, Abdul Alim Abed had been in a position to contend that it had been decided in his absence that the wakfnama was invalid and that he was not bound by the decree in the former suit. The law contemplated that, as the question of the validity of the wakf had been raised in the Suit No. 190 of 1915, this question should be decided in such a way as to bind all persons interested in upholding or denying the validity of the wakfnamas, for the purpose of preventing further litigation on this point. Hence Abdul Alim Abed was rightly impleaded as a defendant. (3) There was a clear conflict of interest between Abdul Alim Abed on the one hand and Aberjan Bibi and Badaruddin Ahmed on the other. The former was interested in upholding the validity of the wakfs, while the latter were contending that the property covered by the wakfnamas was secular. (4) As regards the question of the necessity for deciding the issue raised in regard to the validity of the wakfs, reference has already been made to the view expressed on this point by the learned Subordinate Judge who tried Suit No. 153 of 1922. Further, Sir George Rankin C. J. in the concluding portion of his judgment, dated 12th June 1930, seems to have held the same view. On this point, the nature of the relief claimed in Suit No. 190 of 1915 has already been discussed at some length, and we have held that the learned Subordinate Judge who tried Suit No. 190 of 1915 had jurisdiction to adjudicate upon the issues with regard to the validity of the wakfs. Even if it be assumed that the learned Subordinate Judge was correct in supposing that he was unable to grant the plaintiffs relief in respect of the possession of the disputed property, it was nevertheless clear that, in order to give them the declarations which they sought, it was necessary to decide whether the wakfs were valid or invalid. The position of Samiruddin and Abdul Alim Abed in Suit No. 190 of 1915 was analogous to that of the two sisters in the suit of 1918 which was discussed in 59 I A 247.[22] Their interests in maintaining the validity of Umer Ali's wakfnama were identical. Either the property in suit was wakf or it was secular, and this was a point which it was essential to decide in order to give the plaintiffs the relief which they sought. (5) The question in issue with regard to the validity of the wakfs between Abdul Alim Abed on the one hand and Aberjan Bibi and Badaruddin Ahmed on the other was actually decided.

It follows, therefore, that, with regard to the essential conditions relating to the application of the doctrine of res judicata as between co-defendants, the principles formulated by the Judicial Committee have been fulfilled in respect of the decision in Suit No. 190 of 1915 between Abdul Alim Abed and Aberjan Bibi and her transferees and consequently the second main condition which is requisite in order to apply the doctrine of res judicata has also been fulfilled. With regard to this matter, Mr. Gupta rightly points that, even apart from any right which Fateh Nasib may claim to have derived from the terms of Abdul Alim's will, this person professes to come forward in the present suit in a representative capacity with a claim to the effect that the property in suit is wakf property. Mr. Gupta, therefore, argues that, in view of the terms of Expln. 6 to S. 11, Civil P. C., Fateh Nasib must be regarded as claiming under Abdul Alim Abed and, from this point of view also, as bound by the decision in Suit No. 190 of 1915, provided the other essential conditions with regard to the doctrine of res judicata have been fulfilled. With regard to this argument Dr. Sen Gupta contends (1) that Abdul Alim Abed was not litigating in a representative but in a personal capacity and (2) that it had been decided in Suit No. 190 of 1915 that the suit was not of a bona fide character.

With regard to the first of these arguments, it seems to be clear from the pleadings in Suit No. 190 of 1915 and in those of the suit out of which this appeal arises that neither Abdul Alim Abed nor Fateh Nasib was litigating in his personal capacity. They both claimed to be persons interested in the wakf character of the property in suit, not on their own behalf but on behalf of their co-religionists for the benefit of whose religion the dedication had been made. The mere fact that Abdul Alim Abed was a pro-

spective mutwalli and Fateh Nasib claimed to be a de facto mutwalli is immaterial. In effect both these persons were litigating in a representative capacity for the purpose of ensuring that the property which had been dedicated by Umer Ali to pious and charitable objects should be utilized for promoting the objects which the wakif had in view at the time of the dedication.

As regards his second argument, Dr. Sen Gupta places much reliance upon the finding on issues 16 and 17 contained in the judgment of the learned Subordinate Judge who tried suit No. 190 of 1915 to the effect that "the plaintiff's suit is not a bona fide one and they are colluding with defendants 2 and 3." Dr. Sen Gupta argues that the learned Subordinate Judge did not consider Samiruddin's suit to be bona fide litigation on behalf of the wakf because he had reason to suppose that the principal plaintiff was colluding with the defendants Karim Bux and Amiruddin. Such an interpretation of this finding was not accepted by Mr. Gupta. However, the implications of any such finding against Samiruddin we are not called upon to decide. The question which we have to consider with regard to the matter now under discussion is not whether Samiruddin was litigating bona fide in respect of the wakf, but whether Abdul Alim Abed's case was of a bona fide character. The onus would lie on Dr. Sen Gupta's client to show that Abdul Alim Abed, who was defendant 6 in suit No. 190 of 1915, was colluding with the plaintiffs: 64 I A 17.[30] This onus has not been discharged. There is no finding in the judgment of the learned Subordinate Judge to the effect that Abdul Alim was not litigating bona fide in the interest of the wakf. It seems most unlikely that there could possibly have been any collusion between him and Samiruddin. In this connexion, it is significant that the person who was nominated by the plaintiffs as Abdul Alim's guardian in para. 22 of the plaint was not appointed as such by the Court as is shown by the decree in the suit (Ex. 5) wherein Abdul Alim Abed is described as represented by "Babu Anath Bandhu Das Gupta, sheristadar of this Court appointed under the order of the Court, dated 13th September 1915." Our conclusion on this point, therefore, is that Abdul Alim Abed was litigating bona fide in a representative character on behalf of the wakf, and that Fateh Nasib must be deemed to be claiming under him within the meaning of Explanation 6 to S. 11 of the Code.

The next point to be considered is whether Fateh Nasib and Abdul Alim Abed were litigating under the same title. This question has already been sufficiently discussed in connexion with Mr. Gupta's argument with regard to the applicability of Expl. 6. In our view, both Abdul Alim Abed and Fateh Nasib were litigating in a representative capacity as persons interested in upholding the wakf constituted under the provisions made in the wakfnama executed by Umer Ali in 1908. It cannot be contended that they are not litigating under the same title merely by reason of the fact that Abdul Alim Abed was a prospective mutwalli and Fateh Nasib claimed to be a de facto mutwalli. Their position bears some analogy to that of presumptive and actual reversioners in respect of a Hindu widow's estate. Admittedly, a decree obtained by a presumptive reversioner would bind the actual reversioners and the observations made by Lord Blanesburgh in 51 I A 381[31] appear to be applicable to the present case. In that case his Lordship observed :

> To the present case the application of this principle is obvious and eminently salutary. It would be *pessimi exempli* that the appellant, whose predecessor in interest failed on the same issue and was content to accept the adverse judgment against him, should be held entitled, years afterwards, when it might be much of the relevant evidence was no longer available to raise the same issue all over again. Their Lordships of course recognize that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked. But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course, further and different considerations would arise.

The views expressed by this Court in 49 Cal 45[32] were to the same effect. Further, it has been held by the Judicial Committee that a presumptive reversioner who seeks to set aside an adoption or an alienation by a Hindu widow, does so in a representative capacity, 42 I A 125,[33] and on the same analogy we hold that Abdul Alim Abed was litigating in a representative character in

30. ('37) 24 A I R 1937 P C 1 : 166 I C 1 : I L R (1937) Mad 263 : 64 I A 17 (P C), Venkata Seshayya v. Kotiswara Rao.

31. ('24) 11 A I R 1924 P C 247 : 82 I C 962 : 46 All 831 : 51 I A 381 (P C), Kesho Prasad Singh v. Sheo Pragash Ojha.

32. ('22) 9 A I R 1922 Cal 321 : 64 I C 980 : 49 Cal 45 : 33 C L J 421 : 25 C W N 585, Pramatha Nath v. Bhuban Mohan.

33. ('15) 2 A I R 1915 P C 124 : 29 I C 298 : 38 Mad 406 : 42 I A 125 (P C), Venkatanarayana Pillai v. Subbammal.

suit No. 190 of 1915. As regards the fourth and fifth conditions which are required in order to enable the doctrine of res judicata to be applied, there is, of course, no doubt in this case that the learned Subordinate Judge who tried suit No. 190 of 1915 was a Court competent to try the suit out of which this appeal arises, and that the question with regard to the validity of the wakfs was finally decided in the former suit. In this connection, it may be mentioned that it is immaterial that no express issue was framed in suit No. 190 of 1915 with regard to the rights of Abdul Alim Abed in respect of the wakf estate. It was quite clear from the pleadings in that suit that on the question of the validity of the wakfs his interest was identical with that of the plaintiffs. The suit was decided in his presence. He had a right to be heard, and he actually filed a written statement in which he supported generally the plaintiffs' case. The decision with regard to the validity of the wakfs in substance clearly affected his interest to the same degree as it affected that of the plaintiffs, and he must be treated as bound by that decision. As observed by their Lordships of the Judicial Committee in 43 I A 91[34]:

> The rule of res judicata while founded on ancient precedent is dictated by a wisdom which is for all time. 'It hath been well said', declared Lord Coke, '*interest reipublicae ut sit finis litium*, otherwise great oppression might be done under colour and pretence of law' . . . and so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Finally, it has been contended by Dr. Sen Gupta that the decision in suit No. 190 of 1915 cannot operate as res judicata as against Abdul Alim Abed, because he was in effect unable to appeal by reason of the fact that the appeal by the plaintiffs, to which Abdul Alim Abed had been made a party, was withdrawn as a result of a petition filed by the plaintiffs on 6th August 1917 (Exibit Z63). In this connexion, the order of the High Court of the same date (Ex. X64) shows that Abdul Alim Abed was represented by his guardian, Anath Bandhu Das Gupta, who had represented him in the suit, and also that the respondents gave their consent to the withdrawal of the appeal. It is impossible, therefore, for us to hold that Abdul Alim Abed was prejudiced by the withdrawal of the appeal or that he was not properly represented in connexion with this matter. Further, there was in our view no reason why Abdul Alim Abed should not have appealed separately against the decision in suit No. 190 of 1915, if he had wished to do so, although he was merely impleaded as a pro forma defendant. This argument which has been put forward by the learned advocate for the appellant, therefore, fails. Our conclusion with regard to this part of the plaintiff's case is that, although we would have been prepared to accept Dr. Sen Gupta's contention that the wakfs created by Juman Mistry and Umer Ali were valid, the parties to the suit out of which this appeal arises are nevertheless precluded from re-agitating this matter in view of the fact that this question must be regarded as res judicata between them by virtue of the finding at which the learned Subordinate Judge arrived in Suit No. 190 of 1915 to the effect that these wakfs were invalid.

We must now consider the third main argument which has been put forward by Mr. Gupta to the effect that the title of his clients' predecessors-in-interest in respect of the property in suit had been perfected by adverse possession before 1928. On this point Mr. Gupta's main contention is that, even if the property in suit was originally wakf property by virtue of the wakfnama executed by Umer Ali in 1908, it nevertheless passed into the possession of Aberjan Bibi as secular property on 2nd March 1913, and from that date until 1928, when Fateh Nasib admittedly succeeded in getting into possession of the property, Aberjan Bibi and her successors remained in continuous possession thereof in the assertion of a title hostile and adverse to the wakf estate. Their title therefore was perfected in 1925 with the result that the title of Fateh Nasib or any other persons who sought to claim this property as wakf property was extinguished under S. 28 read with Art. 144, Limitation Act. Dr. Sen Gupta's argument, on the other hand, is of a three-fold character: (1) In the first place, he contends that no question of adverse possession can arise as the mutwalli of the wakf estate would still be entitled under Art. 134B, Limitation Act, to sue for the purpose of recovering possession of any portion of the estate, which might have been alienated by any of his predecessors; (2) the learned advocate then contends that, even if Art. 144, Limitation Act, applied, limitation would only begin to run with effect from the date of the death of Aberjan Bibi or her removal from the mutwallishiip; and (3) that, even if

34. ('16) 3 A I R 1916 P C 78 : 33 I C 914 : 43 Cal 694 : 43 I A 91 (P C), Sheoparsan Sing v. Ramnandan Prasad Narayan Singh.

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Aberjan Bibi be regarded as having been placed in possession of the disputed property in March 1913 and to have set up a title hostile and adverse to the wakf estate on that date, her possession and that of her successors was not of such a character as would be sufficient to enable the predecessors of the plaintiffs to perfect their title by adverse possession.

With regard to the first of these arguments, Dr. Sen Gupta relies on the decision of this Court in 41 C W N 693,[35] in which it was held that Art. 134B covered transfers whether made before or after the amending Act 1 of 1929 came into force. This article, which was inserted in Sch. 1, Limitation Act in 1929, is to the effect that the period of limitation in respect of suits "by the manager of Hindu, Mahomedan or Buddhist religious or charitable endowments to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration" shall be 12 years with effect from the death, resignation or removal of the transferor. Dr. Sen Gupta contends that Aberjan Bibi was not removed from mutwalliship until 1933, when her removal was ordered by the learned Additional District Judge of the 24-Perganas in a suit under S. 92, Civil P. C. (Ex. Z-104). He contends, therefore, that S. 28, Limitation Act, would not begin to operate until 1945. This argument is, however, based on the assumption that Aberjan Bibi entered into possession of the disputed property as a mutwalli and that she transferred this property to Badaruddin Ahmad in June 1913 when she was the mutwalli of the wakf estate. The same assumption also underlies Dr. Sen Gupta's second argument whereby he contends that, if Article 144 applies, limitation would only run from the date of Aberjan Bibi's death or from the date of her removal from the mutwalliship. This proposition is based on a series of decisions of the Privy Council beginning with the cases in 48 I A 302[36] and 60 I A 124.[37] In the latter case it was observed by Lord Russell of Killowen that :

> A mahant has power (apart from any question of necessity) to create an interest in property appertaining to the math, which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of mahant of the math, with the result that adverse possession of the particular property will only commence when the mahant who had disposed of it ceases to be mahant by death or otherwise.

His Lordship went on to say :

> A mahant is at liberty to dispose of the property of a math during the period of his life and that a grant purporting to be for a longer period is good to the extent of the mahant's life interest. Here again their Lordships think that the reference to life is upon the footing that the mahant continues during his life to hold that office. It will be observed that the statement is in no way confined to the grant of a lease, but covers the case of a purported out-and-out grant of the property. Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.

If this had been a case such as that with which their Lordships of the Judicial Committee were dealing in the two last cited cases, S. 28, Limitation Act, would not come into operation until 1945, but the question must be considered whether Aberjan Bibi was ever a mutwalli of the disputed property and transferred this property to Badaruddin Ahmed in her capacity as mutwalli. In our view, it cannot be said that this lady ever became a mutwalli of the wakf estate. It is true that she was nominated by Umer Ali in the wakfnama of 1908 to succeed him as co-mutwalli jointly with Samiruddin, but it is quite clear from the evidence before us that she never accepted the mutwalliship and, in fact, she availed herself of the earliest opportunity to repudiate it. In such circumstances she cannot be regarded as being under any fiduciary disability in the matter of possessing adversely to the wakf estate : 64 I A 203.[38] Umer Ali died in September 1911 and, on 1st March 1912, Aberjan Bibi filed Suit No. 36 of 1912 against Samiruddin and certain other persons, who have already been mentioned, for a declaration that the wakfnamas executed by Juman Mistry and Umer Ali were invalid and in which she asked for a partition of the property covered by those documents. It is said by Dr. Sen Gupta that an application dated 20th November 1911, (Ex. Z-18), shows that Aberjan Bibi must have accepted the mutwalliship. This application was, however, a document in which Samiruddin had asked that he and Aberjan Bibi might be registered as joint mutwalli in respect of the Rowland Road property in the assessment book of the Corporation of Calcutta. It con-

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35. ('37) 24 AIR 1937 Cal 305 : 172 I C 315 : I L R (1937) 2 Cal 242 : 41 C W N 693, Raghunath Jiu v. Ganga Gobinda Pati.

36. ('22) 9 A I R 1922 P C 123 : 65 I C 161 : 44 Mad 831 : 48 I A 302 (P C), Vidya Varuthi Thirtha v. Balusami Ayyar.

37. ('33) 20 A I R 1933 P C 75 : 142 I C 214 : 12 Pat 251 : 60 I A 124 (P C), Ram Charan Das v. Naurangi Lal.

38. ('37) 24 A I R 1937 P C 185 : 168 I C 765 : 31 S L R 538 : I L R (1937) 2 Cal 447 : 64 I A 203 (P C), Ishwari Bhubaneshwari v. Broja Nath.

tains no indication to show that Aberjan Bibi ever consented to such an application being made and, in view of the fact that she must at this time have been taking steps in connexion with the institution of her suit No. 36 of 1912, it is not unlikely that this document was presented to the authorities of the Calcutta Corporation by Samiruddin in order to create evidence which might possibly be useful to him in connexion with the suit which Aberjan Bibi was going to institute against him. Her subsequent conduct in connexion with the suit, by which she obtained a partition with Karim Bux of the alleged wakf properties on the basis that they were secular in character, and the fact that she took possession of her share of the properties on this basis and executed a hebabilewaj in respect of the Rowland Road property are also circumstances which indicate conclusively that Aberjan Bibi never accepted the office of mutwalli. On the contrary, she set up title hostile to the wakf estate in respect of the property which fell to her share as a result of the decree in Suit No. 36 of 1912. There is some evidence that she concerned herself at various times with certain matters connected with the maintenance of the mosque which was built by Juman Mistry. This, however, appears to have been due to the fact that, under the decree (Ex. 3) in Title Suit No. 36 of 1912, some specified properties had been charged with a sum of money for the maintenance of the mosque and for meeting certain religious expenses and it had been ordered that Aberjan would be

> in sole charge of the said mosque, burial ground, and the properties so set apart for the mosque as described in Sch. C of this decree, and that she do collect rents thereof, pay Government Collectorate revenue and taxes, etc., therefore, repair the mosque and maintain the said properties and carry out the religious festivals at the said mosque and supervise and perform all necessary work relating thereto.

The creation of this charge and the direction whereby Aberjan Bibi was made responsible for expenditure connected with the mosque, this burial ground and certain religious ceremonies did not have the effect of making her a mutwalli of the estate, but merely made her responsible for ensuring that the income which had been charged on some properties for the above mentioned purposes was properly expended. In our view, therefore, Aberjan Bibi was never the mutwalli of the wakf estate created by Juman Mistry and Umer Ali and never acted as such. In these circumstances, the only article in sch. 1, Limitation Act, which can have any application to the present case is Art. 144 which provides that the period of limitation for a person who sues "for possession of immovable property or any interest therein not otherwise specially provided for" shall be 12 years from the date "when the possession of the defendant becomes adverse to the plaintiff." In view of the provisions of S. 28, Limitation Act, if it is found that Aberjan Bibi and her successors were in adverse possession of the disputed property for 12 years continuously with effect from 2nd March 1913, they must be held to have perfected their title thereto. The cases upon which Dr. Sen Gupta relies have no application as regards transfers by persons who profess to make the transfers in their own right and in a secular capacity. In the present case the date of the death of Aberjan or of an order purporting to remove her from the mutwalliship is immaterial. The important date to consider is the date on which she obtained possession of the property in suit in the assertion of a hostile title to the wakf. It was pointed out by Mukherji and Guha JJ., in 34 C W N 498[39] that in that particular case adverse possession in respect of wakf property sold by a person in his secular capacity accrued in favour of the vendee with effect from the date of the alienation. On the same principle, in our view, the adverse possession of the predecessor of the plaintiffs will begin on 2nd March 1913, the date on which Aberjan Bibi took possession of the disputed property. As pointed out by Sir George Rankin in 67 I A 251[40]:

> It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque, whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose . . . The property now in question having been possessed by Sikhs adversely to the wakf and to all interests thereunder for more than 12 years, the right of the mutwalli to possession for the purposes of the wakf came to an end under Art. 144, Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under S. 28. . . . But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder, the rights of all beneficiaries have gone.

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39. ('30) 17 A I R 1930 Cal 673 : 128 I C 195 : 51 C L J 547 : 34 C W N 498, Debendra Nath v. Naharmal Jalan.

40. ('40) 27 AIR 1940 P C 116 : 189 I C 1 : 67 I A 251 : I L R (1940) Lah 493 : I L R (1940) Kar P C 251 (P C), Mosque known as Masjid Shahid Ganj v Shiromani Gurdwara Parbandhak Committee, Amritsar.

a It remains, therefore, to be seen whether the possession of Aberjan Bibi and her successors with effect from 2nd March 1913 has been of a nature and character sufficient to result in the perfection of their title before Fateh Nasib got possession of the disputed property, as admitted by the plaintiffs in 1928. In this connexion, Dr. Sen Gupta has referred to the case in 39 C W N 352,[41] in which the Privy Council restate the general principles of the law with regard to adverse possession, which are conveniently summarized in the judgment of the Judicial Committee in 61 I A 78[42] as follows :

b As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in 27 I A 136[43] at p. 140 where his Lordship said that 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.' The classical requirement is that the possession should be *nec vi nec clam nec precario.* Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. . . . It may be added that it is not necessary c in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. . . . 'The fact of possession may be continuous, though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription' (Miller on Prescription. 36). The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible.

It was also pointed out by the Judicial Committee in 44 I A 104[44] :

An exclusive adverse possession for a sufficient period may be made out in spite of occasional acts done by the former owner on the ground for a d specific purpose from time to time.

Further, in 58 I A 29,[45] their Lordships stated they were not at all disposed to negative or to weaken the principle that as a general rule where title is found- e ed on an adverse possession the title will be limited to that area of which actual possession has been enjoyed. But the application of this general rule must depend upon the facts of the particular case.

We must therefore consider by reference to the evidence whether the plaintiffs have succeeded in establishing their title to the disputed property by reason of adverse possession. In discussing issue 5 with regard to the question of limitation the learned Subordinate Judge examined in considerable detail the oral and documentary evidence which was adduced in this case, and this evidence was also placed before us by the learned advocates on both sides. The learned f Subordinate Judge had the advantage of observing the demeanour of the witnesses who testified before him, and we are not prepared to dissent from the conclusion at which he has arrived that the evidence of the plaintiffs' witnesses was superior to that which was given on behalf of Fateh Nasib. The learned Subordinate Judge considered that these witnesses had proved the possession of Badaruddin Ahmed and Mahananda Nandy, and he arrived at the conclusion that these people had been in possession of the suit lands upto June 1928 when Mahananda Nandy became insolvent. His final conclu- g sion on this point is as follows :

The suit lands are a compact plot of land and it is in evidence that Mahananda fenced it with corrugated iron sheets. The godowns in this land were in the occupation of tenants who were ejected by Mahananda. The remaining land was lying patit or vacant. So I must hold that the entire land was in the possession of Mahananda and not merely the particular plots in which he got decrees for ejectment.

In view of the abovementioned findings, it is somewhat surprising that, with reference to the question of adverse possession, the learned Subordinate Judge decided that the plaintiffs had not been able to establish their case on the ground that h

the doctrine of constructive possession applies only in favour of a rightful owner and must not, as a rule, be extended in favour of a wrongdoer whose possession must be confined to the land of which he is actually in occupation.

On this point the learned Subordinate Judge appears to have taken too strict a view with regard to the doctrine of constructive possession. The proper test to be applied in a case of this nature is whether the predecessors of the plaintiffs for a period of twelve years or more exercised such dominion over the property in suit as to justify an inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors

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41. ('35) 22 A I R 1935 P C 36 : 153 I C 929 : 14 Pat 327 : 62 I A 40 : 39 C W N 352 (P C), Sris Chandra Nandy v. Baijnath Jugal Kishore.

42. ('34) 21 AIR 1934 P C 23 : 147 I C 545 : 61 Cal 262 : 61 I A 78 (P C), Secretary of State v. Debendra Lal Khan.

43. (1900) 27 Cal 943 : 27 I A 136 : 4 C W N 597 : 7 Sar 714 (P C), Radhamoni Debi v. Collector of Khulna.

44. ('17) 4 A I R 1917 P C 18 : 40 I C 337 : 44 Cal 858 : 44 I A 104 (P C), Basant Kumar Roy v. Secretary of State.

45. ('31) 18 A I R 1931 P C 186 : 130 I C 315 : 10 Pat 407 : 58 I A 29 (P C), Nageshwar Bux Roy v. Bengal Coal Co. Ltd.

had actually been in physical possession of every square inch of this land, but it should have been considered whether the acts of possession which had been proved would legitimately show that the predecessors of the plaintiffs had enjoyed dominion over this property in the manner in which such dominion is normally exercised. As pointed out by the Privy Council in 58 I A 29:[45]

> There is an undoubted authority for the proposition that, where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed. The maxim '*tantum prescriptum quantum possessum*' is rigorously applied to him. . . . . On the other hand, possession is a question of fact and the extent of the possession may be an inference of fact. . . . . In considering the character and effect of acts of possession in the case of mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible.

The views expressed by the Privy Council in 61 I A 78[42] were to the same effect. In a case such as that with which we are now dealing, which relates to a compact plot of land, part of which had been let out to tenants and part of which was vacant, it would be sufficient for the plaintiffs to show that for a period of twelve years or more their predecessors held the tenanted land through tenants who had attorned to them or through licensees whom they had permitted to remain on the land and that, in respect of untenanted land, they had asserted their possession from time to time in some suitable manner, for instance, by taking or selling the produce of such land. Mere interference with their possession by the rightful owner would not be sufficient to show that they had been dispossessed unless such interference had resulted in their being definitely ousted from any portion of the land: 44 I A 104.[44] There is also authority for the proposition that even if they had been dispossessed from a certain portion of the land by another trespasser and ultimately recovered possession, such dispossession would not be deemed to constitute a break in their possession: 22 Bom 733.[46]

In the present case, it is hardly disputed that Aberjan Bibi and, after her, Badaruddin Ahmed were in possession of the disputed property from 2nd March 1913 until Badaruddin transferred it to Mahananda Nandy on 9th December 1919. Shortly after Aberjan Bibi had been placed in possession of this property by the Court on 2nd March 1913, she applied for the registration of her name in the collectorate records (Ex. 6) on 12th June 1913, and similar steps were taken by Badaruddin Ahmed on 18th February 1914 after the property had been transferred to him (Ex. 7). The oral evidence makes it clear that until 1919 rent was realized by Badaruddin Ahmed either on behalf of Aberjan Bibi or, after the execution of the hebabilewaj on 22nd June 1913, on his own behalf. There is also evidence to show that Badaruddin Ahmed paid the corporation rates in respect of this property (Ex. 48) during a considerable portion of the period when he was in possession. It must also be remembered that in Suit No. 190 of 1915, which was instituted by Samiruddin and certain other persons, Badaruddin Ahmed was impleaded as a defendant on the ground that a part of the wakf property had been transferred to him and the plaintiffs asked for joint possession of the property in suit with Aberjan Bibi. The logical inference, therefore, is that at that time Aberjan Bibi or her transferees were in possession of the disputed properties and the plaintiffs were out of possession. Further, with reference to the possession of Badaruddin Ahmed there is evidence on the record, which was believed by the learned Subordinate Judge, to the effect that he had taken the fruit of the trees on the land and settled the date and palm trees with certain persons. This evidence we are not prepared to disbelieve. With regard to this part of the case, therefore, we consider that it has been proved that Aberjan Bibi and Badaruddin Ahmed were in continuous adverse possession of the property in suit from 2nd March 1913 until 9th of December 1919.

Dr. Sen Gupta's main argument with regard to the evidence which has been given in connexion with adverse possession of the plaintiffs' predecessors is that Mahananda Nandy never actually succeeded in obtaining possession of the property in suit until he had ejected the tenants on the land, who had refused to acknowledge him as their landlord. The evidence, however, indicates that the tenants who were actually on the property at the time of the conveyance to Mahananda Nandy actually attorned to the latter as their landlord. If the testimony of Chandi Charan Hazra, P. W. 1, is read in the light of the requisitions with regard to the vendor's title (Ex. 64) and Messrs. H. N. Dutt's bill of costs (Ex. 63), dated 21st January 1920, it would appear that all the tenants who were actually on the land at the time wrote letters in which they attorned to

46. ('98) 22 Bom 733, Dagdu v. Kalu.

Mahananda Nandy as their landlord and that Basiruddin, who was a licensee in respect of a portion of premises No. 3, Rowland Road, gave an undertaking that he would vacate the land occupied by him when requested to do so. As regards Basiruddin, Mahananda Nandy took steps to eject him by instituting ejectment Suit No. 357 of 1920 and the judgment in that (Ex. 8), dated 28th February 1922, shows that this man was ejected from two cottas of land on the footing that he was Mahananda's licensee. After certain further litigation with regard to this particular plot of land, Mahananda Nandy ultimately obtained delivery of possession on 8th July 1922 (Ex. 11). On 12th May 1922 Abdul Alim Abed had instituted a suit for an injunction against Mahananda to restrain him from executing the decree which he had obtained in Suit No. 357 of 1920 and for a declaration to the effect that the decree in that suit was not binding on Abdul Alim Abed. This suit was finally dismissed by Second Munsif of Alipore on 15th May 1923 (Ex. 22) and in his judgment the learned Munsif noted that the defendant had already taken possession of the land in suit by demolishing the huts standing thereon and was admittedly in possession of the land before the written statement had been filed.

With regard to the tenants there is no reason for disbelieving the evidence on the record to the effect that they actually paid rent to Mahananda Nandy for the first year or two after he had bought the property from Badaruddin Ahmed. It appears, however, that from about the beginning of 1921 Abdul Alim Abed succeeded in inducing some of these tenants to execute kabuliyats in his favour. Some of these documents have been accepted as evidence in this case namely, (1) Ex. Z10 dated the 8th March 1921, a kabuliyat executed by Bushan Singh in favour of Abdul Alim Abed; (2) Ex. Z11 of the same date executed by Kartar Singh; (3) Ex. Z12 of the same date executed by Dalip Singh; (4) Ex. Z13 of the same date, executed by Pala Singh and (5) Ex. Z14 dated the 10th March 1921 executed by Bishan Singh. This action which was taken by Abdul Alim Abed, together with his conduct in connexion with certain criminal cases which will presently be discussed, merely indicates that Abdul Alim Abed was endeavouring at this time to re-assert the wakf character of the property and to cause as much trouble as possible to Mahananda Nandy probably in view of the fact that he had decided to institute Suit No. 153 of 1922, which was at first numbered Suit No. 150 of 1921, the plaint of which was filed on 28th May 1921.

It seems to have been on account of the above mentioned steps taken by Abdul Alim Abed that Mahananda Nandy instituted certain rent suits against the tenants who had discontinued payment of rent to him. The first of these suits was Rent Suit No. 1073 of 1921 against Narayan Singh and Bishan Singh, in which the plaintiff sought to recover arrears of rent for January and February 1921 (Ex. 15). Had these persons not paid rent in respect of any of the previous months there is no reason to suppose that the arrears for such period would not have been claimed in this suit. The suit was withdrawn against Narayan Singh on 10th April 1922 and was decreed ex parte against Bishan Singh on 28th January 1922 (Ex. 75). The next of these suits was Suit No. 1252 of 1921 against Kripa Singh, in which the plaintiff sought to recover arrears of rent for the period from April to June 1921. The suit was decreed on 5th of July 1922. Subsequently, Ejectment Suit No. 805 of 1922 was filed against Bishan Singh and another Suit No. 883 of 1922 against Pala Singh. As regards the latter tenant the plaintiff claimed arrears of rent and damages for the period from April 1921 to May 1922. The plaintiff obtained decrees in both these suits (Exs 12 and 13) which he put into execution. Having regard to the nature of the above mentioned proceedings it is quite clear that Mahananda Nandy was in possession of the tenanted portion of the land in suit through tenants, and the mere fact that some of these tenants had become refractory could not have the effect of interfering with his possession in view of the general principles of estoppel laid down in S. 116, Evidence Act. Similarly, the possession of Basiruddin in respect of a two cotta plot in premises No. 3, Rowland Road was merely the possession of Mahananda Nandy.

With regard to premises No. 3 Rowland Road, it is, however, argued by Dr. Sen Gupta, that Abdul Alim Abed actually succeeded in getting possession of these premises. On this point, the evidence is merely to the effect that Abdul Alim Abed built some sort of a hut on Basiruddin's land, and it appears to have been in respect of this building that he obtained sanction from the Calcutta Corporation on 23rd of November 1921, (Ex. Z8) and a document, dated 13th February 1922, (Ex. Z20), shows that a notice under S. 451, Calcutta Municipal Act, was

served on him in respect of some unauthorised work at 3, Rowland Road on 26th January 1922. It is true that Abdul Alim Abed had formerly lived under the protection of Aberjan Bibi at a house situated at 3, Rowland Road, but the evidence indicates that he left this house in 1917 or 1918 and the building was subsequently demolished by Basiruddin. Even if it be admitted that he erected a hut on this land in 1921, it is clear that he did so merely as the licensee of Basiruddin who was himself the licensee of Mahananda Nandy, and it cannot possibly be contended that any possession which he may have obtained enured to his own benefit. In any case, the period of Abdul Alim Abed's occupation of the hut must have been of short duration as the huts which stood on this plot of land were demolished when Mahananda executed his decree against Basiruddin on 8th July 1922.

Dr. Sen Gupta has referred to certain criminal cases between the predecessors of the plaintiff and Abdul Alim Abed, which began with a complaint filed by Badaruddin Ahmed on 11th October 1919 to the effect that Abdul Alim Abed and other persons had trespassed upon premises Nos. 2 and 3, Rowland Road. In this case Abdul Alim Abed and Fateh Nasib were acquitted on 22nd July 1920 (Ex. Z42). Again, on 10th April 1922 Mahananda Nandy appears to have obtained an order under S. 144, Criminal P. C., against Abdul Alim Abed and Fateh Nasib on the allegation that they were trying to disturb his possession of the Rowland Road property by forcibly erecting a hut thereon. This probably has reference to the hut which has already been mentioned in connexion with the plot of land in respect of which Basiruddin was a licensee. It certainly cannot be said that any of these criminal proceedings indicate that Abdul Alim Abed or Fateh Nasib was in possession of any portion of the Rowland Road property. They merely indicate that these persons were endeavouring to disturb the possession of Badaruddin Ahmed and Mahananda Nandy.

If the oral evidence is read in the light of the documents which have been filed in this case, there is no doubt that, after his purchase from Badaruddin Ahmed, Mahananda Nandy remained in full and open possession of the Rowland Road property in every way by which such property is capable of being possessed. For instance, there is evidence which cannot be rejected to the effect that he actually placed a fence round the whole of this property during the period of his possession, although the exact date when the fence was erected has not been mentioned. There is also evidence as regards the vacant land to the effect that Mahananda took fruit from the trees and settled the trees with various persons and that he allowed horses to be trained on this portion of the land. We are satisfied that his possession continued until his firm were adjudicated insolvent on 14th June 1928 when Fateh Nasib admittedly obtained possession of the property in suit.

We therefore arrive at the conclusion that all the necessary elements with regard to the adverse possession of their predecessors for a period of more than 12 years have been established by the plaintiffs in this case. It follows therefore that, as they were holding adversely to the wakf estate, the title of that estate has become extinguished in view of the provisions of Art. 144, Limitation Act, read with S. 28 of that Act. The plaintiffs have been able to establish all the requisite links as regards their title to this property. They are therefore entitled to succeed in the suit out of which this appeal arises on grounds other than those on which the suit was decided in their favour by the learned Subordinate Judge. This appeal is therefore dismissed with costs. The appellant was allowed to file his appeal in forma pauperis. We therefore direct him to pay the requisite court-fees, namely Rs. 2137-8-0 only under O. 33, R. 11, Civil P. C., read with O. 44, R.1, of the Code.

Biswas J. — I agree.

G.N./R.K. *Appeal dismissed.*

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(29) A. I. R. 1942 Calcutta 26

B. K. MUKHERJEA AND BISWAS JJ.

Jogesh Chandra Ghose, Defendant and others — Appellants

v.

Sree Sree Dhakeswari Mata Bigraha and others — Respondents.

Appeals Nos. 1269 and 1270 of 1939, Decided on 2nd May 1941, from appellate decrees of Addl. Dist. Judge, 1st Court, Dacca, D/- 15th May 1939.

(a) Hindu law—Religious endowment—Inalienab'lity is rule—Custom to contrary must be strictly proved.

As a general rule of Hindu law, a trust attached to a temple or endowment cannot be alienated by the holder and whoever sets up a custom which is at variance with the general law must prove it with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. [P 28*f*]

(b) Civil P. C. (1908), S. 100 — Custom — Whether from facts found, essential attributes of legal custom are established or not is question of law.

Whether a particular custom is proved to exist or not, is undoubtedly a question of fact, and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal : 32 All 363 (PC), *Rel. on.* [P 28*g*]

But the question whether on the facts found, the essential attributes of a legal custom are or are not established is certainly a question of law which can be discussed in second appeal : ('17) 4 A I R 1917 P C 33, *Applied.* [P 29*a*]

(c) Custom—Special custom—Essentials of, stated—Acceptance must be conscious — Successful contest in one or two instances—It has more weight than several instances in absence of contest.

The legal title to recognition of a special custom depends upon its antiquity, certainty and uniformity, and the Court must be assured of these conditions by means of clear and unambiguous evidence : 14 M I A 570 (PC) and 3 I A 259 (PC), *Rel. on.* [P 30*b*]

A custom to be valid must be consciously accepted as having the force of law : 8 Mad 464, *Ref.* [P 30*e*]

It must be submitted to as legally binding. Even one or two instances where the right claimed under custom is contested, and that successfully would far exceed in value the weight that is to be attached to a plurality of instances when there was no contest and the matter practically rested on indulgence or mutual consent : ('17) 4 A I R 1917 P C 33, *Considered.* [P 30*c*,*e*]

(d) Hindu law—Religious endowment—Pala —Alienability — Custom—Sri Sri Dhakeswari mata of Dacca—Custom allowing alienation of Pala in favour of any one of three higher classes or sanyasins held not only prejudicial to deity but also against presumed intentions of founder.

For the purpose of determining whether a custom is against reason or not the Court has to judge not by the reason of an unlearned man, but by artificial and legal reason warranted by authority of law. The Court should see whether the custom that is set up is prejudicial to the interests of the endowment and goes contrary to the presumed intention of the founder : ('15) 2 A I R 1915 Cal 161, *Rel. on.* [P 30*f*,*g*]

[Custom of alienability of pala held by shebaits of Sri Sri Dhakeshwari Mata to any one of three higher castes of Hindus or Sanyasins held not only prejudicial to deity but against presumed intention of founder.] : 1 Mad 235 (PC), *Rel. on.* [P 31*d*,*e*]

(e) Custom—Validity—Unreasonable custom cannot be validated by usage.

If a custom is unreasonable at its inception no usage or continuance can make it good. [P 31*f*]

Dr. Basak, Hemendra K. Das, Radhika Ranjan Guha (in 1269), Hiralal Chakrabarty and Syamadas Bhattacharjee (in 1270) — for Appellants.

Dr. Sen Gupta and Jyotish Ch. Guha (in both) — for Respondents.

S. A. No. 1269 of 1939

B. K. Mukherjea J.—This appeal is on behalf of defendant 1 and it arises out of a suit commenced by the plaintiff as a shebait of idol Sri Sri Dhakeswari Mata, an ancient deity in the town of Dacca, for a declaration that the palas or turns of worship held by the shebaits of the idol are not alienable in law, and that the transfer of such palas by defendants 2 to 7, who were some of the shebaits, in favour of defendant 1 was void and inoperative and did not create any rights in the purchaser. There were prayers also for a permanent injunction restraining defendants 1 to 7 from entering into the temple premises, and for removal of defendants 2 to 7 as shebaits of the deity.

The temple of Dhakeswari Mata is one of the oldest temples in the town of Dacca, the origin of which is lost in obscurity. There is no deed of dedication in respect of the endowment, and there is no evidence as to who founded it or who the original shebaits of the institution were. The shebaitship, according to the plaintiff, is vested, at present, in 16 persons, namely, the plaintiff himself and defendants 2 to 16, who constitute a heterogenous group and include persons who belong to the three higher castes among the Hindus or are Sanyasins. The endowment is said to be a private one, and it is managed by the shebaits with the help of pujaks or priests. For 9 days in the year, the worship is carried on by all the shebaits jointly, and for the rest of the year, there are palas or turns of worship allotted to shebaits or group of shebaits, and they alone are entitled to the offerings that are presented to the deity by the worshippers on those days. The shebaits are bound to defray the expenses of worshipping the deity on the days of their palas, and they are under an obligation to keep the temple and the other structures in proper repair. Defendants 2 to 7 who are members of a joint Mitakshara family had palas or turns of worship in the temple extending over 14 days every month. Defendant 2 as karta of the family had borrowed money from defendant 1 to meet his own family necessities in which the deity was not in the least interested, and the creditor got a money decree against these defendants in the Court of the First Subordinate Judge at Dacca. In execution of this decree, the palas held by defendants 2 to 7 in the Dhakeswari temple were attached, and eventually on 8th Pous 1343 B.S., a kobala was executed by these defendants in favour of defendant 1 by

a which all the palas held by them together with proportionate shares of the properties of the deity were sold to the latter in full satisfaction of the decretal debt. The plaintiff's case is that the kobala is void and inoperative as being repugnant to Hindu law, and that defendant 1 did not acquire the rights of a shebait on the strength of the same. Defendants 2 to 7 were further alleged to have forfeited their rights as shebaits of the deity by reason of this and other acts committed by them which were prejudicial to the interest of the idol. It is on these allegations that the present suit was instituted.

b The defence of the appellant as well as of the other contesting defendants, in substance, was that there was an immemorial custom obtaining in this particular institution, according to which palas or turns of worship held by a shebait could be privately transferred to any persons who professed the Hindu faith and were either sanyasins or belonged to the three higher castes among the Hindus. Most of the existing shebaits, it was said, had acquired their shebaiti rights by such transfers. It was further alleged on behalf of defendants 2 to 7 that they had not done anything which would justify their c removal from office. The Subordinate Judge who heard the suit came to the conclusion that the defendants succeeded in proving the custom alleged by them, and the kobala in dispute was a valid and operative document which gave defendant 1 the rights of a shebait. In this view of the case, no question of removal of defendants 2 to 7 from their office as shebaits did at all arise. The result was that the plaintiff's suit was dismissed. On appeal, the judgment was reversed by the lower appellate Court. The Additional District Judge who heard the appeal was of opinion that no custom in the legal sense of the term was proved in this case, and, even d if such a custom was established, it was unreasonable and opposed to public policy. Defendant 1 was held therefore not to have acquired any rights on the basis of the conveyance executed in his favour. The Additional District Judge further found that defendants 2 and 3 were liable to be removed from their office as shebaits on account of certain acts committed by them which went against the interest of the deity. As against the other defendants however no case for removal was made out, and the lower appellate Court directed that a receiver should be appointed to take charge of the palas of defendants 2 and 3 for a period of e two years only during which the other shebaits were to make suitable arrangements for the distribution of these palas. It is against this part of the decision which negatives defendant 1's right by purchase that the present second appeal has been preferred by him.

There are two points which require consideration in this appeal: (1) whether on the facts admitted and found, a custom has been established which would make the palas or turns of worship in the Dhakeswari temple alienable to any person professing the Hindu faith, provided that the alienee belonged to any of the three higher castes or was a f sanyasi and (2) even if such a custom is established, whether it is unreasonable or opposed to public policy. It is not disputed that as a general rule of Hindu law, a trust attached to a temple or endowment cannot be alienated by the holder, and whoever sets up a custom which is at variance with the general law must prove it with all its requisites to the satisfaction of the Court in a most clear and unambiguous manner. In the present case, the trial Judge was of opinion that a transfer of the palas of the Dhakeswari temple, provided that the transferee was a caste Hindu or a Hindu sanyasi was established by custom. The lower appellate g Court held, on the other hand, that although there were various instances of such transfers, yet the practice did not amount to a legal custom. Dr. Sen Gupta who appears for the respondents has invited us to hold that this finding of the Additional District Judge is a finding of fact which is conclusive in second appeal, and that the appellant is not entitled to assail it. Whether a particular custom is proved to exist or not, is undoubtedly a question of fact, and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal : *vide* 37 I A 191;[1] but as h was observed in 40 Mad 709[2] :

> Questions of the existence of an ancient custom are generally mixed questions of law and fact ; the Judge first finding what were the things done in alleged pursuance of the custom and then determining whether these facts so found satisfied the requirements of the law. The latter is a question of law — not fact.

In the present case, the facts found by the trial Court were accepted in their entirety by the Additional District Judge. The latter

1. ('08) 32 All 363 ; 6 I C 787 : 37 I A 191 : 13 O C 163 : 7 A L J 704 (P C), Ananta Sing v. Thakur Durga Singh.
2. ('17) 4 AIR 1917 P C 33 ; 39 I C 722 : 40 Mad 709: 44 I A 147 (P C), Palaniappa Chetty v. Devasikamony Pandara Sannadhi.

a however differed from the former in holding that on the facts found, the essential attributes of a legal custom were not established. This is certainly a question of law which can be discussed in second appeal. Now, it has been found as a fact by both the Courts below that for a period extending over a century, there have been various instances when the palas or turns of worship held by the shebaits in the Dhakeswari temple have been sold to strangers, the alienees being caste Hindus or Hindu Sanyasis. Exhibit C is the earliest deed of transfer that has been made an exhibit in this case, and it is a document in Persian executed in the year b 1822. By this document, Neemchand, a Kayestha by caste, transferred his rights as shebait in favour of Gopi Nath Dobey, a Brahmin, and it is through Gopi Nath that defendants 2 to 7 purport to derive their title. The transfer was for a consideration of Rs. 475 and there was a recital in the document that it was made with the consent of all the co-shebaits. In 1850, Ganga Debya, a daughter-in-law of Gopee Nath, executed a deed of gift in respect of two days' pala or turn of worship, which she had inherited from her husband, in favour of Jalim Tewary, her relation, and Jalim Tewary, was grand-c father of defendant 2. Jalim Tewary was a stranger to the endowment and was not previously connected with it in any way.

There were three deeds of transfer executed in the year 1865. In the first of these documents (Ex. C1), Madan Kishore Lala was the vendor and the vendees were Jalim Tewari and one Madan Mohan Sarma Talukdar. In the other two documents, (Exs. C-2 and C-3), the transferee was the same Madan Mohan Sarma Talukdar, and the transferors were Makhan Bibi and Lala Durga Prasad respectively. In 1866, we have a sale deed by a Lachman Bibi in favour of d one Sumeru Ban Goswami, and the latter who was a perfect stranger at that date was the predecessor of pro forma defendants 11 and 12. In 1875, one Basantamoni, whose husband had purchased certain palas, transferred the same by a sale deed to one Banga Chandra Chakrabarty, pro forma defendant 8. There were also several other instances of sale which are fully set out in the judgment of both the Courts below. In all these cases, it seems that there was no opposition to the transfer by any of the existing shebaits, and although there is no evidence that the actual consent of the co-shebaits was taken when a shebait transferred his palas to a stranger, yet in fact there was a recital to that effect in the first of the documents mentioned above. e

It appears that in 1883, Surja Sarma Talukdar, the son and heir of Madan Mohan Sarma Talukdar, transferred certain shares to one Lala Kanai Lal. There is some evidence on the record to show that the purchase by Kanai Lal was objected to by Brojo Lal Tewary who was the most influential shebait at that time. This opposition, however, was not very strong, for, it appears that Kanai Lal transferred portion of his palas to Shiba Sundari by a document (Ex. C-7) and Shiba Sundari's grand-son, who is pro forma defendant 15, is admittedly in possession of these palas at the present time and has been f recognized as a shebait by the plaintiff himself. Kanai Lal left a will behind him, by which the remaining palas were bequeathed to one Ratinath Misra. This Ratinath could not get possession of the palas devised to him on account of the opposition of some of the other shebaits, and he had to file a suit against all the shebaits including the present plaintiff. Eventually the matter was settled and Ratinath did not proceed further with the suit, and to purchase peace he sold his palas to Brojolal Tewari himself by sale deed, Ex. C-9. This transaction by itself does not throw much light on the matter in con- g troversy between the parties, but it certainly shows that there was some opposition to these transfers from time to time. As Ratinath did not proceed with the suit, the matter did not come up before the Court for adjudication. There were two occasions, however, when the matter was actually brought before and decided by a Court of law.

The first was in 1872 when the shebaiti share of Kali Charan Giri, a predecessor-in-interest of the plaintiff, was auction purchased by one Baroda Kanta Roy, a pleader of Dacca Court. There was a dispute as to the propriety of the sale order, and the mat- h ter ultimately came up before this Court in appeal. It was held by this Court and the decision is reported in 15 W R 339,[3] that the right of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of a shebait. It is somewhat curious to find that in spite of this decision no attempt was made to oust Baroda, and his grandson who is a pro forma defendant in this suit is still in possession of the pala purchased by his predecessor. The second occasion arose in 1905, in connexion with a mortgage suit, instituted by a mortgagee in

3. ('71) 15 W R 339 : 6 Beng L R 727, Kali Charan Giri v. Bangshi Mohan Das.

respect of some of these turns of worship. *a* It was held by the Courts below, and this decision was affirmed by this Court on appeal, that the rights of the shebaits in the properties of the deity were inalienable, and if there was any custom which sanctioned such a transfer, it was bad in law and should not be enforced. The Additional District Judge has laid great stress on this judgment which was marked EX. 10A. The decision may not be res judicata as it was not between the same persons who are parties to the present suit, but it is a very good piece of evidence and shows clearly that this identical customary right which was set up and *b* asserted by one party in that suit was definitely negatived by the Court.

The legal title to recognition of a special custom depends upon its antiquity, certainty and uniformity, and the Court must be assured of these conditions by means of clear and unambiguous evidence: *vide* 14 M I A 570[4] and 3 I A 259[5] at p. 285. The practice of transfer of palas by the shebaits of Dhakeswari temple must, on the evidence of this case, be held to be an ancient practice. There is no doubt that it was in vogue from very early times but it cannot be said that it was either uniform or constant. It is clear from the evi- *c* dence in this case that far from receiving any judicial recognition, the validity of the custom has been negatived by a competent tribunal whenever the matter has come up before any Court of law for adjudication. In my opinion, even one or two instances where the right claimed under custom is contested and that successfully would far exceed in value the weight that is to be attached to a plurality of instances when there was no contest and the matter practically rested on indulgence or mutual consent.

In 40 Mad 709,[2] where the question related to the legality of the transfer of endowed *d* lands by a shebait, it was found as a fact by the first two Courts that there was a legal custom existing from a long time past according to which leases of temple lands were habitually granted and the alienees were never disturbed in their possession. It was held by their Lordships that this was misappreciation of the word "custom," and the Courts below were quite forgetful of the essentials of a valid custom which modified *e* the ordinary law. A custom to be valid must be consciously accepted as having the force of law: *vide* 8 Mad 464.[6] It must be submitted to as legally binding, and in my opinion, this element is totally lacking in the present case. It seems to me that this practice of transferring palas to strangers must have resulted from some exception or indulgence at the beginning, and as some of the shebaits became shebaits by purchase, they possibly did not deem it prudent to question the rights of others who came exactly in the same way. In this way, the practice may have grown up, but it does not furnish any *f* indication of any legal right in the beginning: *vide* (1861) 9 H L C 692.[7] I agree, therefore, with the Additional District Judge that a legal custom has not been established in the present case.

I am also of opinion that even if a custom is held to have been established by evidence in the present case, such custom is unreasonable and should not be enforced. As was pointed out by Sir Ashutosh Mookerji in 42 Cal 455,[8] for the purpose of determining whether a custom is against reason or not, we are to judge not by the reason of an unlearned man but by artificial and *g* legal reason warranted by authority of law. All customs involve some inconsistency with the general law, and the mere fact that a custom is at variance with ordinary law is no ground for condemning it as unreasonable. In cases like this we are to see whether the custom that is set up is prejudicial to the interests of the endowment and goes contrary to the presumed intentions of the founder. In a private endowment, unless the founder has directed otherwise, the shebaitship passes to his heirs or disciples; and where the shebaits are descendants or nominees of the founder, it can be presumed that their cult of worship is the same as that of *h* the founder, and they can naturally be expected to revere their ancestral deity and continue to worship in the same way as was done by the founder. The rights of a shebait are heritable, and they can be partitioned also for purposes of convenience. If a transfer is made by a shebait of his turn of worship in favour of one of his co-shebaits,

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4. ('70-72) 14 M I A 570 : I A Sup Vol 1 : 17 W R 553 : 12 Beng L R 396 : 2 Suther 603 : 3 Sar 108 (P C), Rama Lakshmi Ammal v. Sivanatha Perumal Sethurayar.

5. ('76) 3 I A 259 : 26 W R 55 : 3 Sar 611 : 3 Suther 304 (P C), Hurpurshad v. Sheo Dyal.

6. ('85) 8 Mad 464, Mira Bivi v. Vellayanna.

7. (1861) 9 H L C 692 : 9 W R 930 : 131 R R 403 : 4 L T 849 : 8 Jur (NS) 625 : 34 L J C P 222, Salisbury v. Gladstone.

8. ('15) 2 A I R 1915 Cal 161 : 27 I C 400 : 42 Cal 455 : 20 C L J 183 : 19 C W N 208, Mahamaya Debi v. Haridas Haldar.

a or to some other person belonging to the same family or group who might in his own right have been a shebait or might have held a pala, no conceivable injury is done to the deity or the endowment. But it is difficult to say that the interests of the endowment or of the deity do not suffer, if a shebait is allowed to transfer for his own pecuniary advantage his rights of worship and management to a perfect stranger who is not in any way, connected with the institution. It was held by their Lordships of the Judicial Committee that a custom which sanctions the sale of a trusteeship for the pecuniary advantages of the trustee is bad in law : *vide* 4 I A 76.[9]

b An exception has been made when the transferee is in the line of shebaits already and is an actual or potential shebait himself. But, in my opinion, it would lead to disastrous results if the trusteeship of a temple be regarded as a marketable commodity which can be sold for the personal benefit of the holder, provided only that the transferee professes to be a follower of the Hindu religion. There are innumerable religious sects among the Hindus, and there are various cults of worship among them which differ from each other on material particulars and the mere fact that the transferee is a Hindu is not a

c guarantee that he is the follower of the particular cult which is maintained in a particular institution, nor can he be expected to be as much mindful of the interests of the deity as the heirs or the descendants of the original founder.

I cannot agree with Dr. Basak, though his argument finds support from some of the observations made by the Additional District Judge that the only duty which the shebait in the present case has got to discharge is to pay to the officiating priest the minimum costs of worshipping the deity which are estimated at Re. 1-3-0, a day, and that

d if the purchaser undertakes to do the same thing, the deity does not stand to lose anything by the transfer of the shebaiti right. It is a bad custom, if I may say so, if it allows the shebait to appropriate all the offerings which are made to the deity, and cannot compel him to render any other service to the deity except paying Re. 1-3-0 a day to the priest who actually performs the ceremony. It is not necessary, however, to dilate on this point any further. In my opinion, the custom that is set up here is not only prejudicial to the interests of the deity, but is also against the presumed intentions of the founder. In the case of a private de- e butter, the intention of the founder undoubtedly is that the shebaitship should ever remain in his family, or it would pass to such person or persons as he himself had indicated. It cannot be his intention that it should pass to a total stranger. The shebaits cannot possibly work together as one group, if strangers are permitted to come in from outside, and I agree with the Additional District Judge that such practice tends to multiply the chances of mismanagement and deterioration of the temple. It is true that this practice of transferring palas having been started from very early times, most of f the existing shebaits of the temple are shebaits by purchase. But if a custom is unreasonable at its inception no usage or continuance can make it good, and as I have pointed out already, it was pronounced to be unreasonable by this Court as early as in the year 1905.

On both the points, therefore, I hold that the decision of the Court of appeal below is right, and this appeal must fail. Dr. Basak has argued, in the last place, that in any event, defendants 2 to 7 should be directed to pay to the appellant the sum of money which g was the consideration for the transfer. This question does not arise in the present case, and it would be open to defendant 1 to take such steps as he may be advised to take for the recovery of the money due to him by defendants 2 to 7. The result is that this appeal is dismissed, but in the circumstances of the case, I direct that each party shall bear its own costs in all the Courts.

S. A. No. 1270 of 1939

I now come to S. A. No. 1270 of 1939 which is preferred by defendants 2 and 3 against the same judgment, and the only point for consideration in this appeal is as to whether h the District Judge was justified in directing their removal as shebaits of the deity. There are two grounds on which the order for removal was passed : (1) that these defendants had mortgaged to one Gokul Chand certain properties which included C. S. Plot No. 32 belonging to the deity ; and (2) that defendant 3 had erected a stable within the temple compound at a distance of only 12 or 13 cubits from the temple itself. In my opinion, there is not much substance in either of these two grounds. Regarding C. S. Plot 32, there is a dispute as to whether this plot belongs to the deity, or is the private property of these defendants. The C. S. records are

9. ('76-78) 1 Mad 235 : 4 I A 76 : 3 Sar 687 : 3 Suther 382 (P C), Raja Vurmah Valia v. Ravi Vurmah Mutha.

undoubtedly against these defendants, but as the point was not raised in the plaint as one of the grounds for removing defendants 2 to 7 from office, I think that the latter can reasonably complain that they had no opportunity of adducing evidence on this point. It appears, however, that in this as well as other matters, defendant 2 was acting as the karta of the family. This defendant 2 is now dead, and I do not think that there is any justification for removing the heirs of defendant 2 from the office of shebaits for any misconduct on his part.

As regards the erection of the stable, it seems to be a temporary one established for the convenience of the pilgrims, and we are told that it is no longer in existence. If it still exists, defendant 3 can certainly be directed to remove it, but that is no ground, in our opinion, for removing him from his office. Dr. Sen Gupta who appears for the respondents has also not pressed this point. The direction of the Additional District Judge for the appointment of receiver in place of defendants 2 and 3 is, in our opinion, entirely misconceived and cannot be supported on any ground. The result, therefore, is that this appeal is allowed and the decree of the lower appellate Court is varied to this extent: that the order of removal of defendant 3 as shebait of the deity will be set aside. As defendant 2 is reported to be dead, no order in his favour is necessary. Subject to this modification the judgment of the lower appellate Court will stand. Each party will bear their own costs in all the Courts. No order is necessary on the cross-objection.

Biswas J. — I agree.

R.K. *Order accordingly.*

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(29) A. I. R. 1942 Calcutta 32

B. K. MUKHERJEA AND ROXBURGH JJ.

Malati Dutt — Defendant — Petitioner

v.

Surendra Nath Dutt, Plaintiff and another, Defendant — Opposite Party.

Civil Rule No. 258 of 1941, Decided on 22nd May 1941, issued in matter of application for setting aside order of Dist. Judge, 24-Perganas at Alipur, D/- 10th February 1941.

(a) Divorce Act (1869), S. 8 — Expression "High Court" in S. 8 means both original and appellate sides.

The expression 'High Court' as used in S. 8 does not mean either the original or the appellate side of the High Court. It means the High Court as one whole as separate and distinct from other Courts : ('29) 16 A I R 1929 Cal 756 (FB) and ('40) 27 A I R 1940 Cal 264, *Rel. on.* [P 34*a*,*b*]

(b) Government of India Act (1919), S. 108 — Terms "original" and "appellate" in S. 108 are wide enough to include all different jurisdictions.

The terms "original" and "appellate" as used in S. 108 are wide enough to include all the different jurisdictions, viz., civil, criminal, admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdictions. [P 34*e*]

(c) Calcutta High Court, Original Side Rules, Chap. 35A, R. 44 — Single Judge on original side exercising matrimonial jurisdiction cannot be said to have only co-ordinate powers with other District Judges — His powers are akin to those exercisable by an appellate tribunal — Application for transfer under S. 8, para. 2, Divorce Act, is covered by R. 44—Single Judge on original side can transfer divorce suit from one District Court to another.

A Judge sitting singly in the original side of the Calcutta High Court and exercising matrimonial jurisdiction cannot be said to have only co-ordinate powers with other District Judges. Ss. 13 and 17, Divorce Act, as well as the power of removal which can undoubtedly be exercised by a Single Judge under R. 44 do indicate that in exercise of its matrimonial jurisdiction a Single Judge of the Calcutta High Court has powers which are somewhat akin to those exercisable by an appellate tribunal. An application for transfer made under para. 2 of S. 8, Divorce Act, is covered by R. 44 and hence a Single Judge sitting on the original side of the Calcutta High Court is competent to transfer a divorce suit from one District Court to another. [P 35*b*,*c*,*d*]

(d) Calcutta High Court, Original Side Rules, Chap. 35A, R. 44 — Single Judge transferring divorce suit from one District Court to another —Question of jurisdiction not raised—Held that rules being ambiguous, it was not just or proper for High Court to interfere under S. 115, Civil P. C., and treat proceedings before transferee District Court as initiated without jurisdiction.

A Single Judge of the Calcutta High Court acting under R. 44 transferred a divorce suit from one District Court to another on an application made in that behalf under para. 2 of S. 8, Divorce Act. No question of jurisdiction was raised before the Single Judge. On an application under S. 115, Civil P. C., against the order of the transferee District Court holding that it had jurisdiction to try the suit:

Held that if the question of jurisdiction had been expressly raised before the Single Judge and the Judge had decided that he had jurisdiction the decision would have been conclusive and could be set aside only by an appropriate proceeding : ('20) 7 A I R 1920 Cal 131, *Approved.* [P 35*f*]

But since the rules themselves were ambiguous and the question of jurisdiction was a doubtful one it would not be just or proper for the High Court to exercise its powers of revision under S. 115, Civil P. C., and treat the proceeding before the District Judge to whom the divorce suit was transferred as being initiated without jurisdiction. The case was not one of lack of inherent jurisdiction. The utmost that could be said was that the jurisdiction was not invoked or exercised in the right way : ('15) 2 AIR 1915 Bom 146 (F B), *Disting.* [P 35*f*,*g*]

S. N. Banerjee (Sr.), Arun Sen, P. N. Mallick and Smriti Kumar Roy Choudhury — for Petitioner.

Clough and Bonbehari Ghose; and Hiran Kumar Roy — for Opposite Party 1 and 2, respectively.

B. K. Mukherjea J.—This rule is directed against an order dated 10th February 1941, passed by the District Judge of 24-Perganas in a divorce suit which was originally started in the Court of District Judge of Mymensingh, but was later on transferred to the Alipur Court under an order of Sen J. in exercise of matrimonial jurisdiction of this Court. The material facts are not in controversy and may be shortly stated as follows : The petitioner, one Malati Sudha, was married to the plaintiff-opposite party, Surendra Nath, on 18th January 1940, and the marriage was solemnized under Act 3 of 1872. On 1st August 1940, the husband instituted a divorce proceeding in the Court of the District Judge of Mymensingh and prayed for dissolution of the marriage on the ground of alleged misconduct of the wife with opposite party No. 2, Jyoti Prokash. The wife thereupon moved an application to this Court in its extraordinary original civil jurisdiction under Cl. 13, Letters Patent, as well as under S. 8, Divorce Act, praying that the divorce suit pending before the Mymensingh Court might be transferred to this Court and tried in its ordinary original jurisdiction along with a maintenance suit, which was filed by her against her husband in this Court, and was still pending hearing. On this application a rule nisi was directed to be issued by Panckridge J. on 14th August 1940 and the rule was heard by Sen J. sitting singly on 3rd September following. The learned Judge directed by an order passed on that date that the divorce suit should be transferred from Mymensingh to Alipur and be heard and decided by the District Judge of 24-Perganas. It was further directed that a writ of commission should issue forthwith under the seal of this Court in its matrimonial jurisdiction to the District Judge of Mymensingh authorizing him to examine ten witnesses named in the writ including the opposite party himself as witnesses on his behalf. The said commission was made returnable to the Court of the District Judge of 24-Perganas on or before 11th November 1940.

In pursuance of this writ the District Judge of Mymensingh proceeded to examine the witnesses named therein. Objections were raised by the counsel appearing on behalf of the petitioner that the order made by this Court for examination of the witnesses on commission was without jurisdiction as Sen J. had no seisin of the case after he made an order of transfer. Complaint was also made on behalf of the petitioner that the District Judge of Mymensingh did not allow her counsel to cross-examine most of the witnesses that were examined on behalf of the opposite party. The District Judge overruled these objections and after the examination of the witnesses was finished the records of the divorce suit were transmitted to the Alipur Court and the suit was registered as Original Suit No. 47 of 1940. The petitioner filed her written statement in due course and besides answering the allegation of disloyalty brought against her by her husband, she took the specific point that the Alipur Court had no jurisdiction to entertain or hear the suit.

On 17th January 1941 issues were framed by the District Judge of Alipur and issue 1 which raised the question of jurisdiction was heard as a preliminary issue by the Court on 10th February 1941. By his order passed on that date the District Judge decided this issue in favour of the plaintiff-opposite party and held that he had jurisdiction to try and determine the suit. It is against this order that the present rule has been obtained. It is conceded on both sides that apart from the order of transfer made by Sen J. the District Judge of Alipur would have no jurisdiction to entertain the suit. Mr. Banerji who appeared in support of this rule contended before us that the order of our learned brother, Sen J., was without jurisdiction and that a Judge sitting on the original side of this Court was not competent to transfer a divorce suit from one District Court to another, over neither of which he could exercise any appellate jurisdiction. This power, it is said, could be exercised only by the appellate Bench of this Court which is empowered to deal with civil business arising from the particular district where the suit was pending. It is contended, therefore, that the order of Sen J. being void for want of jurisdiction could not confer any legal authority on the District Judge of Alipur to hear and determine the suit.

Now, the application of the petitioner upon which the order for transfer was made by Sen J. was one under Cl. 13, Letters Patent, and S. 8, Divorce Act. It is not disputed that under Cl. 13, Letters Patent, the learned Judge could not transfer the divorce suit to the Court of the District Judge of Alipur. He could only remove the suit from Mymensingh and try and determine it himself as a Court of extraordinary original jurisdiction. The controversy therefore narrows down to this, as to whether the order of transfer could be made under S. 8, Divorce

Act. Section 8, Divorce Act, stands as follows :

The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act. The High Court may also withdraw any such suit or proceeding and transfer it for trial or disposal to the Court of any other such District Judge.

It is para. 2 of this section that is relevant for our present purposes, for it was under that paragraph that the order of transfer was made by our learned brother. We have no hesitation in holding that the expression "High Court" as used in this section does not mean either the original or the appellate side of this Court. It means the High Court as one whole and the definition is intended to do no more than to point to this Court itself as separate and distinct from other Courts : *vide* the observation of Rankin C. J. in 34 C W N 13;[1] *see also* the case in 44 C W N 258.[2]

Under S. 9 of Act 24 and 25 Vict. Chap. 104 all the powers are conferred on the High Court as one body. But as it is neither convenient nor possible that the entire Court should sit for determination of every single matter, power was given to this Court by S. 13 of the Act to make rules according to which jurisdiction might be conferred on one or more Judges which they could exercise within the limits prescribed by the rules themselves.

Under S. 223, Government of India Act, 1935, the provisions of S. 108, Government of India Act, 1919, are continued in force subject to the provisions of any order in council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by the Act. Section 108, Government of India Act, 1919, which substantially repeats the provision of S. 13 of Act 24 and 25 Victoria Chap. 104 runs as follows:

(1) Each High Court may, by its own rules, provide as it thinks fit for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the High Court of the original and appellate jurisdiction vested in the Court.

(2) The Chief Justice of each Court shall determine what Judge in each case is to sit alone and what Judges of the Court whether with or without the Chief Justice are to constitute the several Division Courts.

The terms "original" and "appellate" as used here are obviously wide enough to include all the different jurisdictions, viz., civil, criminal, admiralty, vice-admiralty, testamentary, intestate and matrimonial jurisdictions which are referred to in S. 9 of Act 24 and 25 Vic. Chap. 104. The Divorce Act as such has nothing to do with the internal arrangements of this Court that are determined by the rules; but the litigant when he wants to have an order under S. 8 of the Act, would have to approach that particular department of this Court which by its rules is empowered to deal with this matter. It is necessary therefore to see what rules have been prescribed by the Court on this point. The learned counsel for the respondent contended before us that the appropriate rule which regulates the procedure in the present case is R. 44, Chap. 35-A of the Original Side Rules. Chapter 35-A lays down the rules framed by this Court under the Divorce Act, though undoubtedly such rules could be framed under the general powers spoken of above. Rule 44 of this chapter provides as follows:

An application to the High Court to remove a suit or proceeding under S. 8 of the Act shall be made by an ex parte application to the Judge on the original side in open Court for a rule upon the party or parties concerned to show cause against such removal.

This rule speaks of removal of a suit or proceeding which is dealt with under para. 1 of S. 8, Divorce Act, and does not say anything about the transfer of such suit which is dealt with in para. 2. The question is whether an application for transfer made under para. 2 of the said section is also covered by this rule. We have no doubt that such was the intention of the framers of the rule though the language is certainly not clear and, if strictly interpreted, would exclude an application for transfer. No reason can be assigned as to why the powers of removal which also imply interference with the proceedings before another Court should be exercised by a Judge of the original side sitting singly whereas the powers of transfer could be exercised only by the appellate Bench; and if this is the procedure that is to be followed certain anomalous consequences are likely to arise. Suppose, for example, a party to a divorce proceeding makes an application before a Single Judge in the original side of this Court for removal of the suit under Rule 44 of Chap. 35-A of the Original Side Rules and the Judge makes an order that the suit should be withdrawn and heard by himself. It is quite conceivable that while the application was pending before the Judge

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1. ('29) 16 A I R 1929 Cal 756: 123 I C 433: 31 Cr L J 506: 57 Cal 1042: 50 C L J 408: 34 C W N 13 (F B), Emperor v. Girish Chandra.
2. ('40) 27 A I R 1940 Cal 264: 188 I C 302: I L R (1940) 1 Cal 79: 44 C W N 258, Jnan Kumar Das v. Ram Kumar Das.

in the original side any other party might make an application to a Division Bench in the appellate side for transfer of that suit to another District Judge; and if such order is made by the Division Bench a clear conflict of jurisdiction will arise.

Unfortunately, the Appellate Side Rules also do not throw much light on this point. There is no specific provision in the Appellate Side Rules dealing with an application for transfer under S. 8, Divorce Act, though there are undoubtedly some rules in relation to matters coming under Ss. 9 and 17 of the Act: *vide* Part 1, Chap. 2, R. 16. Mr. Banerji argues that a Judge sitting singly on the original side of this Court has only co-ordinate jurisdiction with a District Judge in matters coming under the Divorce Act. He has no appellate jurisdiction or powers of superintendence or control over the latter, and consequently, an application should be made before the Division Bench under the general provision contained in Part 1, Chap. 3, R. 3 of the Appellate Side Rules. There is undoubtedly considerable force in this contention. But here again the matter is not free from doubt.

A Judge sitting singly in the original side of this Court and exercising matrimonial jurisdiction cannot be said to have only co-ordinate powers with other District Judges. Under S. 13, Divorce Act, when a petition is dismissed by a District Court under that section, the petitioner may nevertheless present a similar petition to the High Court. Again, under the last paragraph of S. 17 when during the progress of a divorce suit in the Court of a District Judge, any person suspects that any of the parties to the suit has been acting in collusion for the purpose of obtaining a divorce he shall be at liberty to apply to the High Court not only to remove the suit under S. 8, but to direct the District Judge to take such steps in respect of the alleged collusion as to be necessary to enable him to make a decree in accordance with the justice of the case. Mr. Banerji concedes that these directions could be given by a Judge sitting singly on the original side of this Court. These provisions of the Divorce Act as well as the power of removal which can undoubtedly be exercised by a Single Judge under R. 44, Chap. 35A do indicate that in exercise of its matrimonial jurisdiction a single Judge of this Court has powers which are somewhat akin to those exercisable by an appellate tribunal. On the other hand the general provision contained in Part 1, Chap. 3, R. 3, Appellate Side Rules, which provides that a civil business arising from the districts of each group shall be laid before the Division Court appointed by the Chief Justice to deal with such business, is very general in its expression and does not specifically cover a case of this description.

As matters stand the position seems to us to be this : The rules of this Court must be taken to be exhaustive and it must be presumed that the different jurisdictions that have been delegated to one or more Judges under the rules leave nothing which has to be dealt with by all the Judges together. In this particular case it is doubtful whether one rule or the other covers the matter. Mr. Sen J. obviously proceeded upon the assumption that the present case is covered by R. 44, Chap. 35A, Original Side Rules. If this question of jurisdiction had been expressly raised before him and the learned Judge had decided the matter in that way the decision would undoubtedly have been conclusive and could be set aside only by an appropriate proceeding : *vide* 31 C L J 272.[3] Even though it was not expressly decided, we think, that in these doubtful cases where the rules themselves are ambiguous it would not be just or proper on our part to exercise our powers of revision under S. 115, Civil P. C., and treat the proceeding before the District Judge of Alipur as being initiated without jurisdiction. It is not a case of a lack of inherent jurisdiction. The utmost that can be said is that the jurisdiction was not invoked or exercised in the right way.

The decision of the Bombay High Court in 39 Bom 604,[4] upon which Mr. Banerjee relies is distinguishable. It was a case where a single Judge sitting on the original side of the Court made an order staying the hearing of a suit pending in a Subordinate Judge's Court in the muffasil. There was no rule empowering a single Judge to pass such orders, and consequently the matter had to be dealt with by the appellate side under R. 1, of the Appellate Side Rules of that Court. Quite apart from this the order that is sought to be revised is an interlocutory order, no final order has yet been passed in the suit and we think that it would be open to the petitioner to raise this question of jurisdiction if she is so advised if any decree

3. ('20) 7 A I R 1920 Cal 131 : 56 I C 532 : 47 Cal 770 : 31 C L J 272 : 24 C W N 633, Krishna Kishore De v. Amarnath Khettry.
4. ('15) 2 A I R 1915 Bom 146 : 30 I C 560 : 39 Bom 604: 17 Bom L R 655 (F B), Narayan Vithal v. Jankibai.

for dissolution of marriage is at all passed in this case and the matter comes up for confirmation before this Court under the provisions of the Divorce Act. The result, therefore, is that this rule is discharged. We make no order as to costs.

G.N./R.K. *Rule discharged.*

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(29) A. I. R. 1942 Calcutta 36

BARTLEY AND MOHAMAD AKRAM JJ.

Manik Gazi — Appellant

v.

Emperor.

Criminal Appeal No. 737 of 1940, Decided on 26th March 1941.

(a) Penal Code (1860), S. 302—Murder—It is not obligatory on prosecution to prove adequate motive.

In a murder case it is not obligatory for the prosecution to prove adequate motive for the crime. [P 37*a*]

(b) Criminal P. C. (1898), S. 164 — Statement made under S. 164, Criminal P. C., is admissible —It can be used to corroborate and contradict statement made in Court under Ss. 145 and 157, Evidence Act.

A statement made under S. 164, Criminal P. C., is not inadmissible in evidence and may be used to corroborate or contradict a statement made in Court in the manner provided by Ss. 145 and 157, Evidence Act. [P 37*d*]

(c) Criminal P. C. (1898), S. 297 — Murder — Jury trial — Dying declaration and evidence of witness examined under S. 164 only evidence in case — Witness declared hostile in Sessions Court and cross-examined on statement made under S. 164 — Failure to point out to jury to exercise considerable caution before relying upon witness's statement, absence of reference in charge to jury of details of first information report and failure to mention delay in making over dying declaration to investigating officer held rendered charge defective so as to prejudice accused.

The only evidence in a murder case beyond the dying declaration of the deceased was the evidence of a witness who was examined under S. 164, but was declared hostile in the Sessions Court and cross-examined on the statement made under S. 164. No reference was made in the charge to the jury to the details of the first information report filed by the deceased's brother who alleged to have seen a person *A* with a dagger with which the deceased was killed. Although the dying declaration was recorded before arrival of investigating officer and although the doctor, who recorded it came back to the house during the investigation, the dying declaration was not made over to the investigating officer for four days after the date of the occurrence :

Held that in the circumstances it was incumbent upon the Judge to emphasize to the jury to exercise a very considerable amount of caution before making up their minds to rely upon the statement of the witness upon whom even the prosecution did not rely to any considerable extent. The absence of any such direction in the charge must be held to have prejudiced the case of the accused. Similarly the failure to make a reference in the charge to the details of the first information report and the name of *A* and the failure to mention the delay in making over the dying declaration rendered the charge defective and the majority verdict of jury finding the accused guilty could not be sustained. [P 37*d*,*e*,*f*,*g*]

Sudhansu Sekhar Mukherji — for Appellant.

Bireswar Chatterji — for the Crown.

Bartley J. — The appellant in this case was placed upon his trial upon a charge of murder before a jury consisting of seven persons in the Court of the learned Additional Sessions Judge of Khulna. The jury by a verdict of 4 to 3 found him guilty and the learned Judge who records that though he does not agree with the verdict of the jury, he accepts it, convicted him under S. 302, Penal Code, and sentences him to transportation for life. The case for the prosecution was briefly that on the night of 10th June 1940 one Madar Gazi was returning home when he was suddenly attacked in a jute field by the appellant who stabbed him in the abdomen with a dagger. At the time of the occurrence he was accompanied by a man called Jasim Gazi who was examined in the case as a prosecution witness. This man was in front of him at the time of the actual assault. In the Court of Session his evidence was that he heard Madar saying that Manik had stabbed him but he did not see anybody there. His original statement which for some reason, not apparent from the record, was recorded by a Magistrate under S. 164, Criminal P. C., was that he heard Madar saying that Manik had stabbed him and he turned back and saw two men running away, one towards the south and one towards the north. He could recognize Manik who was running towards the south. The injured man was brought home with a blood-stained knife in his hand. He told a number of people that Manik had stabbed him with the knife. He was attended by a doctor who recorded his dying declaration, according to him, at about 2 O'clock in the morning. The declaration was to the effect that Manik Gazi had stabbed him that evening a little after dusk in the jute field of Tara Gazi. The witness Jasim saw the occurrence and both men caught the assailant, snatched away the dagger from him and he ran away. There was another man with him. This dying declaration does not appear to be made over to the police at the time of the investigation although the doctor came back next day after the arrival of the investigating officer. The injured man died about 4 o'clock that day.

Information had been lodged to the thana about 7 o'clock in the morning of 11th June

and it contained the story that after the stabbing there was a struggle between the assailant and the witness Jasim Gazi after which the assailant escaped. The information also contained the statement that the informant who was a brother of the deceased man had seen the dagger with which his brother was stabbed, in the hands of a man called Asiruddi. For that reason he believed that Asiruddi was also connected with the occurrence. In his charge to the jury the learned Judge pointed out, in the first place, that there was no evidence of any adequate motive though he added quite rightly that it was not obligatory for the prosecution to prove it. When dealing with the evidence, however, the charge delivered by the learned Judge was not entirely satisfactory in that there are important omissions with regard to certain very material aspects of the case as presented in the evidence. The only evidence beyond the dying declaration made by the deceased man is that of prosecution witness 19, Jasim Gazi. The record shows that this witness was examined under S. 164, Criminal P. C., a somewhat unusual feature of the present case. When examined before the Court of Session this witness was declared hostile and cross-examined on the statement which he had already made under S. 164, Criminal P. C. In connexion with this evidence, the learned Judge said that the prosecution was allowed to prove this statement which was to the effect that the witness had recognized Manik. He then pointed out that even in his deposition before the committing Court, the witness refused to adhere to the statement and finally went on to say that in any case his statement under S. 164, Criminal P. C., is not evidence in the case and that the jury could not even consider whether the statement was true or not. This of course is not a correct direction of law. A statement made under S. 164, Criminal P. C., is not inadmissible in evidence and may be used to corroborate or contradict a statement made in the Court in the manner provided by Ss. 145 and 157, Evidence Act. A further consideration of the present case is that the statement was actually used by the prosecution to discredit their own witness in the manner provided by S. 155, Evidence Act.

In these circumstances we think it was incumbent upon the learned Judge to emphasise to the jury that they should exercise a very considerable amount of caution before making up their minds, to rely upon the statement of the witness upon whom even the prosecution did not rely to any considerable extent. We think the absence of any such direction in the charge of the learned Judge must be held to have prejudiced the case of the appellant. Again there is no reference in the charge to the details contained in the first information report and the name of the man Asiruddi who, as it appears from the evidence, was the only person actually connected with the ownership of the dagger with which the deceased was stabbed, is not to be found in the charge delivered by the learned Judge. A further point which is not mentioned is that although the recorded dying declaration was, according to the doctor, taken before the arrival of the investigating police officer and although the doctor himself came back to the house during the investigation, that dying declaration was not made over to the investigating officer, according to his own evidence, for four days after the date of occurrence. We are of opinion, therefore, that this point should certainly have been put to the jury in view of the position that the only direct evidence in the case besides the dying declaration was the evidence given by the witness Jasim Gazi. In view of these infirmities in the learned Judge's charge we are of opinion that the majority verdict of the jury finding the appellant guilty of murder cannot be sustained as, in our view, there was such non-direction on material points in the case as amounted to prejudice. We accordingly allow this appeal, set aside the majority verdict of the jury and the conviction and the sentence based thereon and remand the case for retrial in accordance with law before some other Court.

Mohamad Akram J. — I agree.

G.N./R.K. *Appeal allowed.*

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(29) A. I. R. 1942 Calcutta 37

SEN J.

Promode Kumar Roy and another — *Defendants* — *Applicants*

v.

Tincowrie Dey — *Plaintiff* — *Respondent.*

Application in Suit No. 98 of 1940, Decided on 22nd July 1941.

Bengal Money-lenders Act (10 of 1940), S. 36 (1) Proviso (ii) — In 1924 debtor borrowing Rs. 60,000 on mortgage carrying interest at 9 per cent per annum with quarterly rests—Creditor suing upon his mortgage in 1931 and obtaining decree for sale in 1932—On 1st February 1937 amount due under decree swelling to Rs. 72,000—Debtor paying Rs. 33,000; obtaining reconveyance of mortgaged property from

creditor and executing another mortgage in creditor's favour for balance of Rs. 39,000—On 5th February 1937, satisfaction of decree on first mortgage entered up—Creditor suing on second mortgage and obtaining preliminary decree on 1st March 1940—Application by debtor under S. 36 to reopen whole transaction—Decree of which satisfaction was entered on 5th February 1937 held was not decree passed in suit to which Act applied—Granting relief to debtor held affected aforesaid decree — Debtor held not entitled to relief.

In 1924 the debtor borrowed Rs. 60,000 from the creditor and executed a mortgage in his favour, the interest payable being 9 per cent. per annum with quarterly rests. The creditor sued upon his mortgage in 1931 and a decree for sale of the mortgaged property was passed in 1932. On 1st February 1937 when the amount due under the decree swelled up to Rs. 72,000 the debtor paid to the creditor Rs. 33,000 and obtained a reconveyance of the mortgaged property in his favour and for the balance of Rs. 39,000 executed another mortgage in the creditor's favour the interest stipulated being 7 per cent. per annum, with quarterly rests. On 5th February 1937 satisfaction of the decree passed in the first mortgage suit was entered up. The creditor instituted a suit in 1940 upon the mortgage of 1937 and obtained preliminary decree on 1st March 1940. On the debtor's application to reopen the whole transaction under S. 36 :

Held that the decree on the first mortgage satisfaction whereof was entered on 5th February 1937 could not be said to be a decree passed in a suit to which the Act applied and therefore the Court in granting relief was not permitted to do anything which affected that decree. The granting of relief to the debtor affected the decree in the first mortgage suit, inasmuch as the sum of Rs. 39,000 represented a liability under a decree and not a contractual liability and it was to secure the decretal liability that the subsequent mortgage was effected. If the debtor was to be relieved of a portion of that liability the decree passed in the first mortgage suit would have to be reopened. Therefore the debtor was not entitled to any relief under the Act. [P 39*b*, *c*]

P. C. Ghose — for Applicants.

S. N. Banerjee — for Respondent.

Order.—This is an application under the Bengal Money-lenders Act. The facts as stated in the application briefly are as follows: On 29th August 1924 the petitioner borrowed Rs. 60,000 from the opposite parties and executed a mortgage in their favour. The interest payable under the mortgage was 9 per cent. per annum with quarterly rests. There was a suit upon that mortgage being Suit No. 2354 of 1931 and a decree for the sale of mortgaged properties was passed on 12th December 1932. On 13th February 1933, an order was passed recording certain terms of settlement wherein it was provided that the properties would not be brought to sale for three years from 1st January 1933, the interest on the amount found due would run from 28th November 1932 at the rate of 8½ per cent. per annum and the costs would be paid by the defendant to the plaintiffs. On 1st February 1937, the amount due swelled up to Rs. 72,000 odd. On that day the mortgagor sold a portion of the mortgaged premises at Rs. 37,000 and the plaintiffs executed a reconveyance of all the mortgaged properties on receipt of Rs. 33,000 odd. The balance due was Rs. 39,000. On that date the petitioner executed another mortgage for the sum of Rs. 39,000 in favour of the plaintiffs, the interest stipulated being at 7 per cent. per annum with quarterly rests. On 5th February 1937 the plaintiffs caused satisfaction to be entered of the decrees passed in the first mortgage suit, namely, No. 2354 of 1931.

The present suit was instituted on 15th January 1940 on the mortgage of 1st February 1937. The preliminary mortgage decree was passed on 1st March 1940. The Registrar's report has been made. The interest fixed by the present mortgage is admittedly within the limits specified in the Bengal Money-lenders Act. What the petitioner wants is the re-opening of all the transactions between the parties including the transaction prior to the decree passed in suit No. 2354 of 1931. Mr. Ghose on behalf of the petitioner contended that under S. 36, Bengal Money-lenders Act, this Court has power to re-open all the transactions had between the plaintiffs and the defendant inasmuch as the sum of Rs. 39,000 for which the mortgage was executed includes interest calculated at a rate higher than 8 per cent. simple which is maximum rate of interest allowed under the Act. He argues that under the Bengal Money-lenders Act he can get relief by a refund of the interest paid in excess of the maximum allowed under the Act and that consequently this Court should re-open the transactions between the parties both with respect to the mortgage of February 1937 and with respect to the mortgage of 1924.

Mr. Bannerjee on behalf of the plaintiffs refers me to Proviso (ii) of S. 36, sub-s. (1) and he says that this proviso would prevent the Court from granting any relief to the defendant. Now, S. 36 lays down that if a Court has reason to believe that the exercise of one or more of the powers mentioned in that section would give relief to the borrower, it may exercise all or any of such powers. One of such powers is the power to re-open any transaction and take an account between the parties. Another power is the power to set aside any agreement purporting to close previous dealings and create new obligations and to re-open any account already taken be-

tween the parties. The proviso to the section, however, says that in the exercise of these powers the Court shall not do anything which affects any decree of a Court other than a decree in a suit to which this Act applies which was not fully satisfied by 1st January 1939.

Now the decree in Suit No. 2354 of 1931 was passed on 12th December 1932 and satisfaction of that decree was entered on 5th February 1937. That decree, therefore, is not a decree passed in a suit to which the Act applies and this Court in granting relief is not permitted to do anything which affects that decree. The question which arises now is whether that decree would be affected if the prayer of the petitioner is acceded to. In my opinion it would. The dues on previous transactions between the parties were all merged in the decree passed in suit No. 2354 of 1931. After the decree was passed the liability of the defendant was no longer a contractual liability but it was a liability under a decree of this Court. Thus the sum of Rs. 39,000 represents a liability under a decree and it is to secure this decretal liability that the subsequent mortgage was effected. Now, if the defendant is to be relieved of a portion of this liability it means that the decrees passed in Suit No. 2354 of 1931 must be re-opened. The proviso however forbids interference with such a decree. That being so no relief can be granted. The application must accordingly be dismissed with costs.

G.N./R.K. *Application dismissed.*

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(29) A. I. R. 1942 Calcutta 39

B. K. MUKHERJEA AND ROXBURGH JJ.

Romesh Chandra Bhaduri — *Judgment-debtor — Appellant*

v.

Jnanada Prosanna Bhaduri and others — *Respondents.*

Appeal No. 302 of 1940 (F. M. A.), Decided on 19th May 1941, from original order of Sub-Judge, Second Court, Pabna, D/- 18th November 1940.

Bengal Money-Lenders Act (10 of 1940), Ss. 30, 30 (2), 2 (8) and 36 — Whether limits of S. 30 have been exceeded in awarding interest— Total interest for whole period up to date of payment must be looked to — Total interest on secured loan up to date of payment not exceeding 8 per cent. — Fact that interest at 12 per cent. was allowed for period pendente lite is immaterial and cannot attract S. 36.

For the purpose of applying the test as to whether the limits prescribed by S. 30 have been exceeded in awarding interest to a lender, the total interest awarded must be considered for the whole period up to the date of payment and should be compared with the amount arrived at for the same period calculated at the statutory rates. It is not correct to split that period into two parts and to apply the test to the parts separately. This is clear from the provisions of Ss. 2 (8) and 30 (2). Consequently where in the case of a secured loan the total interest on the principal amount included in the decree including the interest for the period pendente lite does not exceed the amount calculated for the same period at the limit of 8 per cent. the fact that in the process of calculation a rate of 12 per cent. may have been allowed for part of the period, namely the period pendente lite is immaterial and cannot attract S. 36 of the Act : ('41) 28 A I R 1941 Cal 673 and ('41) 28 A I R 1941 Cal 498 (FB), *Disting.* [P 40*e*,*f*]

Nirmal Chandra Chakravarty and Hiran Kumar Roy — for Appellant.

Jatindra Nath Sanyal and Ranjit Acharjya Choudhury — for Respondents.

Roxburgh J. — This appeal arises out of a refusal by the second Subordinate Judge of Pabna to reopen a decree in a mortgage suit on application being made to him under S. 36, Bengal-Money Lenders Act, 1940. The borrower took a loan of Rs. 6000 on a simple mortgage bond on 15th July 1929. The lender sued for his dues by a suit brought in March 1937. Though the interest then due amounted to some Rs. 3300 in all, so that his claim might have been laid at Rs. 9300 the lender gave up some part of his claim for interest, reducing his total claim to Rs. 8000. A preliminary decree was passed on 23rd March 1938, fixing 24th September 1938, as the date for payment, and the amount at Rs. 9867-9-6, being made up as follows :

Claim	Rs. 8000
Interest on the principal	Rs. 1400
Costs	Rs. 823-9-6
Total	Rs. 9867-9-6.

The interest pendente lite amounting to Rs. 1044 was thus calculated at 12 per cent. per annum for a period of 17⅓ months. Final decree was passed on 26th October 1938. The decree has been executed and the property has been sold for Rs. 3000 only, and purchased by the lender on 18th November 1940. The only point taken by Mr. Nirmal Chandra Chakravarti, who appears for the appellant, is that since interest pendente lite has been calculated in the decree at a rate of 12 per cent. the debtor has been made liable to pay interest at a rate exceeding 8 per cent. for that period and that therefore the limits laid down in S. 30 of the Act have been exceeded. Consequently if the decree is reopened the debtor can obtain relief, and thus the provisions of S. 36 of the Act are attracted. For the respondent it is contended that taken as a whole the decree does not

make the borrower liable to pay interest at a rate exceeding 8 per cent. and that it is immaterial that part of the interest included in the decree has actually been calculated at 12 per cent. The total interest included in the decree is Rs. 3044, and it is conceded that this is less than what the plaintiff would have obtained if interest had been calculated at 8 per cent. throughout. The point for decision turns on the interpretation to be given to Cl. (2) of S. 30 of the Act. We think that the correct interpretation is that contended for by the respondent, and that it is immaterial that in the process of calculation a rate of 12 per cent. may have been taken for part of the period, namely the period pendente lite, provided that the total interest on the principal amount included in the decree including the interest for the period pendente lite does not exceed the amount calculated for the same period at the limit of 8 per cent. laid down in cl. (1) (c) (ii) of section 30.

There appears to be no previous decision on this point. Our attention has been called to the cases in 45 C W N 526[1] and 45 C W N 609.[2] In both cases there are remarks indicating that in testing whether the limits of S. 30 had been exceeded or not the interest for the total period up to the date of payment, that is to say, interest including that for the period pendente lite was taken into account, but it does not appear that in either case the particular point in controversy here arose at all. In the former case interest was originally calculated at 7½ per cent. compound, and the amount so calculated was less than the amount arrived at by calculating at 8 per cent. simple. There was no suggestion that the amount calculated at 7½ per cent. compound for the period pendente lite would have exceeded the amount calculated at 8 per cent. for that period. In the latter case the total interest, including that for the period pendente lite exceeded 10 per cent. and it was not suggested that the interest for the period up to date of suit did not also exceed that rate. Thus in both cases for the purpose of testing whether relief could be obtained it would apparently have been immaterial whether the period up to date of suit, or the two periods up to date of suit and from the date of suit up to the date of payment separately were taken as a basis. These cases are therefore not of assistance in deciding the present point.

No doubt in a sense the appellant has been made liable to pay interest at 12 per cent. since the plaintiff claimed only Rs. 2000 interest in his plaint, and the interest pendente lite has been calculated by the Court at that rate but in our view, for the purpose of applying the test as to whether the limits prescribed by S. 30 of the Act have been exceeded in awarding interest to a lender, the total interest awarded is to be taken for the whole period up to the date of payment, and this is to be compared with the amount arrived at for the same period calculated at the statutory rates. It is not correct to split this period into two parts and to apply the test to the parts separately. We think that support for this view is to be found in the definition of "interest" in S. 2 (8) of the Act, and from the wording of S. 30 (2) itself. We think therefore that the learned Subordinate Judge took a correct view in declining to reopen the decree in this case. The appeal is accordingly dismissed. There will be no order as to costs in this Court.

B. K. Mukherjea J.— I agree.

G.N./R.K. *Appeal dismissed.*

1. ('41) 28 AIR 1941 Cal 673 : 73 C L J 344 : ILR (1941) 1 Cal 499 : 45 C W N 526, Mahalakshmi v. Shamrangini.

2. ('41) 28 AIR 1941 Cal 498 : 196 I C 161 : I L R (1941) 2 Cal 107 : 45 C W N 609 : 73 C L J 333 (F B), Harsukdas Balkissendas v. Dhirendra Nath.

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(29) A. I. R. 1942 Calcutta 40

NASIM ALI J.

Sris Chandra Nandy of Kasimbazar represented by Manager, Kasimbazar Raj Wards Estate — Plaintiff — Appellant

v.

Joyramdanga Coal Concern Ltd., Calcutta — Defendant — Respondent.

First Appeal No. 265 and Appeal No. 149 of 1941, Decided on 17th June 1941, from decree of Sub-Judge, Burdwan at Asansol, D/- 7th November 1940.

Court-fees Act (1870 as amended by Bengal Act 7 of 1935), S. 17 — Claims for possession, mesne profits and arrears of royalty are separate and distinct causes of action— Suit for aforesaid reliefs falls under S. 17.

Order 2, Rules 2 and 4, Civil P. C., clearly indicate that a claim for mesne profits would not be barred under O. 2, R. 2, Civil P. C., if such a claim was not included in a previous suit for possession and that the claims for possession and mesne profits are not based on the same cause of action : 19 Cal 615, *Rel. on* ; 8 Cal 593 (FB), *Not applied.* [P 41*g*]

The cause of action in respect of the claim for arrears of royalty is also separate and distinct from the cause of action for khas possession and mesne profits. Consequently, a suit for khas possession, mesne profits and arrears of royalty being based on three separate and distinct causes of action is a

multifarious suit and falls within the purview of Section 17. [P 41*h*]

Rama Prosad Mukherjee — for Appellant.

Dr. S. C. Basak — for Respondent.

Order. — This is a reference by the taxing officer under S. 5, Court-fees Act, for determination of the amount of court-fees payable on the memorandum of an appeal filed by the plaintiff in a suit for khas possession of a colliery, arrears of royalty and mesne profits against the decree of the lower Court dismissing his claim for khas possession and mesne profits but decreeing his claim for arrears of royalty in part. Plaintiff valued in the plaint the claim for arrears of royalty at Rs. 3654-14-0, the claim for khas possession at Rs. 5310-6-0 and the claim for mesne profits at Rs. 4646-10-0. In the memorandum of appeal to this Court, his valuation of the claims for khas possession and mesne profits for purposes of court-fees is the same in the plaint. So far as the claim for arrears of royalty is concerned, he has valued it at the difference between the amount claimed in the plaint and the amount decreed in his favour by the trial Judge. The point for determination in this reference is whether the suit out of which this appeal arises is a multifarious suit within the meaning of S. 17, Court-fees Act. Section 17, Court-fees Act (Act 7 of 1870) is in these terms:

> Where a suit embraces two or more distinct subjects the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeals in suits embracing separately each of such subjects would be liable under this Act.

In 8 Cal 593[1] it was held by this Court that a claim for possession and mesne profits was one subject and not two distinct subjects within the meaning of this section. In 1935 the following section was substituted in Bengal for the above section by the Bengal Amendment Act, 7 of 1935.

> (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act in separate suits instituted in respect of each such cause of action :
>
> Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, to order separate trials.
>
> (2) Where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable.

It cannot be disputed that the cause of action in respect of the claim for arrears of royalty is separate and distinct from the cause of action for khas possession and mesne profits. On the authority of the decision in 8 Cal 593,[1] it was contended on behalf of the plaintiff-appellant that the claims for possession and mesne profits were not separate and distinct causes of action within the meaning of S. 17, Court-fees Act, as amended in Bengal. In view of the material change in the wordings of the section, I am unable to accept this contention. The words in the new section are 'separate and distinct causes of action' and not 'distinct subjects.' In the old section a suit embracing two or more distinct subjects was a multifarious suit. Under the present section, however, a suit in which two or more separate and distinct causes of action are joined is a multifarious suit. The word 'cause of action' has not been defined in the Court-fees Act. Apparently, it has been used in the same sense as in the Code of Civil Procedure. Order 2, R. 2, Civil P. C., lays down that a person entitled to more than one relief in respect of same cause of action must sue for all or any of such reliefs and that if he omits except with the leave of the Court to sue for all such reliefs he shall not afterwards sue for such relief so omitted. Order, 2 R. 4, Civil P. C., lays down that no cause of action shall, unless with the leave of the Court, be joined with a suit for recovery of immovable property except claims for mesne profits in respect of the property claimed or any part thereof. These provisions clearly indicate that a claim for mesne profits would not be barred under O. 2, R. 2, Civil P. C., if such a claim was not included in a previous suit for possession and that the claims for possession and mesne profits are not based on the same cause of action : 19 Cal 615.[2] I am, therefore, of opinion that the three reliefs claimed in the memorandum of appeal are based on three separate and distinct causes of action and that the memorandum of appeal is chargeable with the aggregate amount of fees with which the memorandum of appeal would be chargeable under the Court-fees Act in separate suits in respect of each such cause of action.

G.N./R.K. *Order accordingly.*

1. ('82) 8 Cal 593 : 10 C L R 359 (F B), Kishori Lal v. Sharut Chunder.

2. ('92) 19 Cal 615, Lalessor Babui v. Janki Bibi.

(29) A. I. R. 1942 Calcutta 42

PANCKRIDGE J.

Dolly Bathena

v.

Shaik Fazle Ellahi.

Matrimonial Suit No. 29 of 1939, Decided on 20th January 1941.

(a) Special Marriage Act (1872), Ss. 2 (3), 10 and Sch. 2, Bengal Forms Nos. 1622 and 1623 — Words "when the parties are of full age" in form No. 1622 and words "when bridegroom is of full age and bride minor" in Form No. 1623 are misleading — Marriage between bride below 21 years and bridegroom above 21 years solemnised in Form 1622 without bride's father's consent is invalid.

The words "when the parties are of full age" and the words "when the bridegroom is of full age and the bride minor" in Bengal Forms Nos. 1622 and 1623 respectively which have been adopted without the slightest legal justification in supersession of the statutory form, are misleading inasmuch as a party may have attained the age of majority according to the personal law to which he or she is subject and still be under the age of 21 years and therefore incapable of contracting a marriage under the Act except with the father's or guardian's consent. A marriage between a bride below 21 years and a bridegroom over 20 years solemnised in Bengal Form No. 1622 without the bride's guardian's or father's consent is invalid. [P 43*c*,*d*,*e*]

(b) Divorce Act (1869), S. 3 (1) — Marriage between *A* residing in Calcutta and *B* who had his home in Punjab and was residing in Calcutta for studies, solemnised under Special Marriage Act at Calcutta on 23rd May 1939 — Parties never residing together — Marriage not consummated nor parties establishing matrimonial home at Calcutta — Petition by *A* for dissolution of her marriage filed on 25th August 1939 at Calcutta—*B* after marriage going to his home in Punjab as college was closed for vacation and was seen at Calcutta in September, October and November 1939 — No evidence as to whereabouts of *B* on date of *A*'s petition — Held that even if *B* was absent from Calcutta on date of petition his absence was temporary and therefore he must be deemed to be residing within the Calcutta Court's jurisdiction within meaning of Act.

The marriage between *A*, a Mahomedan girl and *B*, who had his home in the Punjab but was residing for his studies at Calcutta was solemnised under the Special Marriage Act on 23rd May 1939 at Calcutta. *A* was a resident of Calcutta but the parties never resided together nor was the marriage consummated nor did the parties set up any matrimonial home at Calcutta. On 25th August 1939 *A* presented a petition in the Calcutta High Court, for the dissolution of her marriage with *B*. Although prior to marriage *B* had resided for a considerable time at Calcutta for studies, after the marriage he went away to his home in the Punjab as the College was closed for holidays and was seen at Calcutta in the months of September, October and November 1939. There was no evidence as to the whereabouts of *B* on the date of the petition by *A* :

Held that even if *B* was absent from Calcutta on 25th August 1939 when the petition for dissolution of marriage was filed, his absence was merely temporary and he must be deemed to be still residing within the jurisdiction of the Calcutta High Court within the meaning of the Act. [P 44*a*]

Kamala Bose — for Petitioner.

Order. — There are certain features in this otherwise unimportant case which I can only describe as disquieting. The facts are as follows : The petition is a wife's petition presented under the Divorce Act read with S. 17, Special Marriage Act of 1872, and it seeks for a declaration that the marriage of the petitioner to the respondent Shaik Fazle Ellahi, is null and void. The petitioner, as her birth certificate and her father's evidence prove, was born on 5th October 1921. Accordingly on 23rd May 1939, which is the date of the marriage I am asked to annul, her age was 17 years and 7 months. The respondent, whose age, as declared before the Registrar, is 24 years, was studying at an establishment, which teaches dentistry and is situated in Lower Circular Road near the house in which the petitioner's parents reside. It appears that the petitioner was attending school in 1939 and the respondent scraped an acquaintance with her on her way to or from the school she was attending. She says that they fell in love with one another, and agreed to marry. It was also agreed that they should not set up house together immediately after the marriage, but should wait until the respondent had some assured position and income from his profession.

On 9th May the parties gave the notice of marriage which is required in the case of marriages under the Act and this notice which was signed by the petitioner gave her age as "about 18 years." The petitioner's evidence is that on 23rd May 1939, the Registrar of Marriages under the Act, Khan Saheb Kazi N. Rahaman, went to the boarding house in Metcalfe Street where the respondent was staying, and there solemnized a marriage under the Act between them. The signature of the parties was duly witnessed by three witnesses, two of whom had been brought for the purpose, the third, apparently being pressed into service at the last moment. Under the provisions of the Special Marriage Act one of the conditions which must be fulfilled before parties can be married under the Act, is that laid down in S. 2 (3) and is that each party must, if he or she has not completed the age of 21 years, have obtained the consent of his or her father or guardian to the marriage. Section 10 of the Act goes on to provide that before the mar-

riage is solemnized the parties and three witnesses, shall, in the presence of the Registrar, sign a declaration in the form contained in sch. 2 to the Act and also that, if either party has not completed the age of 21 years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case it shall be countersigned by the Registrar. Part 2 of sch. 2 contains two "declarations" on a single form to be made respectively by the bridegroom and bride. Paragraph 5 of the bride's declaration is as follows :

(And when the bride has not completed her age of 21 years, unless she is a widow) :

5. The consent of *M N* my father (or guardian, as the case may be) has been given to a marriage between myself and *A B* and has not been revoked.

The form concludes :

(And when the bridegroom or bride has not completed the age of 21 years, except in the case of a widow):

Signed in my presence and with my consent by the abovenamed *A B* and *C D* : *M N* the father (or guardian) of the abovenamed *A B* (or *C D*, as the case may be).

Now the use of this form is compulsory, and it is reasonably fool-proof. The attention of the parties and of the Registrar is drawn to the necessity of the consent of the father or guardian when one of the spouses is under the age of 21, and, when both have passed that age, para. 5 of the form can be penned through as inapplicable. Apparently, however, some officer of the Bengal Government has in the past employed his time in improving on the efforts of the Legislatures, and has drafted various alternative forms, which have been adopted without the slightest legal justification in supersession of the statutory form. A true copy of the actual form (Bengal Form No. 1622, Act 3 of 1872) used for this marriage is Ex. B in the case. In the right hand top corner of the form appears (when the parties are of full age). This is in itself misleading, because a party may have attained the age of majority according to the personal law to which he or she is subject, and may still be under the age of 21 years, and therefore incapable of contracting a marriage under the Act except with the father's or guardian's consent.

The form contains no reference to the consent of the father or guardian, nor is a space allotted for the signature of the father or guardian. Since the hearing, I have obtained a blank form (Bengal Form No. 1623, Act 3 of 1872) which I have attached to the record. Assuming the use of alternative forms to be legal, this is the form which presumably is appropriate to a marriage between the petitioner and respondent. In the right hand top corner of the form appears "(when the bridegroom is of full age and bride minor)." I have already pointed out how misleading this phraseology is. The declaration to be made by the bride is in the proper statutory form and there is a space allotted for the signature of the father or guardian. If this form had been used, it is hardly to be believed that the Registrar would have consented to solemnize the marriage. However, although he had before him the signed declaration of the petitioner, dated 9th May 1939, that her age was about 18 years, and although, to judge from her appearance to-day she could scarcely have looked so old, he proceeded to perform the ceremony without obtaining the evidence which the Act requires of the consent of the petitioner's father. The whole situation is lamentable and discreditable to all concerned. I may perhaps say that, until she was rebuked by me the demeanour of the petitioner indicated that she is young woman of considerable levity, and it is precisely girls whose characters resemble that of the petitioner, who are most in need of every protection which the law can give them. To return to the facts of the case, both the petitioner and her father have given evidence that four days after the marriage the father, having heard a rumour of what had taken place, taxed his daughter with having been secretly married and she made a clean breast of the whole thing, and in consequence he made the necessary investigations.

It only remains for me to add that by reason of S. 3 (1), Divorce Act, I have to be satisfied that the petitioner and the respondent resided within the jurisdiction of the Court when the petition was presented, or alternatively that they last resided together within such jurisdiction. The evidence is that the parties never resided together. In the petition it is alleged that the marriage has never been consummated, and although there has been no evidence on the point, this is not denied in the answer, and it is certain that they have never attempted to set up anything in the least resembling a matrimonial home. Therefore, the Court must be satisfied that the parties both resided within its jurisdiction when the petition was presented. About the petitioner's residence there is no doubt whatever. With regard to the respondent, it is clear that he had resided in Calcutta for the purpose of study for a considerable time previous to the marriage. It is true that after the marriage he went to

his home in the Punjab, but it appears that this was because the College was closed for holidays, and the petitioner and her father have given evidence, which I accept, that they saw him, though they did not speak to him, on several occasions in the months of September, October and November 1939. Therefore although the petition was presented on 25th August 1939 and there is no evidence as to the whereabouts of the respondent on that day, I hold that if he was absent, his absence was merely temporary and he was still residing within the jurisdiction of the Court within the meaning of the Act. I therefore declare the marriage of the petitioner with the respondent null and void, and I award costs against the respondent. This declaration will take the form of a decree nisi. I direct that in view of the observations I have made with regard to the way in which the provisions of the Special Marriage Act have been disregarded, that a copy of my judgment be forwarded to the Chief Secretary to the Government of Bengal.

G.N./R.K. *Petition granted.*

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(29) A. I. R. 1942 Calcutta 44

MCNAIR J.

Sm. Shamangini Roy Chowdhurani

v.

Sm. Mahalakshmi Rakshit.

Application in Suit No. 96 of 1939, Decided on 20th February 1941.

Civil P. C. (1908), O. 34, R. 5 — Sale by Registrar under Chap. 27, Calcutta High Court, Original Side Rules and Orders — Judgment-debtor seeking relief should, as far as possible, observe provisions of Code—O. 34, R. 5 applies — Costs need not be deposited with application under O. 34, R. 5 — Procedure as to costs stated — Judgment-debtor held observed provisions of Code and Original Side Rules and Orders.

In sales by the Registrar under Chap. 27 of the Calcutta High Court Original Side Rules and Orders, the judgment-debtor seeking relief should as far as possible observe the provisions of the Civil P. C. The provisions of O. 34, R. 5 apply to sales by the Registrar. It is not necessary to deposit costs with the application by the mortgagor under O. 34, R. 5 but it is desirable that O. 34, R. 5 should be complied with as far as possible. The mortgagee can furnish an estimate of his costs which can be accepted or modified by the Court and the Court can direct that a sufficient sum should be deposited when the application under O. 34, R. 5 is made or before an order is made on the application provided the attorney of the mortgagee gives the usual undertaking to refund any balance that may ultimately be found due. But this course is unnecessary where in an application under O. 34, R. 5 both the mortgagor and the mortgagee agree that the mortgagee should retain the title deeds which were deposited as security until the costs have been taxed and the amount is paid to him. In such a case the provisions both of the Civil Procedure Code, and Original Side Rules and Orders must be taken to have been observed.

[P 45*b*,*c*,*e*,*f*]

B. C. Ghose and S. P. Chowdhuri — for Appellant (Defendant).

S. N. Banerji (Jr.) and S. Hazra — for Purchaser.

K. L. Roy — for Plaintiff.

Order. — This is an application by the mortgagor for leave to deposit in Court the amount found due to the mortgagee under the Registrar's report that on such payment being made direction be given to the plaintiff to tax her bill of costs, and that on payment to the plaintiff of such amount as may be adjudged due to her in respect of costs, charges — expenses and subsequent interest, the plaintiff be directed to deliver up the original documents of title. The mortgage was by deposit of title deeds, and in effect the applicant is asking for leave to deposit in Court the amount found due under the Registrar's report and recover her security and is suggesting, as the costs have not yet been taxed and cannot be taxed within a reasonable time, that the mortgagee should retain the documents of title pending payment by the mortgagor of the amount of the taxed costs. The mortgagee is agreeable to this arrangement provided the mortgagor is also liable for the Accountant-General's commission, if any, and deposits that sum in Court, when ascertained. The preliminary decree was made on 3rd March 1939, and the final decree on 15th May 1940. The mortgagor applied on 12th September 1940 for relief under the Money-lenders Act. That application was dismissed and the property was sold on 14th September and the purchaser, Thakurmoni Dasi bought it for Rs. 17,400 and deposited 25 per cent. of the purchase money on the same day. On 27th September the certificate of the result of the sale was filed by the Registrar, but three days later the mortgagor applied for leave to set aside the sale. That application was dismissed and the purchaser applied for confirmation of the sale. There were applications to the Court of appeal and interim injunctions which prevented either of these applications coming before the Court.

The purchaser opposes this application first on the ground that the mortgagor having applied under O. 21, R. 89 and that application having been dismissed, cannot now apply for the same relief under O. 34, R. 5. It is further argued that the sale is not under the provisions of the Civil Procedure Code

but under the rules framed in Chap. 27 of the Original Side Rules and Orders for sale by the Registrar. Under these rules, it is said, there is no necessity for confirmation of a sale by the Registrar, therefore the provisions of O. 34, R. 5 which inter alia provide that the application must be made before the confirmation of the sale are not applicable. Finally, it is argued that if O. 34, R. 5 is applicable, then there must be strict compliance with the provisions of that rule and the mortgagor must deposit everything contemplated by Rr. 4 and 5 of O. 34, including the costs. A similar argument had been put forward in application under O. 21, R. 89, and it has been decided in relation to that order that costs need not be deposited when applications are made to set aside a sale on making required deposit in Court. It appears to me that the same principles apply to an application under O. 34, R. 5 as under O. 21, R. 89. Costs cannot be taxed, but, in my opinion, it is desirable that the order should be complied with as far as possible, and in most cases the mortgagee can furnish an estimate of his costs and that estimate can be accepted or modified by the Court and the Court may direct that a sufficient sum should be deposited when the application is made, or before the order is made on the application, provided the attorney for the mortgagee gives the usual undertaking to refund any balance that may ultimately be found due. In this particular instance that course is unnecessary because the mortgagor and mortgagee have agreed that the mortgagee should retain the title deeds which were deposited as security until the costs have been taxed and the amount of the taxed costs have been paid to him.

I cannot accept the argument based on the alleged absence of any provision in the Original Side Rules for the confirmation of a sale. The scheme of the rules has been explained in reported judgments and I do not propose to analyze that scheme again. But in Chap. 27, which deals with sales by the Registrar, the rules provide that after the Registrar has accepted the highest bid, he shall as soon as possible proceed to certify the result. The certificate of sale may be varied. If it is not varied it is confirmed by effluxion of time, or the purchaser may apply for an order confirming the certificate. Rule 45 then provides that where immovable property has been sold by the Registrar under O. 34, R. 4 or any subsequent rule of that order and the certificate of the result of the sale has been confirmed, the purchaser may obtain a certificate of sale as evidence of title. Whether the sale has to be confirmed or not under these rules, in practice the purchaser applies, so far as I am aware, invariably, for confirmation of the sale, and there is before me the application by the purchaser in this case for confirmation of the sale. In previous decisions where questions have arisen as to the necessity for strict compliance with the provisions of the Civil Procedure Code, when dealing with sales by the Registrar, the Court has held that the judgment debtor who seeks relief after a sale has been held should so far as possible observe the relevant provisions of the Code, and in my opinion, in this application the relevant provisions both of the Code and of the Original Side Rules have been observed by the present applicant. There will be an order in terms of para. 1, save that the figure of Rs. 13,363-3-0 shall be substituted for the figure Rs. 12,540-3-0; and in terms of paras. 2, 3, 4 and 5 of the summons. The purchaser will be entitled to withdraw the sum stated in para. 4. The applicant must also deposit in Court such amount, if any, as is due for the Accountant-General's commission. The mortgagee may add his costs to his claim. The applicant must pay the taxed costs of the purchasers. Certified for counsel.

G.N./R.K. *Application granted.*

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(29) A. I. R. 1942 Calcutta 45

LORT-WILLIAMS J.

Ramprosad Lohia — Plaintiff

v.

M. P. Patel — Defendant.

Suit No. 1486 of 1939, Decided on 10th March 1941.

Contract Act (1872), S. 62—Cheque drawn by debtor in favour of creditor negotiated with third party—Cheque outstanding in hands of third party—Original debt cannot be said to be outstanding and unpaid.

Where a cheque drawn by the debtor in favour of his creditor is negotiated with a third party and while it is outstanding in the hands of that third party it cannot be said that the original debt is still outstanding and unpaid : (1898) 1 Q B 1 and (1908) 1 K B 344, *Rel. on* ; (1878) 3 Q B D 371 and ('38) 25 A I R 1938 P C 66, *Disting.* [P 46*g*]

J. C. Sett — for Plaintiff.

K. P. Khaitan — for Defendant.

Judgment.—In this case the plaintiff sues the defendant for the recovery of Rs. 5311-14-3 due under a deed of assignment. The facts alleged are as follows: A joint family carrying on business as Goberdhonedas Murlidhar sold oil to the defendant, carrying on business as Manubhai Purshottam & Co., valued

at Rs. 4630, in October 1937. Two members of the family carrying on the business of Goberdhonedas Murlidhar were adjudicated insolvent on 16th November 1937, and on 22nd July 1938 the Official Assignee at a public auction sold to the plaintiff the entirety of the outstandings of the business of Goberdhonedas Murlidhar, and by a deed of assignment dated 9th March he assigned and transferred, among other debts, the debt alleged to be due by the defendant to the insolvents.

The defence is that no debt was owing at the time of the assignment. The defendant admits the delivery of the oil and says that for some time prior to 16th October 1937, the insolvents owed a firm named Hiralal Nayak Nilratan Sadhu a sum of money exceeding the claim of the insolvents against the defendant, and that on that date, by mutual arrangement, it was agreed that, after making certain deductions, Rs. 4219-5-6 should be paid by the defendant to the insolvents, who agreed to accept that sum in full settlement, and gave a receipt to that effect, and there and then the insolvents endorsed the cheque with the name of their business and delivered it to the firm of Hiralal Nayak Nilratan Sadhu in part satisfaction of the claims of that firm against the insolvents. The defendant therefore alleges that the firm of Hiralal Nayak Nilratan Sadhu became holders in due course of the cheque for value. It has been argued on behalf of the plaintiff that this defence is of no avail, because at the time of the adjudication the debt was still owing by the defendant to the insolvents and therefore became vested in the Official Assignee. This argument is advanced by reason of the fact that on 18th October 1937 the cheque was dishonoured, and it was not until 6th July 1939 that Hiralal Nayak Nilratan Sadhu filed a suit in the Alipur Court against the defendant upon the cheque, which was decreed by consent.

The only other relevant facts which must be considered are that after the order of adjudication, namely, on 20th July 1938, the attorney of the defendant informed the Official Assignee that upon inspecting the schedule filed by the insolvents, to enable him to bid at the forthcoming sale of the insolvents' assets, he was surprised to find that his client had been described as a debtor, whereas the debt had been paid long before the date of adjudication. The Official Assignee replied that he could not do anything about the matter unless the defendant got the insolvents to delete his name from their schedule, whereupon, on the date of the sale, the defendant's attorney gave notice to all present, both in English and Hindustani, that this debt had been paid. On 26th July the insolvents wrote to the defendant admitting that they had inadvertently included his name in the schedule and that the debt had been paid by him long before the order for adjudication was passed. What has happened is unfortunate, for the plaintiff paid about Rs. 13,000 for the assets of the insolvents which he valued at about Rs. 27,000 and up to the present he has only been able to realize about Rs. 10,000. But after giving careful consideration to the evidence which has been given I feel no hesitation whatever in accepting the evidence which has been given by the defendant and on his behalf, nor can I accept the plaintiff's statement that though present at the auction he did not hear any notice being given with regard to this particular debt to the effect that it had already been paid.

Learned counsel for the plaintiff I think realized that he was unable successfully to dispute the facts, and the only question is whether, in these circumstances, it can be said that the debt was in existence at the time of the adjudication. On behalf of the plaintiff reliance has been placed upon the case in (1878) 3 Q B D Q 371[1] and the case in 65 I A 132[2] at p. 133. In my opinion, neither of these cases has any bearing on the point which I have to consider. On the other hand, such cases as (1898) 1 Q B 1[3] and (1908) 1 K B 344[4] show that where such a bill, promissory note or cheque has been negotiated with a third party, and while it is outstanding in the hands of that third party, it cannot be said that the original debt is still outstanding and unpaid. In (1898) 1 Q B 1[3] it was held that where a buyer of goods has given a bill of exchange for the price, an action will not lie for the price, even after dishonour of the bill, if at the date of the commencement of the action the bill is outstanding in the hands of a third party. It is not enough to entitle the plaintiff to succeed that he is in possession of the bill

1. (1878) 3 Q B D 371 : 47 L J Q B 496 : 39 L T 35 : 26 W R 680, Cohen v. Hale.
2. ('38) 25 A I R 1938 P C 66 : 172 I C 978 : ILR (1938) All 326 : 65 I A 132 : 32 S L R 388 (PC), Monmohon Das v. Baldeo Narain Tandon.
3. (1898) 1 Q B 1 : 66 L J Q B 844 : 77 L T 399 : 46 W R 96, Davis v. Reilly.
4. (1908) 1 K B 344: 77 L J Q B 409: 98 L T 652: 15 Manson 1 ; 52 S J 174, In re Debtor; Ex parte Debtor.

at the date of the trial. And in the case in (1908) 1 K B 344[4] it was held that acceptance by a judgment creditor of a bill, or promissory note, for the amount of his debt operates as an agreement not to enforce that debt during the currency of the bill, and afterwards, notwithstanding dishonour, so long as the bill is outstanding in the hands of a third person to whom it has been indorsed for value by the creditor. In that case a creditor who had accepted a bill of exchange for the amount of his judgment debt, which was dishonoured but was outstanding in the hands of a third party, issued a bankruptcy notice upon the judgment-debtor but it was held that this was not a debt on which a bankruptcy notice could be served, and that the notice of a receiving order made upon it must be set aside. For these reasons there must be judgment in favour of the defendant with costs.

G.N./R.K. *Suit dismissed.*

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(29) A. I. R. 1942 Calcutta 47

EDGLEY AND BISWAS JJ.

Pran Krishna Mukherjee—Plaintiff—Petitioner

v.

Jnananda (Jnanananda) Roy — Defendant — Opposite Party.

Civil Rule No. 1201 of 1940, Decided on 5th May 1941, from order of Dist. Judge, Howrah, D/- 14th June 1940.

(a) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), Ss. 3 and 6 — Whether suit includes appeal depends on subject and context — Tenant's appeal against decree for ejectment does not fall within words "suit for ejectment" in Ss. 3 and 6 and hence cannot be stayed.

The word "suit" cannot in every case and for all purposes include an appeal. Whether it does or does not include an appeal depends on the subject and context in connexion with which the word is used. The Civil Procedure Code clearly recognizes the distinction between a suit and an appeal which are in fact regarded as representing two distinct proceedings, and though in regard to certain matters no separate provision is expressly made for appeals, the context shows that in those respects appeals are intended to be governed by the same provisions as apply to suits. A tenant's appeal against a decree for ejectment can in no sense be brought within the words "suits for ejectment" in Ss. 3 and 6 having regard to the subject and context in connexion with which they are used and therefore the appeal cannot be stayed under Ss. 3 and 6: ('41) 28 AIR 1941 Cal 452, *Foll.* [P 48*a*, *d*, *h*]

(b) Interpretation of statutes — It is not relevant to refer to or to rely on provisions of one statute while construing another especially when it is not in pari materia.

It is not right or relevant to refer to or rely on the provisions of one statute in construing those of another, particularly when it is not in pari materia. [P 48*c*]

Chandra Sekhar Sen — for Petitioner.

Prafulla Kumar Roy and Amiya Chandra Mukherjee — for Opposite Party.

Biswas J. — The question we are called upon to decide in this rule is whether the Court below was competent to stay the hearing of an appeal pending before it. The appeal arose out of a suit for ejectment of a non-agricultural tenant, and was preferred by the tenant defendant against whom a decree for ejectment had been made by the trial Court. While the appeal was pending, the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, 1940, came into force, and thereupon the appellant himself applied for stay of the appeal, claiming that he was entitled to it as of right under the provisions of this Act. Agreeing with this contention, the lower appellate Court made the order for stay, and it is against this order that the plaintiff landlord has obtained this rule.

The petitioner's main point is that the Act is ultra vires of the Provincial Legislature. This is a question involving the construction of certain sections of the Government of India Act, 1935, which requires careful consideration, but we do not propose to go into that matter in the present rule, as in our opinion we can dispose of it on the other ground which the petitioner raises, namely that the provisions for stay contained in this Act do not apply to an "appeal." These provisions are embodied in S. 3 and also in S. 6, the difference between the two sections being that the former refers to suits and proceedings commenced after the Act has come into force, and the latter to suits and proceedings which were pending at the date of commencement of the Act. Section 6, however, attracts in terms of the provisions of S. 3. The short point which arises is whether the words "every suit and proceeding in any Court for ejectment of a non-agricultural tenant" used in these sections can be said to include an appeal. I had occasion recently to consider this very question in Civil Revision Case No. 1189 (1411) of 1940,[1] which came on for hearing before Mukerjee J., and myself, and I took the view that an appeal does not come within the scope of these words, though my learned brother reserved his opi-

1. *Reported in* ('41) 28 A I R 1941 Cal 452 : 196 I C 346 : 45 C W N 603, Jahur Mia v. Abdul Gaffur Mia.

a nion on the point. In coming to this conclusion, I held that the scope and intendment of the Act should be the guide to a correct interpretation.

An appeal undoubtedly arises out of a suit, and may in a sense be regarded as a proceeding in the suit itself, in the same way as an execution proceeding may be so regarded. It does not follow, however, that the word "suit" must, therefore, in every case and for all purposes include an appeal. Whether it will or will not include an appeal, will, in my opinion, depend on the subject and context in connexion with which the word is used. Mr. Prafulla Kumar Roy,
b advocate for the opposite party, arguing against the view expressed in my judgment in the other case, was content to rely on the word "suit," and not "proceeding," as covering an appeal, and his contention was that the word must be given the wider meaning, unless the subject and context required a more limited interpretation. In support of this argument, he referred to a number of sections of the Code of Civil Procedure, and endeavoured to show that in these sections a suit could not but be regarded as including an appeal. He made the point that while the adoption of this con-
c struction would give these provisions a consistent and reasonable meaning, involving no repugnancy whatever, to hold otherwise would lead to the anomalous result of the Code making provision for certain matters in respect of suits, but no corresponding provision for appeals. I am not much impressed with this argument. In the first place, it is not right or relevant to refer to or rely on the provisions of one statute in construing those of another, particularly when it is not in pari materia, and secondly taking the Civil Procedure Code itself, I think the Code clearly recognizes the distinction between a suit and an appeal which are
d in fact regarded as representing two distinct proceedings, and while it may be that in regard to certain matters no separate provision is expressly made for appeals, the context will probably show that in these respects appeals are intended to be governed by the same provisions as apply to suits.

Mr. Roy's next point was that the scope and object of the Act itself showed that the stay provisions were intended to apply to appeals as well as to suits, and that the only reason why the Legislature did not expressly mention appeals is that a "suit" was deemed to include an "appeal." According to the learned advocate, in enacting this measure which was avowedly of a temporary character, the object of the Legislature was not merely to secure tenants against actual ejectment for the period the Act was to remain in force, but also to render it unnecessary for them during such period to take or prosecute any steps to set aside any decree for ejectment that may have been already passed against them. In other words, it was said, the object was to maintain the status quo between the parties so long as the permanent legislation envisaged by the Act was not enacted. This would necessarily require a stay of all proceedings between landlord and tenant in which the question of ejectment was involved, whether they were pro- f ceedings by the landlord for ejectment or proceedings by the tenant to avoid ejectment. Otherwise, Mr. Roy contended, it would have been enough for the Legislature to have provided only for stay of execution proceedings under a decree for ejectment, and not for suits at all, but in fact they have expressly mentioned "suits" as well as "proceedings."

I do not think there is any force in this argument. The word "suit" was mentioned, because it was itself a proceeding for ejectment, while an appeal might or might not be such a proceeding, according as it was by g the landlord or by the tenant. As the preamble as well as the body of the Act shows, what the Act aims at is to give relief to the class of tenants for whose benefit it has been enacted, only by way of a compulsory stay of all actions and proceedings for ejectment against them, and to that extent it seeks to maintain the status quo. But as I have explained in my other judgment, the Act does not contemplate stay of a proceeding which is not one for ejectment, but a proceeding directed against an order of ejectment. I do not think we should be justified in disregarding the words "for ejectment" which h occur in the sections as if they were of no effect. To hold that an appeal was included within the word "suit" would be to hold that even where the appeal was by the tenant against a decree for ejectment, it should have to be regarded as a proceeding for ejectment, which ex hypothesi it is not. In my opinion, any construction which would lead to such a result ought to be avoided.

In any case, it seems to me that a tenant's appeal against a decree for ejectment can, in no sense, be brought within the words "suit for ejectment." Having considered the matter further in the light of the arguments put forward by Mr. Roy, I see therefore

no reason whatever for altering the opinion I had previously formed. The result is that the rule must be made absolute and the stay order made by the Court below vacated. The petitioner is entitled to his costs. We assess the hearing fee at 2 gold mohurs. As already stated, the question of ultra vires is left open. Let the record be sent down at once.

Edgley J. — I agree.

G.N./R.K. *Rule made absolute.*

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(29) A. I. R. 1942 Calcutta 49
SPECIAL BENCH

DERBYSHIRE C. J., NASIM ALI AND R. C. MITTER JJ.

Sm. Sukumari Devi — Decree-holder — Petitioner

v.

Rajdhari Pandey—Judgment-debtor — Opposite Party.

Civil Rule No. 1416 of 1940, Decided on 11th November 1941, issued from order of Dist. Judge, 24-Parganas at Alipore, D/- 20th July 1940.

(a) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Act is not beyond power of Bengal Provincial Legislature.

The Provincial Legislature, and the Provincial Legislature only, has the legislative power to direct the Courts to stay proceedings for ejectment of non-agricultural tenant. Hence S. 3 is not beyond the law making power of the Bengal Legislature. [P 50*d*,*e*]

(b) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), Ss. 3, 6 — Provisions directing stay of ejectment proceedings against non-agricultural tenants prevail over Civil P. C., O. 21, R. 24.

The provisions of the Bengal Non-agricultural Tenancy Act of 1940 which direct the Court to stay proceedings for ejectment of a non-agricultural tenant prevail over O. 21, R. 24, Civil P. C., by virtue of S. 4 (1), Civil P. C., and therefore are not invalid under S. 107, Government of India Act. [P 49*g*; P 50*f*,*g*]

(c) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 2 — 'Tenant' includes not only current tenant but ex-tenant in occupation.

The word tenant is used not in its strict legal sense, but in its wider popular sense and includes not only the current tenant as set out in S. 2 but the ex-tenant remaining in occupation who formerly held in the manner described in S. 2 as a non-agricultural tenant. [P 51*b*]

Subodh Chandra Basak — for Petitioner.

Sris Chandra Dutt — for Opposite Party.

Derbyshire C. J.—Sm. Sukumari Debi is the owner of a plot of land in the 24-Perganas which was let some time before October 1939, to Rajdhari Pandey who used the land in connexion with his business of hiring out carts. The tenancy was described as a monthly tenancy at will and in 1939 the landlord gave the tenant notice to quit. The tenant did not quit and has not quitted. On 7th October 1939, the landlord obtained a decree against the tenant for possession of the premises. On 14th December 1939 the owner made an application for execution. That application was not dealt with immediately. On 30th May 1940, the Bengal Non-agricultural Tenancy (Temporary Provisions) Act of 1940, was passed by the Bengal Legislature and received the assent of the Governor on 30th May 1940. The Act did not receive the assent of the Governor-General. On 10th June 1940, the Munsif in the execution proceedings granted a stay of execution under the provisions of the Act just mentioned. On 20th July 1940, the owner appealed to the District Judge against the decision of the Munsif staying execution, but the appeal was dismissed. The owner applied to this Court for a rule to show cause why the orders just mentioned should not be set aside. That rule was granted and the matter has been argued at length before this Bench.

The learned advocate for the plaintiff — the petitioner before us — the owner of the land, has argued (1) that the Act in question is beyond the law-making powers of the Bengal Legislature and (2) that the provisions in the Act he complains of are repugnant to an existing law passed by the Central Legislature, namely the provisions of the Civil Procedure Code, which provide that execution of a decree shall be granted by the Courts. The Act itself begins with this preamble :

> Whereas it is expedient, pending the enactment of further legislation, to provide for the temporary stay of certain suits and proceedings for ejectment of certain non-agricultural tenants; It is hereby enacted. . . .

By S. 1 the Act is extended to the whole of Bengal with the exception of certain parts of Calcutta. Nothing arises under this part of the Act. Section 1 also provides that the Act shall continue in force for two years from the date of its commencement, that is, from 30th May 1940. Section 2 defines a 'non-agricultural tenant.' I will deal with this definition later. Section 3 provides :

> Notwithstanding anything contained in any other law for the time being in force, every suit and proceeding in any Court for ejectment of a non-agricultural tenant, other than a suit or proceeding for ejectment on account of the non-payment of rent by such tenant, shall be stayed for the period during which this Act continues in force :
>
> Provided that every proceeding for delivery of possession in execution of a decree for ejectment on account of the non-payment of rent by such tenant shall be stayed if, within 30 days from the date of

the decree, such tenant deposits into Court the amount of the decree together with the costs of the proceeding.

Section 4 provides that the Court may in certain cases set aside certain orders made for the delivery of possession as from certain dates. Section 5 contains provisions to compensate the owner of the premises in respect of possession of those premises by the tenant during the period from 30th January 1940 down to the end of the period during which the Act operates. Section 6 provides :

Subject to the provisions of Ss. 4 and 5, every suit and proceeding to which the provisions of S. 3 are applicable, which is pending at the date of the commencement of this Act, shall be stayed for the period during which this Act continues in force.

It is provided in S. 8 as follows :

Nothing in this Act shall apply to any tenant who holds non-agricultural land under the Central or Provincial Governments or under a local authority.

It is under this Act that the Munsif who has been upheld by the District Judge has stayed the proceedings for delivery of possession until 30th May 1942. As regards the first contention of the landowner, namely that the provisions of the Act relating to stay of proceedings for recovery of possession for two years as made are beyond the law-making powers of the Provincial Legislature ; those powers so far as they are relevant in this case are set out in List II of the Provincial Legislative List, items 2 and 21. Item 2 is :

Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list.

Item 21 is :

Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents.

What the Provincial Legislature here has enacted and what is complained of is that it has directed the Courts to stay proceedings for the ejectment of non-agricultural tenants for a period of two years. Under the provisions of S. 100, Government of India Act, 1935, subject to sub-ss. (1) and (2) the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II of the Provincial Legislative List. The Provincial Legislature in curtailing the powers of the Court to grant possession has acted under item 2 taken in conjunction with that part of item 21 which deals with rights in or over land. In my view the Provincial Legislature and the Provincial Legislature only, had the legislative power to direct the Courts to stay proceedings for ejectment of a non-agricultural tenant in the way it has done. The plaintiff's contention as regards S. 3 being beyond the law-making powers of the Bengal Provincial Legislature fails. The second point taken by the plaintiff was that the Code of Civil Procedure in O. 21, R. 24 provides that

when the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

It is said that that provision of law directs that the Court shall issue the process ; that the provisions of the Bengal Non-Agricultural Tenancy Act of 1940 which direct the Court to stay proceedings for ejectment of a non-agricultural tenant are repugnant to O. 21, R. 24, Civil P. C., and therefore under S. 107, Government of India Act of no avail. That argument however leaves out of account the provisions of S. 4 (1), Civil P. C., which is as follows :

In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

That means that if there is some local law in force, special power conferred or any special form of procedure prescribed by some valid Act of the proper Legislature, then the other provisions of the Code of Civil Procedure must give way to that special or local law or special form of procedure. That avoids the conflict and the repugnancy which it is alleged (I do not say correctly alleged) arise in the present case. In my view the second contention of the plaintiff fails. There is one matter that deserves some attention although it has not been urged in argument by the learned advocate for the plaintiff petitioner in this matter. In S. 2 of the Act it is provided :

In this Act, unless there is anything repugnant in the subject or context, — "non-agricultural tenant" means a tenant who holds under another person, and is liable to pay rent to such person for, non-agricultural land which, under the terms of any agreement, such tenant is entitled to use for any homestead or residential purpose or for the conduct thereon of any commercial of industrial enterprise or any trade or business, but does not include a tenant who so holds non-agricultural land together with any structure thereon erected or owned by the person under whom such tenant holds or by the superior or predecessor in interest of such person.

It has not been disputed in the present case that the tenancy was originally a non-agricultural tenancy. However, under the wording of the definition construed in its narrowest sense a non-agricultural tenant is

"a tenant who holds (note the present tense) under another person and is liable to pay rent to such person for non-agricultural land which, under the terms of any agreement. . . . ." Strictly construed, that would only apply to a tenant whose tenancy is still current under the terms of the agreement. It would not apply to a person who had been a tenant and whose tenancy has come to an end for some reason and who is still in possession of the premises. It is clear, however, that if the word "tenant" is used to denote only a person whose tenancy agreement is current, he does not need the protection the Act has given to him, because he has his rights under his tenancy agreement. It is only when his tenancy agreement has come to an end and he no longer has his rights under it that he needs the protection which the Act has provided. It would appear, therefore, that the word "tenant" is used not in its strict legal sense, but in its wider popular sense and includes not only the current tenant as set out in S. 2 but the ex-tenant remaining in occupation who formerly held in the manner described in S. 2 as non-agricultural tenant. That seems to be recognized by the proviso to S. 3 which is "that every proceeding for delivery of possession in execution of a decree for ejectment, etc., shall be stayed" . . . . on certain terms. When ejectment proceedings have reached the execution stage, a decree for possession has been passed against the tenant and the tenant has no longer his rights under the tenancy agreement.

For those reasons I am of the opinion that Rajdhari Pandey who was formerly a non-agricultural tenant of these premises was entitled to the protection that was given to him by the Munsif and the District Judge in this case. I am therefore of the opinion that this rule must be discharged. We make no order as to costs. Certificate under S. 205, Government of India Act, is granted.

Nasim Ali J. — I agree.

R. C. Mitter J. — I agree.

K.S./R.K. *Rule discharged.*

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(29) A. I. R. 1942 Calcutta 51

PANCKRIDGE J.

S. N. Mukherjee — Applicant

v.

Sir G. Russel and another — Respondents.

Application, decided on 26th May 1941.

(a) Defence of India Act (1939), S. 2, Rules under R. 84 and S. 16 (1) — Notification under Rule 84 by Central Government dated 31st December 1940 prohibiting import of iron and steel — Under notification, applicant cannot ask for import license as of right — Grant of license is discretionary — Court cannot interfere with that discretion — Order granting or refusing license must be taken to have been made in exercise of power conferred by Act.

Under the notification issued by the Central Government under R. 84 prohibiting the import of iron and steel of specified description with certain exceptions, an applicant cannot ask for an import license as of right even in the case of goods ordered before 1st January 1941. It is within the discretion of the Steel Controller's department to grant the license or to refuse it and with that discretion the Court cannot interfere. [P 53*a*,*b*,*e*]

An order granting or refusing a license under the notification must be taken to have been made in exercise of the powers conferred by the Act and therefore falls within the purview of S. 16 (1). [P 53*d*]

(b) Defence of India Act (1939), S. 16 (1) — Order when can be said to be called in question.

An order is equally called in question when it is suggested that it is made without power to make it or made in improper exercise of the power to make it. [P 53*e*]

S. C. Roy and M. Hazra — for Applicant.

Sir A. K. Roy and J. A. Clough — for Respondents.

Order. — This is an application under S. 45, Specific Relief Act, and is made by one S. N. Mukherjee, who carries on business at 22, Canning Street, under the name and style of Messrs. S. N. Mukherjee. The respondents are Sir Guthrie Russel, Steel Controller, and Mr. S. M. K. Alvi, Deputy Steel Controller, whose office is at No. 7, Wellesley Place, Calcutta. The application asks that the respondents should grant an import license for the import of 15 tons of mild steel plates 1/8" American make, covered by a certain order dated 13th December 1940. On 31st December 1940, a notification was published in the Gazette of India whereby it was notified that in exercise of the power conferred by Rule 84 of the Defence of India Rules the Central Government prohibited the bringing into British India by Sea from any place outside India of any iron or steel of the description specified in the schedule with certain exceptions. Exception 4 is:

Any iron or steel covered by a special license issued (a) in the case of goods imported from the United Kingdom or the United States of America by the Steel Controller or Deputy Steel Controller for India appointed in this behalf by the Central Government, on application made before the placing of an order: Provided that in respect of firm orders placed before 1st January 1941, applications are made to the Steel Controller for India before 1st April 1941.

The same day another notification was published appointing Sir Guthrie Russel, Steel Controller, and Mr. J. Walton and Mr.

S. M. K. Alvi Deputy Steel Controllers for India. It is conceded that the applicant had placed firm orders for steel plates prior to 1st January 1941, with certain manufacturers in the United States through his London agents, Messrs. D. & J. Fowler Ltd., of Queen Victoria Street, London. These firm orders included an order for the 15 tons of mild steel plates which are the subject-matter of this application. The applicant states, and I see no reason to question his statement, that these steel plates were required to fulfil an order given him by concerns known as the Kamala Soap Factory and the Model Soap Company for construction for chimneys in their soap factories. On 20th January 1941, the applicant wrote to the steel controller asking him to issue import licenses for steel plates of which these 15 tons were part. He received a reply from Mr. Alvi, the Deputy Steel Controller, requesting him to fill up the appropriate form, which is numbered W. S. B 73. On the reverse of the form he gave certain particulars as to the shipment and the price and on the face of the form against the space reserved for special reasons for wishing to import these articles he wrote : "We have imported these plates for manufacturing chimneys for soap factories." The petitioner's London agents kept on pressing him for the numbers of the import licenses which he was expecting to obtain, and the Deputy Steel Controller, who had received several reminders from the petitioner, made enquiries whether the shipment was covered by an irrevocable dollar credit. The petitioner was able to satisfy the steel controller on the point. As far as the correspondence is concerned there was nothing more from the controller until Mr. Alvi, the Deputy Steel Controller, wrote, on 16th April 1941, regretting his inability to grant import licenses. This refusal is on a common form and there are four possible reasons given, and to judge what has happened in this case it appears that the Department indicates by placing a tick against one of those reasons why they have refused the import licenses. The reasons are :

(a) The steel required by you can be obtained in India ; (b) suitable substitutes for the type of steel required by you can be obtained in India ; (c) the purpose for which the material is desired to be imported by you stated under item 3 of the application does not justify the issue of an import license ; (d) your demand is in excess of your normal imports.

In this case the Deputy Steel Controller had by placing a tick in the margin indicated that the reason for refusal was that the purpose for which the material was required specified by the applicant, did not justify the issue of an import license. It will be remembered that the purpose notified by the petitioner was the erection of chimneys for soap factories. It is in these circumstances that the present application has been taken out.

Mr. Alvi has filed a somewhat verbose affidavit in which he says that it is the custom of the department to satisfy themselves that the applicant is a bona fide importer, and he suggests that his investigations show that the applicant was merely a middleman and also he was not satisfied that the purpose for which the goods were imported was truly stated, and there were suspicions of profiteering. He also suggests that in early March he had orally intimated the applicant that his application for import license was rejected. I have not thought it necessary to examine these allegations on either side in great detail, because I am of opinion that unless in the circumstances the applicant is entitled as of right to the issue of a special license I cannot investigate the reasons which have caused the Deputy Steel Controller to refuse his application. It is obviously impossible for any Court to conduct an enquiry into questions of policy, whether it is desirable that this particular applicant should be granted a license, and although the reasons which have appeared good to the steel controller might appear open to question by the Court, yet there may be excellent reasons for refusing the license, reasons which reflect in no way on the character or dealings of the applicant, but which the Court is in no position to assess. Now, it will be noticed that unless the applicant comes within an exception he is absolutely prohibited from importing steel into British India by sea from any place outside. He can only do so in the circumstances of the case by obtaining a special license. Normally he can only obtain a special license if he applies for it before placing his order. Mr. Roy wishes to read the words "provided that in respect of firm orders placed before 1st January 1941, applications are made before the Steel Controller before 1st April 1941" as entitling the applicant, if he makes the application before the specified date, to obtain a license as of right. The notification is not happily worded but I cannot read it as bearing the meaning which Mr. Roy would put on it. What I think it means is that whereas generally no licenses to import steel will be granted unless they have been applied for before the

order is placed, yet an exception is made in the case of licenses to import steel shipped in fulfilment of firm orders placed before 1st January 1941, to the extent that applications from importers who place such orders will be considered if they are made before 1st April 1941. In other words, the controller has no discretion to grant a license in respect of goods ordered after 1st January 1941, unless the license has been applied for before placing the order. In the case of goods ordered before 1st January 1941, the controller has a discretion to grant or refuse a license though applied for subsequently to the date of placing the order, if application is made to him prior to 1st April 1941. In this case he has in his discretion refused a license and I am powerless to interfere.

The Advocate General has taken the point that this application is incompetent by reason of S. 16 (1), Defence of India Act, which provides that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court. The order here made was under the notification which purports to be made in pursuance of R. 84 (3) by which the Central Government under its rule-making powers gives itself power to make provision for prohibiting or restricting or otherwise controlling, in all classes or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import or export, or the carriage coastwise or the shipment as ships stores, of all goods or goods of any specified description. Mr. S. C. Roy for the applicant maintains that the order of refusal was made under the notification which itself was made in virtue of R. 84 and therefore it cannot be said to be made in exercise of any power conferred by or under the Act. I think he is right in saying it was not made in exercise of any power conferred by the Act, but I think if it was necessary for me to decide the question one way or the other, I should hold that the order was made in exercise of a power conferred under the Act because ultimately the power given by the notification derives from the rule making power conferred by S. 2 of the Act.

Mr. Roy also argues that the order is "not called in question" by this application within the meaning of the Act, and by reference to sub-s. (2) he suggests that an order is only properly said to be called in question when it is attacked on the ground that it has been made by some one incompetent to make orders of that character. I do not agree with that submission and I think an order is equally called in question when it is suggested that it is made without power to make it or made in improper exercise of the power to make it. However that may be, my reason for refusing the application is that I consider that under the notification the applicant cannot ask for a license as of right and it is within the discretion of the Steel Controller's Department to grant the license or to refuse it, and with that discretion I cannot interfere. This application is dismissed with costs.

G.N./R.K. *Application dismissed.*

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(29) A. I. R. 1942 Calcutta 53

B. K. MUKHERJEA AND ROXBURGH JJ.

Sm. Indumati Debi, w/o Thakur Shiw Sundar Singh—Claimant—Petitioner

v.

Tulsi Thakurani and others — Counter-Claimants—Opposite Party.

Civil Rule No. 249 of 1941, Decided on 27th May 1941, issued in application for setting aside order of President, Calcutta Improvement Tribunal, D/- 13th February 1941.

Land Acquisition Act (1894), S. 30—Reference under S. 30 — Court's jurisdiction is confined expressly to dispute referred to by Collector — Person claiming share in compensation money who was not party to proceeding before Collector cannot be made party to apportionment case.

The jurisdiction of the Court in a reference made by the Collector under S. 30 is confined to a consideration of the dispute expressly referred to it by the Collector. An addition of parties may indeed be made when the persons who desire to be added as parties do not raise any new dispute but want to place other materials before the Court in connexion with the dispute that is referred to it by the Collector: ('27) 14 A I R 1927 Cal 352, *Approved.* [P 55*b*]

But it cannot be permitted where the question sought to be raised is entirely a new one and is not covered by the reference made by the Collector. Consequently a person claiming a share in compensation money who was not a party to the proceeding before the Collector cannot be made a party to the apportionment case referred to Court under S. 30 : 12 C W N 987, *Rel. on;* 11 C L J 420 and 12 C L J 545, *Disting.;* 25 All 133, *Not foll.* [P 55*c*]

Phani Bhusan Chakravarty — for Petitioner.

Ramaprosad Mukherjee and Bhupal Chandra Roy — for Opposite Party.

Order. — This rule is directed against an order made by the President of the Calcutta Improvement Tribunal rejecting the petitioner's application to be added as a party to an apportionment case pending before the tribunal. The material facts lie within a brief compass and are for the most part undisputed. Premises No. 33, Cockler Lane was acquired by the first Land Acquisition Collector, Calcutta, in connexion with scheme

No. 47 of the Calcutta Improvement Trust and a sum of Rs. 9573 and annas odd was settled as compensation, in respect of which a joint award was made in favour of three persons who are the three opposite parties in the rule. There was a dispute between these three persons as regards their right to the compensation money. Opposite party No. 1 claimed the entire compensation as the sole surviving daughter and heiress of one Yasoda Debi to whom the premises admittedly belonged. Opposite parties, Nos. 2 and 3, on the other hand, contended that they were entitled to a half share of the compensation money as sons and heirs of one Rajabala, a sister's daughter of opposite party No. 1, who got a moiety share in the acquired premises on the basis of a compromise with the latter. The Collector acting under Ss. 30 and 31 (2), Land Acquisition Act, sent the compensation money to the Calcutta Improvement Tribunal and referred the dispute to that Court.

The petitioner is a daughter of Rajabala and it is said that she received no notice under S. 9, Land Acquisition Act, nor was she aware of the proceedings before the Collector. Her case is that a moiety share of the premises acquired, which belonged to her mother Rajabala devolved on her to the exclusion of opposite parties Nos. 2 and 3 and that she — and not opposite parties Nos. 2 and 3 — was entitled to half of the compensation money. She came to know of the reference case pending before the Improvement Tribunal after issues were framed in that case and on 4th September 1940 she made an application before the tribunal praying that she might be added as a party to the proceeding. The President of the tribunal rejected the application on the ground that the addition of a party at that stage would enlarge the scope of enquiry. It is the propriety of this order that is challenged before us in this rule. Mr. Chakravarty who appears in support of the rule has argued before us that it is necessary and proper to add his client as a party to the apportionment case as that would enable the tribunal to deal effectively and completely with all matters in controversy in the case and that the learned President was in error in thinking that the scope of the enquiry would be enlarged in any way. Mr. Ramaprosad Mukherjee who appears for the opposite parties has contended, on the other hand, that apart from the fact that the addition of a party at this late stage would introduce a new and complicated question of title, the tribunal had no jurisdiction to make the petitioner who was not a party to the proceedings before the Collector a party to the apportionment case.

This identical point came up for consideration before a Division Bench of this Court in 12 C W N 987[1] and it was held by Maclean C. J. and Doss J. that the Land Acquisition Court had no jurisdiction to deal with objections except those which were made by persons who were parties to the proceedings before the Collector and which brought about the reference. In this case also, there was a reference made by the Collector under S. 30, Land Acquisition Act, and the respondent, who was not a party to the proceedings before the Collector and consequently had made no objection to the award, was made a party to the reference on his own application by the Land Acquisition Court. The order of the Court making him a party was discharged and the compensation money was directed to be paid to the appellant without prejudice to the rights of the respondent who was treated as not being made a party to the proceedings at all. The learned Chief Justice in course of his judgment relied, amongst others, on two earlier decisions of this Court which are to be found in 34 Cal 451[2] and 12 C W N 98[3] to both of which he was a party. It is true that in both these cases the reference was made under S. 18, Land Acquisition Act, and not under S. 30 and in the earlier case in 34 Cal 451[2] there was no question of addition of a party. The respondent in that case was, in fact, a party to the proceedings before the Collector but he raised an objection before the Land Acquisition Court which he did not raise before the Collector. It was held that the Court could not go into a question raised for the first time by a party who had not referred any question or any objection to it under S. 18, Land Acquisition Act.

Mr. Chakravarty argues that when a reference is made under S. 18, Land Acquisition Act, S. 21 of the Act expressly restricts the inquiry before the Land Acquisition Court to an examination of the question which has been referred by the Collector and consequently the scope of inquiry may not be enlarged at the instance of parties who have not obtained and cannot obtain any order of reference under that section. He says however that there is no such limitation with regard to a reference made by the Collector

1. ('08) 12 C W N 987, Prabal Chandra v. Peyari Mohun.
2. ('07) 34 Cal 451, Abu Bakar v. Peyari Mohun.
3. ('08) 12 C W N 98, Govinda Kumar Roy v. Devendra Kumar.

under S. 30, Land Acquisition Act, and this distinction was overlooked by the Court in 12 C W N 987.[1] It is true that the learned Chief Justice who was a party to the earlier decisions did not fully discuss the distinctions that can be drawn between the two types of reference, but his decision definitely was that the powers of the Land Acquisition Court were equally restricted when the reference was under S. 30, Land Acquisition Act. We do not think that this view is unsound or is not warranted by the language of S. 30. Section 30, Land Acquisition Act, provides that

> if any dispute arises as to the apportionment of compensation or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the Court.

These words can reasonably be construed to mean that the jurisdiction of the Court is confined to a consideration of the dispute that is expressly referred to it by the Collector. An addition of parties may indeed be made when the persons who desire to be added as parties do not raise any new dispute but want to place other materials before the Court in connexion with the dispute that is referred to it by the Collector: *vide* 31 C W N 384.[4] But, in our opinion, it cannot be permitted in a case like this where the question sought to be raised is entirely a new one and is not covered by the reference made by the Collector. The two other decisions of the Court upon which reliance has been placed by Mr. Chakravarty in course of his arguments are clearly distinguishable and in fact they do not in any way militate against the view taken in 12 C W N 987.[1] In 11 C L J 420[5] the property which was the subject-matter of acquisition was sold for arrears of revenue and the purchaser at the revenue sale was allowed to be made a party to the reference made to the civil Court at the instance of the defaulting proprietor. But it was expressly held that he could take only such objections as could be taken by the defaulting proprietor and his special rights, if any, must be asserted in a separate suit. In the other case, namely, the case in 12 C L J 545,[6] an attaching creditor was allowed to be added as a party to the proceedings before the Land Acquisition Court on similar grounds as a representative of the judgment-debtor.

4. ('27) 14 AIR 1927 Cal 352 : 101 I C 539 : 31 C W N 384, Hashim Ibrahim v. Secretary of State.
5. ('10) 11 C L J 420 : 6 I C 546, Promotha Nath Mitra v. Rakhal Das Addy.
6. ('10) 12 C L J 545 : 7 I C 481, Golap Khan v. Bholanath Marick.

The decision that really supports the contention of Mr. Chakravarty is that in 25 ALL 133.[7] There it was held by Knox and Blair JJ., that the provisions of S. 53, Land Acquisition Act, are sufficiently large to allow the adaptation of S. 32, Civil P. C., (corresponding to O. 1, R. 10 of the present Civil Procedure Code) to the matter before the Judge and a person who was not a party to the proceeding before the Collector and who claimed title by adverse possession was allowed to be added as a party to the reference before the Judge that was made by the Collector under S. 30, Land Acquisition Act. The decision, however, did not proceed on any distinction between the provisions of Ss. 18 and 30, Land Acquisition Act. We do not think that we will be justified in following the Allahabad High Court when there is a decision of our Court exactly in point. The decision in 12 C W N 987[1] has not been dissented from in any of the subsequent cases and as the view which it takes is borne out by the language of the section as also the general scheme of the Land Acquisition Act, we have no hesitation in following it. The result is that the rule is discharged. We make no order as to costs. We may add that the decision of the Improvement Tribunal would be without any prejudice to the rights of the petitioner before us who must be deemed not to be a party to the land acquisition proceedings at all.

G.N./R.K. *Rule discharged.*

7. ('02) 25 All 133 : 1902 A W N 215, Kishan Chand v. Jagannath Prasad.

(29) A. I. R. 1942 Calcutta 55

B. K. MUKHERJEA AND ROXBURGH JJ.

Sheikh Akbar Ali and others — *Petitioners*

v.

Sheikh Mafijuddin of Islampur — *Opposite Party.*

Civil Rule No. 1210 of 1940, Decided on 6th June 1941, issued in application for setting aside order of Munsif, Dubrajpur (Birbhum), D/- 18th May 1940.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), S. 26G (5)—Provision entitling mortgagor to recover possession after expiry of 15 years is repugnant to S. 62, T. P. Act — But this repugnancy is immaterial—Provincial legislation with respect to contracts or transfers relating to agricultural land is valid even if it conflicts with any existing Indian law — Provincial Legislature is competent to legislate with retrospective effect — It is return of land to mortgagor that puts an end to security and debt — Since Provincial Legislature can direct return of land S. 26G (5) even if it conflicts with S. 62, T. P. Act, is not ultra vires.

Section 26G (5) so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage to recover possession of the mortgaged property after the expiry of 15 years or the period mentioned in the bond, whichever is less, is undoubtedly in conflict with the provisions of S. 62, T. P. Act. But this repugnancy is perfectly immaterial, as this is a matter which is not covered by the concurrent list of the Government of India Act. Provincial legislation in respect of transfer of, or contracts relating to agricultural lands is valid, even though it contradicts any existing Indian law. Since the Provincial Legislature has power to make a legislation with regard to future transfers, it can certainly in virtue of its plenary powers give retrospective effect to such provision so as to affect transfer made before 1928 : ('41) 28 A I R 1941 F C 16, *Rel. on.* [P 57*f*, *g*]

Under S. 26G (5) it is the return of the lands to the mortgagor that puts an end to the security as well as to the debt, and as it is within the competence of the Provincial Legislature to direct the return of the mortgaged property after a certain period the provision of S. 26G (5) even if it is repugnant to S. 62, T. P. Act, is not ultra vires, or void. [P 59*e*]

(b) Transfer of Property Act (1882), S. 58 (d) Usufructuary mortgage—Mortgagee given personal remedy—Mortgage ceases to be usufructuary whether personal remedy is accompanied by right of sale or not.

In the case of a usufructuary mortgage whenever there is a personal remedy given to the mortgagee whether or not it is accompanied by a right of sale, the mortgage ceases to be a usufructuary mortgage. It can rank only as an anomalous or mixed mortgage, where the rights would be regulated by the contract between the parties : 12 Mad 109; 14 Mad 232; 26 Mad 662 and 27 Mad 526 (FB), *Rel. on*; 28 All 157, *Dissent.* [P 58*f*, *g*]

(c) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), S. 26G—S. 26G is confined to usufructuary mortgage pure and simple and excludes anomalous mortgages giving personal remedy to mortgagee — S. 26G therefore does not conflict with S. 68 (1) (a), T. P. Act—Usufructuary mortgage containing contingent promises as indemnity clauses also falls under S. 26G—Such clauses are no part of mortgage transaction and come into effect only when mortgage fails — They do not alter nature of usufructuary mortgage and do not give mortgagee personal remedy contemplated by S. 68 (1) (a), T. P. Act.

Section 26G excludes from its purview all anomalous mortgages where any personal remedy has been given to the mortgagee and is confined to usufructuary mortgages pure and simple where the mortgagee has no other remedy to realize his dues except by remaining in possession of the lands and therefore it does not conflict with S. 68 (1) (a), T. P. Act, for in cases where S. 68 (1) (a), T. P. Act, will come into operation, S. 26G, Ben. Ten. Act, will have no application at all. Contingent promises occurring more or less as indemnity clauses in a usufructuary mortgage deed, such as where the mortgagor undertakes to pay interest or compensation or the whole or a portion of the mortgage money if the mortgagor is dispossessed from the mortgaged property or the property is sold for default of Government revenue, or the arrangements contemplated by the parties are somehow or other upset form no part of the mortgage transaction for they come into effect only when the mortgage fails : ('40) 27 A I R 1940 Cal 281; ('40) 27 A I R 1940 Cal 426; ('40) 27 A I R 1940 Cal 437 and ('40) 27 A I R 1940 Cal 436, *Rel. on.* [P 58*g*, *h*; P 59*a*, *b*]

The contract to indemnify being really outside the mortgage, it cannot give the mortgagee a personal remedy which S. 68 (1) (a), T. P. Act, contemplates. It can only furnish a cause of action for instituting a suit in the nature of one to recover damages or compensation. The presence of an indemnity clause cannot alter the nature of the usufructuary mortgage which would still come under S. 26G, Ben. Ten. Act. [P 59*b*, *c*]

Gopendra N. Das, Jajnessar Majumdar and Khetra M. Chatterjee — for Petitioners.

Sudhansu S. Mukherjee—for Opposite Party.

Order. — This rule is directed against an order dated 18th May 1940 made by the Munsif of Dubrajpur in a proceeding commenced by the opposite party under S. 26G (5), Ben. Ten. Act. In July 1922 the opposite party executed a usufructuary mortgage bond in favour of the father of the petitioners to secure an advance of Rs. 100 only received from the latter. The terms of the mortgage bond were, that the mortgagee would enjoy the usufruct of the land in lieu of interest, and that the mortgagor would take back the property on payment of the principal sum in the month of Baisakh 1332 B. S. or in the beginning of any other subsequent year; and the mortgagee would go on enjoying the mortgaged properties till the money was paid. There was a further stipulation in the mortgage bond which stood as follows :

Be it further known, that if there arises any hindrance, or disturbance or you are dispossessed from the land described below, till the principal amount is fully realized; in such event I and my heirs shall be liable to you and your heirs for interest on the said principal at the rate of Re. 1-8-0 per cent. per month from the date of such disturbance, and on failure to pay the same, you shall be entitled to realize the amount from my other properties moveable and immovable, and to that neither I, nor my heirs, shall be entitled to raise any objection.

In 1940, the mortgagor presented an application to the Munsif at Dubrajpur under S. 26G (5), Ben. Ten. Act, for recovery of possession of the mortgaged property, on the ground that more than 15 years had elapsed from the date of the registration of the bond. The mortgagee did not appear or contest the proceeding and an ex parte order was made by the Munsif on 18th May 1940, allowing the prayer of the mortgagor opposite party. It is against this order that the present rule has been obtained. The only point that has been raised by Mr. Das who appears in support of the rule is that no legal claim could be founded on S. 26G, Ben.

Ten. Act, which as an enactment of the Provincial Legislature, is void under S. 107 (1), Government of India Act, 1935, on account of its being repugnant to the provisions of existing Indian law. What is said is, that S. 26G, Ben. Ten. Act, conflicts with the provisions of existing Indian law which are contained in Ss. 62 and 68, T. P. Act, and S. 37, Contract Act, and as the matter relates to contracts which is entry No. 10 in the concurrent list, and no assent of the Governor-General has been obtained under S. 107 (2), Government of India Act, the section is void under S. 107 (1) of the Act. The point is one of considerable public importance and requires careful consideration.

A mortgage, as defined in S. 58, T. P. Act, is a transfer of an interest in specific immovable property for securing the payment of money or money's worth. There are two elements involved in a mortgage. In the first place there is a conveyance of some interest in land, and in the second place there is a debt to secure the payment of which the conveyance is made. Transfer or alienation of agricultural land is a Provincial subject coming under Item 21 of the Provincial list, and all contracts relating to agricultural lands are also excluded from Item 10 of the concurrent list 3. If the mortgage relates to agricultural lands, it is not disputed that it is within the competence of the Provincial Legislature to make laws which would regulate the rights of the transferor and transferee with regard to the property which is the subject-matter of the mortgage. Section 62, T. P. Act, provides, that in the case of a usufructuary mortgage the mortgagor has the right to recover possession of the mortgaged property when the debt is satisfied out of the rents and profits of the property, or in cases where the mortgagee has taken the profits in lieu of interest only, or, in part payment of the mortgage money, when the term if any prescribed for payment has expired and the balance of the mortgage money is paid or tendered. Section 26G, Ben. Ten. Act, has certainly altered this law with regard to usufructuary mortgages created in respect of an occupancy holding or a portion of such holding. As the section stood under Act 4 of 1928, it was made illegal on the part of an occupancy raiyat to effect a usufructuary mortgage other than a complete usufructuary mortgage as defined in S. 3 (3) thereof, in respect of his holding or a portion of the holding, nor could the period of such mortgage exceed 15 years, and, in spite of there being any prescribed term for payment, it was open to the mortgagor to exercise his right of redemption any time within the said period. By Bengal Act 6 of 1938, these provisions were extended so as to affect usufructuary mortgages created before 1928.

Under sub-s. 1 (a) of this section which was introduced by Act 6 of 1938 every usufructuary mortgage subsisting on or after 1st August 1937, which was entered into before the commencement of Bengal Act 4 of 1928 shall be deemed to have taken effect as a complete usufructuary mortgage for the period mentioned in the instrument or for 15 years, whichever is less. This means that the loan and interest shall be deemed to be extinguished by the profits arising during the period of the mortgage which can never exceed 15 years. (Vide the definition of complete usufructuary mortgage in S. 3 (3), Ben. Ten. Act.) This position has only been made clear in sub-s. (5), which has further laid down a summary procedure, under which possession can be taken back by the mortgagor, and it has also specified the date from which the period of mortgage is to be calculated. Now S. 26G, Ben. Ten. Act, so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage to recover possession of the mortgaged property after the expiry of 15 years or the period mentioned in the bond, whichever is less, is undoubtedly in conflict with the provisions of S. 62, T. P. Act. But this repugnancy is perfectly immaterial, as this is a matter which is not covered by the concurrent list. This relates to transfer of, or contracts relating to agricultural lands, and the Provincial legislation is valid, even though it contradicts any existing Indian law. If the Provincial Legislature has power to make a legislation with regard to future transfers, it can certainly, in virtue of its plenary powers, give retrospective effect to such provision so as to affect transfers made before 1928: *vide* 45 C W N F C 27.[1]

But it is said that even though the Provincial Legislature is competent to lay down that the security shall cease after a certain period, and the mortgagor shall get back the property from the mortgagee, yet it cannot say that the debt itself shall be extinguished if there is a personal liability on the part of the borrowers to pay the money. The mortgagee has a personal remedy against the

1. ('41) 28 A I R 1941 F C 16 : 192 I C 138 : I L R (1941) Kar F C 72 : 1940 F C R 110 : 45 C W N F C 27, United Provinces v. Mt. Atiqa Begum.

a mortgagor under S. 68 (1) (a), T. P. Act, if the latter has personally undertaken to pay the mortgage money. Section 26G (5) so far as it provides that the consideration shall be extinguished being in conflict with this provision of an existing Indian law relating to contract must be deemed to be void. It is further argued that if this part of S. 26G (5) is invalid, the other part which provides for return of the land must be invalid also. The word "thereupon" which connects the two parts of the sub-section clearly indicates, that it is on the extinguishment of the debt, and as a result of it, that the mortgagor is entitled to claim back his property. In our b opinion the fallacy in this argument is in the assumption that there is any personal liability in the type of mortgage dealt with in S. 26G, Ben. Ten. Act, or that S. 68 (1) (a), T. P. Act, has any application to such mortgages. The present case is governed by S. 26G, as it was in 1928 and it is the validity of that section, that we have got to consider in this rule. That section refers only to usufructuary mortgages. A usufructuary mortgage has not been defined in the Bengal Tenancy Act and in the absence of a definition in the Act itself we can very well be guided by the definition given in the Transfer c of Property Act. Under S. 58 (d), T. P. Act, the essentials of a usufructuary mortgage are as follows: (1) the mortgagor delivers possession or expressly or by necessary implication binds himself to deliver possession of the mortgaged property; (2) that the mortgagee retains possession till payment of the mortgage money and (3) the rents and profits of the mortgaged property or any part of the same are received by the mortgagee, in lieu of interest, or in payment of the mortgage money, or partly in payment of the mortgage money.

It will be seen therefore that in a usu- d fructuary mortgage properly so called, the remedy of the mortgagee is only to remain in possession till the money is paid. He can neither sue the mortgagor personally for the debt, nor can have a decree for foreclosure or for sale. In our opinion, it is only a pure usufructuary mortgage that conforms to the type defined in S. 58 (d), T. P. Act, which comes within the purview of S. 26G, Ben. Ten. Act. Here there is no personal liability on the part of the borrower, and the creditor's remedy is confined to possession of the mortgaged property. If the Provincial Legislature can validly legislate that the mortgagee must give up possession of the mortgaged property after a fixed period, e the mortgagee would have no other legal remedy in respect of the mortgage money, and the security and the debt would both stand extinguished. But what would happen if the mortgage deed contains a personal covenant to pay? If there is really a personal covenant to pay within the meaning of S. 68 (1) (a), T. P. Act, and the mortgagor besides delivering possession of the mortgaged property to the mortgagee binds himself personally to repay the debt, the mortgagee will certainly get an additional remedy and will be entitled to sue for the mortgage money under S. 68 (1) (a), T. P. Act. The mortgage however in that case f would cease to be a usufructuary mortgage under the Transfer of Property Act. It would no longer be a pure usufructuary mortgage as defined in S. 58 (d), T. P. Act: it can rank only as an anomalous or mixed mortgage, where the rights would be regulated by the contract between the parties. This has been held in a series of cases, some of which are to be found reported in 12 Mad 109;[2] 14 Mad 232;[3] 26 Mad 662;[4] 27 Mad 526.[5] It was held in 28 ALL 157[6] that the nature of the mortgage would not be altered by the presence of a personal covenant, unless such covenant imported a right of sale. It has been pointed out by Sir D. F. Mulla in his g commentaries on the Transfer of Property Act (*vide* Mulla, p. 342) that this view is not sound and whenever there is a personal remedy given to the mortgagee whether or not it is accompanied by a right of sale, the mortgage ceases to be a usufructuary mortgage.

In our opinion the proper way to construe S. 26G, Ben. Ten. Act, is to exclude from its purview all anomalous mortgages where any personal remedy has been given to the mortgagee and to confine it to usufructuary mortgages pure and simple where the mortgagee has no other remedy to realize his h dues except by remaining in possession of the lands. If this construction is sound no conflict with S. 68 (1) (a), T. P. Act, is possible, for, in cases where S. 68 (1) (a), T. P. Act, will come into operation, S. 26G, Ben. Ten. Act, will have no application at all. This is quite in accordance with the trend of decisions in our Court which has

2. ('89) 12 Mad 109, Chathu v. Kunjan.
3. ('91) 14 Mad 232, Ramayya v. Guruva.
4. ('03) 26 Mad 662, Madhwa Sidhanta v. Venkata Ramanjulu Naidu.
5. ('04) 27 Mad 526 (FB), Kangaya Gurukal v. Kalimuthu Annavi.
6. ('05) 28 All 157: 1905 A W N 226, Kashi Ram v. Sardar Singh.

held that all anomalous mortgages are outside the purview of S. 26G, Ben. Ten. Act. But there is another class of personal contracts which require consideration and which stand on a quite different footing. They are contingent promises and occur more or less as indemnity clauses in a usufructuary mortgage deed. The mortgagor undertakes to pay interest or compensation or the whole or a portion of the mortgage money if the mortgagor is dispossessed from the mortgaged property, or the property is sold for default of Government revenue, or the arrangements contemplated by the parties are somehow or other upset. They are really no part of the mortgage transaction for they come into effect only when the mortgage fails. In 44 C W N 465[7] the contract was of this description, and it was held by Rau J. that such covenant being in the nature of an indemnity clause was outside the mortgage transaction. The view was accepted in other decisions since then, *vide* 44 C W N 756,[8] 44 C W N 760,[9] 44 C W N 761.[10] If such contract is really outside the mortgage, it would not give the mortgagee a personal remedy which S. 68 (1) (a), T. P. Act, contemplates. It can only furnish a cause of action for instituting a suit in the nature of one to recover damages or compensation.

The presence of a stipulation like this would not certainly alter the nature of the mortgage, and the case would still come under S. 26G, Bengal Tenancy Act; but it is not a part of the mortgage transaction, and is an independent contract altogether. Whether such contract is enforceable or not is another matter. It may be a moot point as to whether such indemnity really purports to give relief against loss occasioned by acts done under express provisions of law, and if it does so whether the provisions of the law would nullify such indemnity if given. In considering this last point, the effect of S. 37, Contract Act, in so far as it makes enforcement of contracts subject to other laws would require to be considered. But that is a matter, which is not necessary for us to discuss in the present case. Our conclusion is that when the mortgage is a mixed mortgage and there is a personal remedy given to the mortgagor in addition to his being let into possession of the mortgaged property, S. 26G, Bengal Tenancy Act, as it stood after amendment in 1938 has no application, and no question arises as to whether any part of the section comes into conflict with S. 68 (1) (a), T. P. Act. If it is a pure usufructuary mortgage, the return of the lands to the mortgagor puts an end to the security as well as to the debt, and as it is within the competence of the Provincial Legislature to direct the return of the mortgaged property after a certain period the provision of S. 26G (5) even if it is repugnant to S. 62, T. P. Act, is not ultra vires, or void. Whether in such cases, a subsidiary agreement in the nature of an indemnity clause can be enforced or not is a question upon which we do not desire to express an opinion.

In 44 C W N 465,[7] referred to above, Rau J. had to deal with a pure usufructuary mortgage, and he himself held that the so-called personal covenant which the mortgage instrument contained was in the nature of an indemnity clause. The argument put forward in that case was somewhat different from that urged before us, and in order to meet it Rau J. dealt with the two parts of sub-s. (5) of S. 26G separately. He held that the mortgagor's right to apply for restoration of possession under Part 2 of the sub-section, and the powers of the Court to make appropriate orders upon such an application were in no way affected by the validity or otherwise of part 1 of the sub-section. He held that the power given under Part 2 came exclusively within item 21 of the Provincial List, and that the exercise of the right under this sub-section was in no way dependent in the extinguishment of the debt which was provided for in Part 1. He held that the word 'thereupon' referred only to the expiry of the period which was specified immediately before. He therefore left open the question whether owing to some failure in the validity of Part 1 of the sub-section some right under S. 68 (1) (a), T. P. Act, or any similar right conferred by any other "existing Indian law" was saved or not. We respectfully suggest that what has to be left open in these cases is not whether Part 1 of sub-s. (5) may be invalid, and thus save certain rights, but whether the indemnity clause itself, which was outside the mortgage, is enforceable in law or not.

In the case before us, there is no personal covenant to pay mortgage money which

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7. ('40) 27 A I R 1940 Cal 281 : 188 I C 819 : 71 C L J 477 : 44 C W N 465, Panchanan Mondal v. Shashi Bhusan.
8. ('40) 27 A I R 1940 Cal 426 : 191 I C 713 : 71 C L J 484 : 44 C W N 756, Khoaj Jamadar v. Abdul Sobhan Khan.
9. ('40) 27 A I R 1940 Cal 437 : 44 C W N 760, Abhoy Charan Malo v. Harendra Chandra Mandal.
10. ('40) 27 A I R 1940 Cal 436 : 193 I C 26 : 44 C W N 761, Bhutnath Jana v. Gopal Prosad Sahu.

would make the mortgage a mixed mortgage in law. It is a pure usufructuary mortgage, and comes within S. 26G, Ben. Ten. Act. The stipulation to pay interest in case of dispossession is a collateral agreement, and makes the mortgage nonetheless a usufructuary mortgage. We have no hesitation in holding that the Munsif was right in allowing the mortgagor's prayer for recovery of possession in the present case. The result is that the rule is discharged. Costs one gold mohur. We are not unmindful of the fact that there have been changes introduced into S. 26G, Ben. Ten. Act, by the amending Act 43 of 1940 and now all mortgages where the mortgagee is given possession of the mortgaged property, and which may not be pure usufructuary mortgages have been brought within the purview of the section. We express no opinion on the validity or otherwise of the recent legislation. Certificate under S. 205 (1), Government of India Act, is granted.

G.N./R.K. *Rule discharged.*

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B. K. MUKHERJEA AND ROXBURGH JJ.

Priya Nath Roy — Plaintiff — Petitioner

v.

Sridhar Chandra Roy and others — Defendants — Opposite Party.

Civil Rule No. 589 of 1941, Decided on 4th June 1941, issued from application for setting aside order of Dist. Judge, 24-Parganas at Alipore, D/- 5th May 1941.

Bengal, Agra and Assam Civil Courts Act (1887), S. 21 — Trial Court's decision as to value of subject-matter is conclusive during all stages of suit and must determine right of appeal under S. 21.

In a suit for partition the decision of the trial Court as to valuation of the subject-matter of the suit for purposes of jurisdiction must be taken as final and conclusive during all the stages of the suit irrespective of what the parties might agree later on to be the actual market value of the suit properties and must determine the right of appeal under S. 21. [P 60*h*; P 61*a*]

Surajit Ch. Lahiri — for Petitioner.

Abinash Ch. Ghose — for Opposite Party.

B. K. Mukherjea J.—This rule is directed against an order made by the District Judge at Alipore on 5th May 1941, returning a memorandum of appeal which was presented by the petitioner before him. The facts, so far as they are material for our present purpose, may be shortly stated as follows: The petitioner instituted a suit for partition in the Court of the third Subordinate Judge, 24-Parganas, claiming 4 annas share of certain Sundarban properties which were alleged to be joint properties of the plaintiff and the defendants. The suit was valued for purposes of jurisdiction at Rs. 2200 only. The defendants in their written statement challenged the valuation made by the plaintiff, and a specific issue was raised, namely issue 5 which was worded as follows: "Has the suit been properly valued?" The trial Court decided this issue in favour of the plaintiff and held that the suit was properly valued. There was a preliminary decree passed in that suit by the trial Judge, against which an appeal was taken by the plaintiff to the Court of the District Judge at Alipore. The appellate Court modified the decision of the trial Court and passed a fresh preliminary decree. There was a second appeal taken to this Court, which was eventually dismissed. The matter then went before the Commissioner of Partition and on the basis of a report made by the Commissioner a final decree was passed. In course of the investigation before the Commissioner it seems to have been admitted by both the parties that the actual market-value of the properties was Rs. 5435-2-0 and the allotments that were made by the Commissioner were made on this basis. The petitioner preferred an appeal against the final decree to the Court of the District Judge at Alipore.

An objection was raised by the respondents that as the value of the property was found to be over Rs. 5000 under S. 21, Bengal, Agra and Assam Civil Courts Act, an appeal would lie not to the Court of the District Judge but to this Court. The learned lower appellate Court has accepted that view and has returned the memorandum of appeal to be presented to the proper Court. Having heard the learned advocates of both sides we are of the opinion that the Court below was not justified in returning the memorandum of appeal and that, as a matter of fact, it had jurisdiction to entertain and hear the appeal. The plaintiff-petitioner, when he filed the suit, did put a definite value upon it, and it was a valuation made for purposes of jurisdiction. The allegation in the plaint was challenged by the defendants, and it was the subject-matter of a specific issue which was expressly decided by the Court. In our opinion, this decision must be taken as final and conclusive during all the stages of the suit and must determine the right of appeal under S. 21, Bengal, Agra and Assam Civil Courts Act. It is not a case where

valuation has increased pending the hearing of the suit and if it is taken that the value of the original suit was Rs. 5435 for purposes of jurisdiction the District Judge who heard the appeal from the preliminary decree had no jurisdiction to modify the judgment of the trial Court. In our opinion, the decision on the question of valuation is conclusive irrespective of what the parties might agree later on to be the actual market-value of the properties in suit, and consequently it was quite competent for the District Judge to hear and determine the appeal that was presented before him. The result therefore is that the rule is made absolute. The order of the District Judge, dated 5th May 1941, is set aside and the case is sent back to him in order that the appeal may be heard and disposed of in accordance with law. We make no order as to costs in this Court.

Roxburgh J. — I agree.

G.N./R.K. *Rule made absolute.*

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B. K. MUKHERJEA AND ROXBURGH JJ.

Rajjab Ali Khan and others — *Appellants*

v.

Bhupatish Chandra Roy Chudhury and others — *Respondents.*

Appeal No. 201 of 1938, Decided on 16th May 1941, from appellate decree of Addl. District Judge, Faridpur, D/- 7th September 1937.

(a) Bengal Tenancy Act (8 of 1885 before amendment in 1928), S. 158B (2)—Provision as to notice is for benefit of cosharer landlords and can be waived by them — Landlord aware and acquiescing in sale — Want of notice does not nullify sale.

The provisions as to notice in S. 158B (2) are only for the benefit of the cosharer landlords and the latter can certainly contest the legality of the sale if no notice is served on them. It is however open to the cosharer landlords to waive their right to notice under S. 158B (2), and if they are actually aware of the sale and acquiesced in it, the want of a notice will not nullify the sale or alter its character to that of a sale held in execution of a money decree: ('24) 11 AIR 1924 Cal 408; ('28) 15 AIR 1928 Pat 234 and ('32) 19 A I R 1932 Pat 284, *Foll.* [P 62*f*,*g*]

(b) Bengal Tenancy Act (8 of 1885 before amendment in 1928), S. 158B (2)—Sale without notice to cosharer landlords — Effect of, explained.

Per *B. K. Mukherjea J.* — A sale held without complying with the provisions of S. 158B (2) is not a nullity out and out and void for want of jurisdiction. The sale is still good as a money sale and it would pass the right, title and interest of the judgment-debtor. It is the cosharers alone who can impeach the sale on the ground of want of notice, and it is open to them also to waive their right to notice, and treat the sale as a rent sale. If they did not receive any notice and did not waive their right to it, it would not be necessary for them to start a proceeding to set aside the sale; they could refuse to treat the sale as a rent sale and go on asserting their rights in the same way as if the sale was of the right, title and interest of the judgment-debtor alone: ('20) 7 A I R 1920 Cal 555 and ('19) 6 A I R 1919 Cal 402, *Expl.* [P 63*a*,*b*,*d*]

Per *Roxburgh J.* — In omitting to give proper notice under S. 158B (2) the Court commits an irregularity and the sale of the entire holding remains good subject to proceedings under O. 21, R. 90, Civil P. C. The irregularity cannot have the effect of changing the character of what purported to be sold. And in practice it would appear that only a cosharer landlord who had not received notice could attempt to challenge a sale on this ground. [P 64*d*]

Obaidul Huq and Hamidul Huq — for Appellants.

Gopal Chandra Das and Sudhir Chandra Choudhury — for Respondents.

B. K. Mukherjea J. — This appeal is on behalf of the defendants and it arises out of a suit commenced by the plaintiff for recovery of possession of the lands in suit on establishment of his title to the same. The lands in dispute consist of several C. S. plots situated partly in Mouza Goaldi and partly in Mouza Paikandi and they formerly belonged to one Edon Molla who held them as an occupancy raiyat under two sets of landlords. The plaintiff Mahendra had 8 anna share in the superior interest, while the remaining 8 anna share belonged to Dakshina and Ramesh. In 1920 Mahendra instituted a rent suit against Edon Molla making his cosharers parties defendants. The suit was decreed and in execution of the same the holding was put up to sale and purchased by Mahendra himself on 20th July 1923. He obtained symbolical possession on 6th June 1926 but when he attempted to take actual possession of the lands he was resisted by the defendants which led to the institution of the present suit.

The suit was contested by defendants 10 and 13 only. Their case was that one Jahanara who was the predecessor of defendants 7 to 12 had purchased all the lands in suit with the exception of plots Nos. 363 and 451 of Mouza Goaldi in execution of a money decree against Edon Molla on 21st June 1923. The remaining two plots were purchased by defendant 13 in execution of another money decree obtained against Edon on 30th July 1919. As these purchases were earlier than that of Mahendra, the latter, it was contended, could not acquire any right against the defendants as his own purchase was in execution of a money decree and not a rent de-

a cree. The whole controversy practically centres round the point as to whether it was a money sale or rent sale at which Mahendra purchased the property. If it was a money sale the defendants would have undoubtedly prior rights, whereas if it was a rent sale, the holding itself would pass, and the interest, if any, of the previous purchasers would stand extinguished. Both the Courts below have decided this point in favour of the plaintiff and only some of the defendants have come up on appeal to this Court.

It is not disputed that the rent suit instituted by Mahendra in 1920 was in conformity b with the provisions of S. 148A, Ben. Ten. Act, and the decree was consequently a rent decree. What is urged on behalf of the appellants is, that as no notice under S. 158B (2), Ben. Ten. Act, (which is now S. 148A (7) of the present Act) was served on the cosharer landlords, the sale which followed could not have the effect of a rent sale and it passed only the right, title and interest of the persons named as judgment-debtors. Both the Courts below have found in effect that no notice under S. 158B (2), Ben. Ten. Act, was actually served on the cosharer landlords but it is held that they received a notice in con- c nexion with the execution proceedings which purported to be under O. 21, R. 22, Civil P. C., and were in fact aware of the sale.

The question as to how far the want of a notice under S. 158B (2), Ben. Ten. Act, affects a sale held under Chap. 14 of the Act, has been considered in several cases by this Court, though the decisions cannot be said to be, by any means, uniform. In 31 C L J 73,[1] which is the earliest case on this point, it was held by Fletcher and Newbould JJ. that the provisions relating to notice as contained in S. 158B (2), Ben. Ten. Act, were mandatory and the Court was not empowered to sell the tenure or holding unless a notice d was so given. The learned Judges laid stress on the word 'shall' in the section occurring before the words 'before proceeding to sell.' This was a suit for possession by a purchaser of an occupancy holding at a private sale which was recognized by some of the cosharer landlords. The other cosharer landlords who did not recognize the purchase instituted a rent suit against the old tenant making the remaining cosharers parties to the suit and in execution of the decree obtained in that suit, the holding was sold and purchased by the decree-holders.

1. ('20) 7 A I R 1920 Cal 555 : 43 I C 3 : 31 C L J 73, Sarip Hochan v. Tilottama Debi.

The suit was decreed by the Courts below e on the ground that the defendant did not acquire the holding by his purchase at the so-called rent sale, as there was no notice served on the other cosharer landlords under S. 158B (2), Ben. Ten. Act, and this view was affirmed on appeal by this Court. This case was followed by Chatterjee and Panton JJ., in 23 C W N 931,[2] and it was held, that if a cosharer landlord wanted to have the sale of a tenure or holding, the provisions of S. 158B (2) which were mandatory, must be complied with and in case of non-compliance with the provisions of this section, the purchaser at such a sale would be in the position of an ordinary purchaser under a money f decree. Both these decisions were considered and distinguished by Sir Ashutosh Mookerjee and Chotzner JJ., in 27 C W N 765.[3] The learned Judges were of opinion that the provisions as to notice in S. 158B (2) were only for the benefit of the cosharer landlords and the latter could certainly contest the legality of the sale if no notice was served on them. It was, however, open to the cosharer landlords to waive their right to notice under this section, and if they were actually aware of the sale and acquiesced in it, the want of a notice would not nullify the sale or alter its character to that g of a sale held in execution of a money decree. This view has been accepted by the Patna High Court in 7 Pat 155[4] and 11 Pat 498.[5]

In my opinion the view taken in these cases is sound and should be followed. Section 158B (2) prescribes an additional formality which has got to be complied with, when the decree that is executed is one for rent obtained by a cosharer landlord in a suit framed under Cl. (1) of that section. Before the tenure or holding is sold the Court is required to give notice of the application for execution to the cosharer land- h lords. I must say, at the outset, that some amount of confusion has been caused by the somewhat loose way in which the expressions 'nullity' and 'irregularity' have been used with respect to sales held in contravention

2. ('19) 6 A I R 1919 Cal 402 : 53 I C 515 : 23 C W N 931, Ahmad Biswas v. Benoy Bhusan Gupta.
3. ('24) 11 A I R 1924 Cal 408 : 82 I C 507 : 37 C L J 447 : 27 C W N 765, Rajani Kanta v. Sheik Rahaman Gazi.
4. ('28) 15 A I R 1928 Pat 234 : 107 I C 810 ; 7 Pat 155 : 9 P L T 241, Badlu Pathak v. Sibram Singh.
5. ('32) 19 A I R 1932 Pat 284 : 139 I C 836 : 11 Pat 498 : 13 P L T 798, Bacha Singh v. Daro Singh.

of this sub-section. It cannot be maintained, and it has not been suggested in any of the decisions mentioned above, that a sale held without complying with the provisions of the section is a nullity out and out, and void for want of jurisdiction. The sale is still good as a money sale and it would pass the right, title and interest of the judgment-debtor. It is also not correct to say that it is an irregular sale, which would mean that it has to be set aside by a proper proceeding on proof of substantial loss to the aggrieved party. The sale is in any event a legal sale, and the only consequence that can possibly follow, if the requirements of the section were not complied with, is that it would have the effect of a money sale. The question really is, whether the giving of this notice as required by the section is an essential pre-requisite to the Court acquiring jurisdiction to put up to sale the holding or tenure, or it is a provision intended merely to safeguard the interests of the other cosharer landlords.

It seems to me that the latter view is correct. It cannot be suggested that unless there was a notice given to the cosharer landlords as prescribed by the section the decree that is executed does not acquire the force and effect of a rent decree proper : for the decree being made in a suit framed under S. 148A, Ben. Ten. Act, was already a rent decree under the Act. On the other hand the interests of the cosharers are likely to be affected in some respects if the whole holding or tenure is sold. If any rent was due to them from the tenant, they could not make the holding in the hands of the purchaser liable for the same, but would have to look to the surplus sale proceeds only, for satisfaction of their existing claims. It seems, therefore, proper to hold that the provision was made exclusively for the benefit of the cosharer landlords. If this position is accepted, the conclusion necessarily follows, that it is the cosharers alone who can impeach the sale on the ground of want of notice, and it is open to them also to waive their right to notice, and treat the sale as a rent sale. If they did not receive any notice and did not waive their right to it it would not be necessary for them to start a proceeding to set aside the sale ; they could refuse to treat the sale as a rent sale and go on asserting their rights in the same way as if the sale was of the right, title and interest of the judgment-debtor alone. In this view the decisions in 31 C L J 73[1] and 23 C W N 931[2] can be supported. In the second of these two cases it was the cosharer landlord who filed a rent suit ignoring the previous sale held at the instance of his cosharer, and this he was certainly entitled to do. In 31 C L J 73[1] the plaintiff was indeed the previous purchaser of the occupancy holding but his claim to possession rested on recognition by some of the cosharer landlords upon whom notice was not given of the sale at which defendants purchased the holding.

In the present case there is certainly no evidence to show that the cosharers of the plaintiff actually acquiesced in the sale, waiving their objections to it under S. 158B(2), Ben. Ten. Act. On the other hand they started proceedings under O. 21, R. 90, Civil P. C., for setting aside the sale, and being unsuccessful in that filed a suit for rent against the old tenant ignoring the sale altogether and making the plaintiff a party to the same. In the rent suit this very question was raised and it was held by the original and the appellate Courts that the cosharers were aware of the sale and did receive a notice though the notice was not in strict conformity with the provision of S. 158B(2), Ben. Ten. Act. It was further held on the authority of this very decision in 27 C W N 765,[3] that as the cosharers after being apprised of the sale kept quiet and did not take any steps, there was waiver on their part. This finding in my opinion is conclusive for the purpose of the suit, and it must be held that the cosharer landlords of the plaintiff did waive their rights to a notice under section 158B(2), Ben. Ten. Act. This decision is not only binding on the cosharer landlords but it is binding on Edon Molla also who was a party to the rent suit, and against whom the suit was dismissed on the ground that the holding vested in Mahendra. The contested defendants who are unrecognised purchasers of the interest of Edon cannot certainly claim higher rights. The result is that I affirm the decisions of the Courts below and dismiss the appeal. There will be, however, no order as to costs.

Roxburgh J. — The decree obtained by the plaintiff's predecessor Mahendra in 1920 under S. 148A, Ben. Ten. Act, as it then stood, was, as regards the remedies for enforcing the same, within the terms of that section "as effectual as a decree obtained by a sole landlord or an entire body of landlords in a suit brought for the rent due to all the cosharers." Mahendra therefore had the right to bring the whole holding to sale in a proceeding which would pass the holding, and

he did so. Part of the procedure for sale required by the terms of S. 158B(2) was that the Court should give notice of that sale to the cosharer landlords. Proper notice was not given, and the effect was that there was an irregularity in that sale. My view is that any person interested could have applied under O. 21, R. 90 to have the sale set aside and could have succeeded if he brought his case within the provisions of that rule. The time for this has now expired, and the sale stands good as a sale of the entire holding. It is to be noted that the sale took place in 1923 in Eastern-Bengal, before the amendments of 1928, which have made full provisions for these matters in S. 174, Ben. Ten. Act, and have excluded the operation of the provisions of O. 21, R. 90, Civil P. C. I am unable to understand how any failure by the Court to follow the procedure prescribed for bringing the whole holding to sale where the decree-holder by virtue of his decree and the terms of S. 148A as then in force had power to do so, and was purporting to do so, can have the effect of turning that sale into something of a different character, namely a sale merely of the right, title and interest of the judgment-debtor. I can understand a view that, the requirements of S 158B (2) being mandatory, the Court had no jurisdiction to bring the holding to sale and therefore nothing was sold at all, the whole proceeding was a nullity; and I can understand a view that the holding was sold in an irregular manner, and was liable to be set aside.

I cannot understand a view that the irregularity could have the effect of changing the character of what purported to be sold. I do not think the correct view is that the issue of notice under S. 158B (2) is mandatory, and a condition precedent to give the Court jurisdiction to sell at all. I think the correct view is that in omitting to give proper notice under that provision the Court committed an irregularity and the sale of the entire holding remained good subject to proceedings under O. 21, R. 90. I may add that in practice it seems hard to conceive of a case in which anyone but a cosharer landlord could show that failure to give proper notice would justify any action under O. 21, R. 90, so that in practice it would appear that only a cosharer landlord who had not received notice could attempt to challenge a sale on this ground. The view I take has the immense advantage that the irregularity will be quickly cured by time, if no one, either a cosharer landlord, or other person who may conceivably have some rights under R. 90, takes action to have it remedied. The other views that the character of the sale remains to be determined at any subsequent time whenever the question is raised, and is to depend on whether it is shown that regular notice was served or not, and the modification of that view that irregularity or defect in procedure as to service may be cured if acquiescence of the cosharer landlord is proved, leads to great disadvantage and uncertainty, and I cannot think that it was ever the intention of the legislators in inserting the provisions of S. 158B (2) to produce such a state of affairs, nor do I think that in fact they did so.

If a decree is not effective to empower the decree-holder to bring the entire holding to sale then even if he purports in execution to sell the entire holding it is clearly correct to hold that he has not sold more than the decree in fact entitled him to sell, namely the right, title and interest of the judgment-debtor: the sale itself cannot be set aside for any defect in the proceedings leading to the decree. I cannot see how the same principle applies to defective procedure by the Court in putting into execution a decree which undoubtedly gives the decree-holder the right to sell the whole holding, and where he in fact applies to sell and purports to sell the whole holding and where there is provision for setting right errors of procedure in conducting sales. The suggestion that this should be so seems to be due to some confusion produced perhaps by the rather clumsy drafting of S. 158B itself particularly by the opening words of the section. Most of that section was really superfluous and in fact it was omitted when the amendments of 1928 were made; the substance so far as suits are concerned being included in cls. 6 and 7 of S. 148A. In the result though for a different reason I agree with my learned brother that this appeal should be dismissed.

K.S./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 65

B. K. MUKHERJEA AND ROXBURGH JJ.

Probodh Mohan Goswami —
Judgment-debtor — Petitioner

v.

Lalit Mohan Dey — Decree-holder —
Opposite Party.

Civil Rule No. 913 of 1941, Decided on 8th August 1941, for setting aside judgment and order of Sub-Judge, 2nd Addl. Court, 24-Parganas (Alipore), D/- 30th April 1941.

Bengal Money Lenders Act (10 of 1940), Ss 36 (6), (2) and (1) (a) and S. 30 — Whether decree should be reopened under S. 36 (1) (a) and S. 36 (6)—Test.

The proper test in considering whether a decree should be reopened under S. 36 (1) (a) and S. 36 (6) is to weigh the actual amount of the liability in respect of total interest under the decree as against what the amount would be if calculated at the appropriate rate specified in S. 30 and not what the decree-holder may choose to claim in execution of his decree. Where the amount as decreed in respect of interest exceeds the amount that could be decreed if the limits applicable under S. 36 (2) read with S. 30 (1) (c) are applied in calculating the liability of the judgment-debtor, the decree must be reopened under S. 36 (1) (a) and S. 36 (6) at the instance of the judgment-debtor. [P 65*h*; P 66*a*]

Gopendra Nath Das and Kalipada Sinha — for Petitioner.

Kumud Bandhu Bagchi — for Opposite Party.

Roxburgh J.—This rule arises out of an order by the Additional Subordinate Judge, 24 Perganas, refusing an application under S. 36, Bengal Money Lenders Act, for re-opening a decree passed against the petitioner. The petitioner took a loan of Rs. 8000 from the opposite party on a mortgage bond dated 5th June 1931, interest being stipulated for at 9 per cent. per annum compound with half-yearly rests. An amount of Rs. 98 was paid on account of interest, and the opposite party instituted a suit on his bond on 7th September 1934 claiming Rs. 10,554-6-9. A preliminary decree was passed on 22nd July 1935 for the amount of the claim together with interest of Rs. 644-4-0 at the bond rate from the date of institution of the suit up to the date of the preliminary decree, and for Rs. 990-9-0 for costs of the suit totalling Rs. 12,189-3-9 in all. Interest was further allowed at the bond rate of 9 per cent. per annum up to the due date of payment and thereafter apparently at 6 per cent. though there appears to be some difference of opinion on the point. Final decree was passed on 8th January 1936; in the decree, actual calculation of the total due is not made, the materials for the calculation are set out.

The mortgagee took out execution in T. Ex. Case No. 58 of 1936 and realised Rs. 2190 by sale of some of the properties on 10th July 1937. He again took out execution on 3rd June 1938 in T. Ex. Case No. 34 of 1938, claiming Rs. 10,572-9-3 together with interest at the bond rate between the date of the execution case and the date of sale, which was fixed for 18th July 1941 the total claim in the sale proclamation being Rs. 15,434-2-3. The learned Subordinate Judge has made a calculation of the amount due to the decree-holder at 8 per cent. simple interest on 3rd June 1938, the date of the application of the decree-holder in T. Ex. Case No. 34 of 1938. Making allowances for the payment of Rs. 98 the amount that would be due at the date of the final decree comes to Rs. 10,872-10-0, and then adding to this interest at 6 per cent. and making allowance for the realization of Rs. 2190 in T. Ex. Case No. 58 of 1936, the amount due to the decree-holder on the date of his application in T. Ex. Case No. 34 of 1938 would be approximately Rs. 11,700 which is less than the amount claimed by the decree-holder in that case, since he has made some deduction in the amount of interest claimed. The learned Judge therefore holds that as on the date of that application, namely, 3rd June 1938, the amount claimed by the decree-holder is less than the amount that would be calculated due to him applying the statutory limit of 8 per cent. simple interest, no relief would be obtained by the judgment-debtor hence the latter is not entitled to have the decree re-opened.

We have noted that there seems to be some difference of opinion as to the interpretation to be given to the final decree in the suit, the decree-holder having apparently claimed interest at the bond rate on the decretal amount for some of the period, while the learned Judge has calculated at the rate of 6 per cent. We mention this to make it clear that we express no opinion on this question of interpretation, since in the view we take the point is immaterial for our present purposes. It is clear that the learned Judge is wrong in applying as a test of the relief to be obtained by the debtor what the decree-holder may choose to claim in execution of his decree. The proper test is to weigh the actual amount of the liability in respect of total interest under the decree as against what the amount would be if calculated at the appropriate rate specified in S. 30. In the present case it is undisputed that the amount as decreed in the final decree in respect of interest exceeds the amount that could be decreed if the limits applicable under S. 36 (2) read with S. 30 (1) (c) are applied in

calculating the liability of the judgment-debtor. The decree in question is therefore to be re-opened under S. 36 (1) (a) and S. 36 (6) at the instance of the judgment-debtor. This rule is accordingly made absolute, the order of the trial Court is set aside, and the case will go back for it to pass orders in accordance with the law as directed above and as laid down in S. 36 of the Act. We make no order as to costs.

B. K. Mukherjea J.—I agree.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 66 (1)

HENDERSON J.

Kalipada Roy — Petitioner

v.

Satish Chandra Hui and others — Opposite Party.

Criminal Revn. Petn. No. 531 of 1941, Decided on 10th June 1941.

Criminal P. C. (1898), Ss. 144 and 145 —Dispute about possession of land — Likelihood of breach of peace — Proceedings under S. 145 should be instituted — Ex parte order under S. 144 is improper — Order directing police to reap paddy standing on land is illegal — Order under S. 144 set aside — No further proceeding under S. 145 or S. 146 — Order directing police to sell paddy and deposit money in Court to lie there indefinitely is illegal.

On an application alleging that a dispute about the possession of certain land was likely to lead to a breach of the peace, proceedings under S. 145 should be instituted. It is improper to pass an ex parte order under S. 144 and absolutely illegal to order police to reap the paddy standing on the land. After the order under S. 144 has been set aside and no further proceedings are taken under S. 145 or S. 146 it is illegal to direct the police to thrash the paddy, to sell it and to deposit the money in Court to lie there indefinitely. [P 66*d*,*f*]

Sudhansu Sekhar Mukherjee — for Petitioner.

Hiralal Ganguly — for Opposite Party.

Order. — The difficulty in this case is due to the fact that the Sub-divisional Magistrate passed an entirely illegal order. The opposite party filed an application under S. 144, Criminal P. C., alleging that there was a dispute likely to lead to a breach of the peace about the possession of a certain plot of land. The opposite party apparently persuaded the Magistrate that there was likely to be a breach of the peace; but, instead of adopting the sensible procedure of drawing up proceedings under S. 145, Criminal P. C., he took the ill-advised course of passing an ex parte order on the petitioner. He then made an absolutely illegal order directing the police to reap the paddy. As was almost inevitable the petitioner appealed to the District Magistrate who promptly set aside the ill-advised order under S. 144, Criminal P. C., and directed the Sub-divisional Magistrate to take proceedings under S. 145 if there was likely to be a breach of the peace. Either there never was any likelihood of a breach of the peace or the matter was settled temporarily by the action of the police. At any rate, no further proceedings were taken. The question, however, remained of the disposal of the paddy. The Magistrate ordered the police to thrash it and sell it and deposit the money in Court. Against that order the petitioner has obtained the present rule.

There is no justification whatever, in the absence of proceedings under S. 145 and an attachment order under S. 146, for detaining this money for an indefinite period in Court. Now it is a matter of common experience that the party who applies for an order under S. 144 is usually not in possession. The only object of applying for such an order is that he may seize possession behind the back of the party who is already there. The opposite party managed to obtain such an order but it has been set aside by the District Magistrate who pointed out that there were no grounds whatever for supposing that the opposite party is in possession of the disputed land. He, therefore, certainly cannot be allowed to reap any benefit from that ex parte order. Then, in the second place, if the opposite party was really in possession of the disputed land, I cannot conceive why he should be content with an order directing his money to remain in the custody of the Court apparently for ever. The fact that he remained content with that order is in itself sufficient to suggest that the petitioner was really in possession. If the opposite party has any title to the disputed land, he should establish it in proper proceedings. The rule is accordingly made absolute and I direct that the paddy be returned to the petitioner.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 66 (2)

AMEER ALI J.

Syed Abbas Ali

v.

Nawab Abid Jahan.

Application in Suit No. 1013 of 1933, Decided on 20th May 1941.

Trustee — Administration suit against, by beneficiary — Receiver appointed — Receiver is not trustee or his personal representative but represents estate — Creditor of estate can proceed against estate in aforesaid suit — But he

cannot ignore trustee or disregard matter of accounts — Trustee must be impleaded—Onus is on plaintiff to establish his claim—It is then for estate to prove that trustee is in default.

The receiver appointed in an administration suit against the trustee by a beneficiary represents the estate but he is not the trustee or a representative of the trustee. [P 67*g*]

No doubt a creditor of the estate can proceed against the estate in the aforesaid suit but the frame of the suit is not a mere matter of form so as to enable the creditor to ignore the trustee or to disregard matter of accounts or be excused from establishing his right against the estate through the medium of a clean account. A suit directly and solely against the receiver does not lie and the trustee must be made a party thereto. It cannot be presumed that the estate alone is liable: ('32) 19 A I R 1932 Cal 356 ; ('33) 20 A I R 1933 Cal 668 ; (1889) 23 L R Ir 333 and (1901) 1 Q B 108, *Rel. on.* [P 67*h*; P 68*a*,*b*]

The onus is on the creditor to establish his claim by clean accounting. It is then for the estate to show that the trustee is in default : Suit No. 1558 of 1930 and ('17) 4 A I R 1917 P C 6, *Rel. on.* [P 68*b*,*e*]

***F. Akbar* — for Applicant.**

Order. — The order which is sought by the receiver is upon a petition for directions originally moved before me on 5th April 1940. The prayer to the petition is to "give directions for the settlement of the suit." The application was made in the administration Suit No. 1013 of 1933.[1] The suit, the settlement of which was in question, was Suit No. 1950 of 1937, a suit brought by a lender to the late mutwalli against the receiver. On 24th April 1940, I gave a short judgment setting out what seemed to me the appropriate practice and directing the receiver to take the opinion of counsel. The petition was renewed on 22nd November 1940 with the opinion of counsel annexed. I then directed the receiver to take no action except upon a definite proposal of settlement. Such proposal has now been made by the plaintiff in the shape of an offer to accept a payment of Rs. 4200 on what is called an ex gratia basis—no order as to costs. The case, I am told, lasted six days and the costs on both sides must be heavy. In the normal case I should not have hesitated in directing the receiver to accept these terms—something not much more than half the original claim and no costs. This, however, is not the normal case. The law laid down in 60 Cal 801[2] and 36 C W N 193[3] was challenged by the plaintiff. It was a test case. Other claims of a similar, and possibly of a more meritorious nature remain, and the proposed settlement will make it embarrassing when these claims come to be renewed. The committee, however, of whom the counsel in the case is one, consider the settlement desirable. It will undoubtedly bring a matter which has long been pending to an end. In the event of an appeal, as Mr. Fazle Akbar pointed out, there is little chance of costs being recovered from the plaintiff. Moreover, the learned Judge trying the case has taken in the matter so much personal interest that it would be unbecoming on my part to exaggerate difficulties. I propose, therefore, to allow the receiver to compromise the suit upon the terms mentioned. I think, however, that in so doing I should reiterate shortly the grounds upon which leave to the receiver to defend the suit and to continue the defence of this suit was given.

To restate the position—there was an administration suit (No. 1013 of 1933[1]) against the mutwalli who died pending the suit. That is in law immaterial—his heirs were substituted. In this suit (No. 1950 of 1937) neither the mutwalli nor his heirs were impleaded. It was assumed by the plaintiff that because the loan had been made to the mutwalli or trustee, therefore, the estate is liable. In giving leave to the receiver to defend, the following principles were considered to apply : (1) Indemnity and subrogation—36 C W N 193[3] and 60 Cal 801.[2] (2) Frame of suit. It seemed to follow from the principle of indemnity and subrogation that a suit brought directly and solely against the beneficiary or the receiver does not lie. There existed one suit (No. 1013 of 1933)[1] by a beneficiary or beneficiaries for administration and accounts. In that suit a receiver was appointed. He may probably be taken to represent the estate or the beneficiaries. He is certainly not the trustee nor the personal representative of the trustee.

The second suit (No. 1950 of 1937) is upon a loan to the late trustee brought against the receiver. There has been no claim in the administration suit which is one of the courses clearly open to a creditor ; there has been no decree against the trustee in any other proceedings. In 60 Cal 801[2] at p. 812 it was assumed that a creditor of a trustee, an administrator, or mutwalli may proceed against the estate in the same suit as that brought against the trustee. It does not follow that the frame of the suit is a mere matter of form. The decision in 60 Cal 801[2]

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1. *Reported in* 47 C L J 28 A I R 1928 Cal 267 : 195 I C 240 : I L R (1940) 2 Cal 208, Syed Abbas v. Abid Jehan Begum.
2. ('33) 20 A I R 1933 Cal 668 : 149 I C 282 : 60 Cal 801, Mackintosh Burn, Ltd. v. Shivakali Kumar.
3. ('32) 19 A I R 1932 Cal 356 : 137 I C 500 : 59 Cal 586 : 54 C L J 328 : 36 C W N 193, Shailendranath Palit v. Hade Kaza Mane.

a should not be read as implying that a creditor can ignore the trustee, or disregard the matter of accounts, or is excused from establishing his right against the estate through the medium of a "clean account". In this suit, the suit of 1937, the trustee is not at all sued, no attempt as against him to establish let alone recover the debt has been made. See on this point (1889) 23 L R Ir 333[4] and (1901) 1 Q B 108[5] at p. 114 and the other cases cited in Seton, vol. II, p. 1499. That is the point relating to the constitution of the suit.

(3) The third question is one of onus. In this particular case the trustee or mutwalli had filed an account, the account required b under the Wakf Act, which did not show this loan to him as a loan taken for the wakf. There were no books. There was no suggestion of collusion between the receiver and the trustee or the trustees representatives. I was of opinion that the onus was upon the plaintiff. The question of onus arose in Ghasiram Bhuaniwalla v. Sm. Thakurani Kusum Kumari, No. 1558 of 1930, a suit by a trade creditor of an administratrix against the administratrix and the beneficiary. I was told by Mr. S. N. Banerjee, an unreported decision, to the effect that the onus is upon the estate to prove that the c trustee is in default. In the absence, however, of any reported decision the following extracts from the judgment in that suit still represent my opinion on the matter :

In my opinion the onus is upon *B*, the administratrix, and hence upon *A* who is seeking the benefit of the right of indemnity. *B* would fail without any proof, i. e., without any accounting I think that is so both according to principle, to the provisions of the Evidence Act and to the English authorities : *see* cases cited in Seton Vol. II, p. 1499 I am not unmindful of S. 114, Evidence Act, and the presumption of regularity but I do not think such presumption takes the place of accounts or counteracts accounts obviously defective. Clearly, however, the onus may shift (reference to 40 Mad 402[6] at pp. 408 and 409).

d The case of subrogation and indemnity is clearly distinguishable from the case of necessity or necessaries. The administratrix or trustee or mutwalli is no doubt vis a vis the beneficiary, a 'third party'. But third parties in law may not be third parties in fact. There may be circumstances sufficient to indicate that the trustee and beneficiary are combining against the lender, and thus to create a presumption that the books, if produced, would support the plaintiff's claim.

It seems to me, therefore, generally speaking, that accounting involves (i) establishing that the money was taken for the purposes of administration. (ii) That the money was spent on the estate. e (iii) That on balance of accounts, *B* has not in fact taken or reimbursed herself from the income of the estate.

In other words she is a creditor of the estate. The accounting party has to show 'clean accounts' before he or she can at law claim an order or decree for payment out of the estate.

On the other hand I think that once having accounted and there being accounts prima facie in order showing *B* to be a creditor of the estate, the onus will then fall upon the beneficiary to show that account notwithstanding, *B* is in some special default.

It was for reasons above indicated indemnity and subrogation, defective frame of the suit, and onus, that leave to defend was given to the receiver in this case. The receiver is given leave to compromise the suit f upon the terms mentioned in the letter placed before me of 12th May 1941. He may take the costs of this application out of the estate as between attorney and client. Certified for counsel.

G.N./R.K. *Order accordingly.*

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HENDERSON J.

Amjad Talukdar — *Petitioner*

v.

Rohini Kanta Bhattacharjya and others — *Opposite Party.* g

Civil Rule No. 1142 of 1940, Decided on 5th May 1941, issued from order of Sub-Judge, 2nd Court, Mymensingh, D/- 21st May 1940.

Bengal Tenancy Act (8 of 1885, as amended by Act 6 of 1938), Ss. 26-F and 22 — Landlord purchasing share in occupancy holding can pre-empt.

The purchaser of a share in an occupancy holding even if he be the landlord is entitled to pre-empt under S 26-F, there being no merger of his interest as landlord and as tenant of occupancy holding.

[P 69a,b]

Hemendra Kumar Das, Ramendra Chandra Roy and Chandra Nath Mukherjee—for Petitioner.

Abani Kanto Roy—for Opposite Party.

Order. — This is a rule calling upon the h opposite parties to show cause why an order of the Courts below allowing the application of opposite parties 1 and 2 for pre-emption should not be set aside. The question for determination is whether opposite parties 1 and 2 were cosharers of opposite parties 5 and 6, petitioner's vendors, within the meaning of S. 26F, Ben. Ten. Act. Opposite parties 1 to 4 purchased 8 annas share in the tenancy. They are also the landlords. The contention made on behalf of the petitioner is that this deprives them of the right to pre-empt. The munsif held that inasmuch as there was no merger, the tenancy still exists. The petitioners have a share in it

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4. (1889) 23 L R Ir 333, In re Morris.

5. (1901) 1 Q B 108 : 70 L J Q B 53 : 83 L T 506 : 8 Manson 14, Jennings v. Mather.

6. ('17) 4 A I R 1917 P C 6 : 39 I C 659 : 40 Mad 402 : 44 I A 98 (P C), Murugesam Pillai v. Gnana Sambhandha Pandara Sannadhi.

and consequently the right to pre-empt. In support of the rule Mr. Das relies on the definition of tenant in the Bengal Tenancy Act, which apparently excludes the idea of a man holding land under himself. The Subordinate Judge got over the difficulty by pointing out that each of the petitioners holds under his cosharers. On this view the sole landlord has no right to pre-empt while a cosharer landlord has. In my judgment the view taken by the learned Munsif is right. There has admittedly been no merger, and accordingly the occupancy holding still exists. If opposite parties 1 to 4, have no interest in it on account of the fact that they are the landlords, then it must belong entirely to opposite parties 5 and 6. This is absurd, as their share is admittedly 8 annas. Under the provisions of S. 22, Ben. Ten. Act, the interest of opposite parties 1 to 4 as landlords has been kept distinct from their interests as tenants. They were therefore cosharers of opposite parties 5 and 6. The rule is discharged with costs to opposite parties 1 and 2, hearing fee one gold mohur.

G.N./R.K. *Rule discharged.*

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R. C. MITTER AND KHUNDKAR JJ.

Satya Narayan Banerjee and another — *Plaintiffs* — *Appellants*

v.

Radha Nath Das and others — *Defendants* — *Respondents.*

Appeal No. 212 of 1940, Decided on 6th August 1941, from original decree of First Addl. Sub-Judge, 24-Parganas, D/- 12th November 1940.

(a) Civil P. C. (1908), O. 1, R. 9 and O. 2, R. 7—Suit bad for misjoinder of parties and causes of action — Defect is not fatal to suit unless plaintiff refuses to elect cause of action to be proceeded with.

The defect of a suit being bad for misjoinder of parties and causes of action is not fatal to the suit unless the plaintiff refuses to elect as to which of the causes of action he would proceed with. [P 70*f*]

(b) Bengal Money-lenders Act (10 of 1940), S. 36 (1), (2), (6) and S. 36 (1) Proviso — Suit under S. 36 (1) can be filed even after decree for recovery of loan has been passed.

Section 36 (1) Proviso and S. 36 (2) make it clear that the suit by the debtor under S. 36 (1) can be filed even after the decree for the recovery of the loan has been passed. Fact that S. 36 (6) would afford adequate relief to the debtor in such a case is no bar to the aforesaid suit. [P 71*c*,*d*]

(c) Civil P. C. (1908), Ss. 15 to 20—No provision in special Act—Civil Procedure Code must govern place of suing — Special Act providing forum—Suit must be filed there.

In the absence of any provision in a special Act, the Civil Procedure Code must govern the place of institution of suits. But if the special Act specifies a particular forum for the institution of a suit of a particular nature that suit must be instituted in that particular forum. [P 71*e*]

(d) Civil P. C. (1908), Ss. 17 and 16—Phrase "relief respecting . . . . immovable property" in S. 17 — Scope.

The phrase "relief respecting . . . . immovable property" in S. 17 has not the effect of including in that section suits relating to immovable property of a nature different from suits in respect thereto as are specified in S. 16 (a) to (e). [P 72*a*]

(e) Bengal Money-lenders Act (10 of 1940), S. 36 (1)—Suit under S. 36 (1) can be instituted only in Court which passed decree sought to be reopened—Mortgage decree passed by Calcutta High Court — Some of mortgaged properties situate within Alipore Court's jurisdiction in 24-Parganas and some of defendants also residing there—Suit under S. 36 (1) to reopen decree filed in Alipore Court—Ss. 16, 17 and 20 (c), Civil P. C., held did not apply — Suit could be instituted at Alipore only by reason of S. 20 (b), Civil P. C.—But S. 20 (a) and (b) being excluded by S. 36 (2) of Bengal Act, Alipore Court held had no jurisdiction to entertain suit — Calcutta High Court alone held had jurisdiction.

Section 36 (2) indicates that the suit under S. 36 (1) must be instituted in the Court which had passed the decree for recovery of the loan at the suit of the creditor and in no other Court. The Court which can entertain a suit under S. 36 (1) must be the Court which can also pass the new decree. The fact that some of the immovable properties included in the mortgage are situate within the local limits of a Court other than the Court which passed the decree on the basis of that mortgage is a fortuitous circumstance, which has no legal significance on the matter of jurisdiction of the Court to reopen the mortgage decree. [P 72*c*,*d*,*e*]

The suit under S. 36 (1) to reopen a mortgage decree passed by the Calcutta High Court was instituted in the Court at Alipore in the 24-Parganas as some of the immovable properties comprised in the mortgage were situate within the jurisdiction of the Alipore Court and some of the defendants also resided there. The decrees were not transferred to the Alipore Court for execution but were being executed by the Calcutta High Court on the original side :

Held that Ss. 16, 17 and 20 (c), Civil P. C., were inapplicable and the suit could be instituted in the Alipore Court only under S. 20 (b) not because some of the mortgaged properties were situate within its limits but because some of the defendants resided there. But S. 20 (a) and (b) was necessarily excluded by S. 36 (2) of the Bengal Act as the Alipore Court where some of the defendants resided would not have jurisdiction to pass a new mortgage decree. Therefore, the Alipore Court had no jurisdiction to entertain the suit under S. 36 (1) which could only be instituted in the Calcutta High Court. [P 71*g*; P 72*d*,*f*,*g*]

G. C. Sen, Abinash Chandra Ghose and Durgadas Ray — for Appellants.

G. N. Das and Nanibhusan Mukherjee — for Respondents.

Judgment. — On 12th July 1933 Ram Narayan Bannerjee, plaintiff 2, borrowed Rs. 6000 from Harihar Dass on the security of a mortgage which comprised immovable

properties, some situate within the ordinary original jurisdiction of this Court and others situate in the district of 24-Parganas. The mortgagee instituted with the leave of this Court a suit No. 1507 of 1937, in the original side of this Court. The preliminary decree was passed on 21st February 1938 and the final decree sometime thereafter. On 23rd February 1934, Satya Narayan Bannerjee, plaintiff 1, borrowed a sum of Rs. 6000 also from Harihar Dass on a mortgage which also comprised properties some of which were within the ordinary original jurisdiction of this Court and the remaining properties were within the jurisdiction of the Alipore Court. The mortgagee instituted Suit No. 1508 of 1937 in the original side of this Court. The preliminary decree was passed on 21st February 1938 and the final decree some time thereafter. On 31st July 1935 both the plaintiffs borrowed Rs. 23,000 from Harihar Dass and three other persons. The mortgage executed to secure this loan also comprised, as in other two cases properties situate in Calcutta and in the district of 24-Parganas. The mortgagees instituted in the original side of this Court their suit, No. 1455 of 1937, to enforce this mortgage, recovered the preliminary decree on 17th December 1937 and the final decree on 24th August 1938. All three loans carried interest at the rate of 12 per cent. per annum with quarterly rests. The three decrees passed by this Court allowed interest at that rate till the time fixed for redemption and thereafter simple interest at 6 per cent.

Execution proceedings were duly started in the original side of this Court, and as some of the properties were common to all three mortgages, those common properties have been advertised for sale in execution of all the three decrees. The said execution proceedings are still pending. The Bengal Money-lenders Act (10 of 1940) came into force on 1st September 1940. On 2nd September 1940 the plaintiffs filed this suit in the Court of the Subordinate Judge at Alipore. They impleaded as defendants the heirs of Harihar Dass who had died on 5th August 1938, as also the other mortgagee decree-holders in Suit No. 1455 of 1937. The last mentioned persons have no interest in the first two mortgages or in the decrees passed on them. In the plaint it is stated that the defendants are only entitled to charge simple interest at rates not more than 8 per cent. per annum, and that a certain sum of money was retained by the mortgagees as capitalist's commission at the time of the advance of Rs. 23,000. The plaintiffs have brought the suit under S. 36, Bengal Money-lenders Act, and pray that the three decrees passed by this Court may be reopened and new decrees passed by the Subordinate Judge giving them instalments. The defendants raised two preliminary issues, namely, (i) that that Court had no jurisdiction to entertain the suit and (ii) the suit as framed was bad for misjoinder of parties and causes of action.

The learned Subordinate Judge upheld both these contentions and has dismissed the suit with costs. The plaintiffs have preferred this appeal. Mr. Sen appearing for them in the end conceded that the suit is bad for misjoinder of parties and causes of action, but he contended that if the Subordinate Judge of Alipore had jurisdiction, that defect cannot be fatal to the suit. In that event, his clients would have to be given the opportunity to elect and say which are of the three causes of action they would proceed with and it is only in the event of their refusing to elect that the suit can be dismissed. This, in our judgment, is a sound position. The only question of importance, therefore, is whether the learned Subordinate Judge at Alipore had jurisdiction to entertain the suit. Before dealing with this point we will consider a point of law raised by Mr. Das appearing for the respondents, a point which does not seem to have been urged in the Court below or in any of the reported decisions of this Court. As the point is of general importance and depends solely upon the construction of S. 36, Bengal Money-lenders Act, we have allowed him to urge the same. The point is that after a decree has been passed for the recovery of the loan at the suit of the creditor, a suit would not lie at the instance of the borrower but his only remedy is to proceed under sub-s. (6) of S. 36. An analysis of S. 36 discloses that a borrower can claim relief in the following manner: (1) if the suit for recovery of the loan is pending at the time, then in the suit itself (sub-s. 1); (2) in an appeal from the decree passed in that suit (sub-s. 6 cl. (b)), (3) if that suit had already been finally decreed and the decree not fully satisfied, then (a) by means of an application moved before the Court which had passed the decree at the stage of execution (sub-s. 6, cl. (a), sub-cl. (i)); (b) by an application for review (sub-s. 6, cl. (a), sub-cl. (ii)); (4) by a suit (sub-s. 1).

Mr. Das's contention is that the fourth remedy is available only when no decree has

been passed for the recovery of the loan. The drafting of the Act, especially of S. 36 leaves much to be desired and there is scope for improvement but that is a matter for consideration for the Legislature. We have to find out the intention from the provisions as they are. We cannot, however, accept the aforesaid contention of Mr. Das for the following reasons. A loan may be either an unsecured loan or a secured loan. A suit by the debtor for relief before the creditor has filed his suit to enforce his dues and has obtained a decree would necessarily be a suit for the determination of the amount then due from him not on the basis of contract but on the basis of these provisions of the Bengal Money-lenders Act which modify the terms of the contract. In the case of a secured loan that can be done by a suit for redemption. In the case of an unsecured loan as also of a secured loan that purpose would be accomplished through S. 38. For in hearing an application made under S. 38 of the Act the Court has to follow, so far as they may be applicable, the provisions contained in Chapters 6 and 7 of the Act.

It was, therefore, unnecessary for the Legislature to provide for a suit by the debtor in sub-s. (1) of S. 36 if the intention of the Legislature was to confine such a suit only to the case where a decree has not been passed on the loan at the instance of the creditor. That is a circumstance that must be taken into consideration. But whatever may be the meaning and the precise effect of the phrase "other than a decree in a suit to which this Act applies" employed in the second proviso to sub-s. (1) of S. 36, that proviso and sub-s. (2) of S. 36 indicate that the suit, which the debtor is given the right to institute by the provisions of sub-s. (1) of S. 36 can be filed even after a decree has been passed for the recovery of the loan. We do not accordingly see our way to accept Mr. Das's contention to the effect that as the procedure indicated in sub-s. (6) of S. 36 would afford adequate relief to the debtor when a decree for the recovery of the loan had already been passed it ought not to be assumed that the Legislature had intended to give the debtor the right to pursue the same remedy by a suit also. Whatever observation we have made above must not however be taken to have decided that a debtor cannot file a suit under S. 36, sub-s. (1) to claim the reliefs mentioned therein where no decree for the recovery of the loan at the suit of the creditor had been passed.

We accordingly hold that the suit which we have before us is maintainable, and the only question at this stage is, whether the Subordinate Judge of 24-Parganas had jurisdiction to entertain it, a question which we now proceed to decide, having in mind the fact that it is a suit for re-opening the mortgage decrees passed by the original side of this Court and for having new decrees passed in these mortgage suits. In the absence of any provision enacted by a special Act, the provisions of the Civil Procedure Code must govern the place of institution of suits. It is also clear that if a special Act has specified a particular forum for the institution of a suit of a particular nature that suit must be instituted in that particular forum. On these principles, it has been contended by the learned advocate for the appellants that as there is no special provision in the Bengal Money-lenders Act specifying the forum for a suit by the debtor under the provisions of S. 36 of that Act, the forum must be determined by the rules contained in the Code of Civil Procedure. It is further contended that the institution of a suit of the nature we have before us must be governed by either S. 16, sub-s. (d), or by S. 17 or at any rate by S. 20, Civil P. C., and it is said that whichever of the aforesaid sections may be applicable, the Subordinate Judge of 24-Parganas had jurisdiction to entertain this suit, as some of the immovable properties included in the mortgages were in the district of 24-Parganas, and as two of the defendants reside within the jurisdiction of that Court.

We will first examine the last mentioned branch of the argument and see in the first instance which of the aforesaid sections of the Civil Procedure Code would have been applicable on the assumption that there is no provision, express or implied, in the Bengal Money-lenders Act on the subject. In our judgment Ss. 16, 17 and 20 (c) are out of question. The suit is a suit for re-opening the mortgage decrees passed by this Court in the exercise of its ordinary original jurisdiction. It is not a suit for the determination of any right to or interest in immovable property. So it does not fall within the provisions of S. 16. Section 17 has no application. That section only supplements the provisions of S. 16. Section 16 enacts that suits concerning immovable property of the description mentioned in sub-ss. (a) to (e) of that section will have to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situate, the only exception being what is enacted in the proviso.

The meaning of S. 17 is that where the

immovable property in suit is situate within the local limits of the jurisdiction of two or more Courts, the suit claiming the reliefs mentioned in S. 16 may be instituted in any one of those Courts. The phrase "relief respecting . . . immovable property" mentioned in S. 17 has not the effect of including in that section suits relating to immovable property of a nature different from suits in respect thereto as are specified in S. 16, sub-ss. (a) to (e). The Legislature could not have but employed that phrase, for different kinds of reliefs in respect of immovable property have been mentioned in S. 16. Section 20 (c) also could not have had any application for the cause of action for such a suit did not arise wholly or partly within the jurisdiction of the Courts of 24-Parganas. The subject-matters of the suit are the three decrees passed by this Court. Those decrees have not been sent for execution to a Court exercising jurisdiction in the district of 24-Parganas. They are being executed in the original side of this Court. On this view of the matter the Court of the Subordinate Judge of 24-Parganas could have had jurisdiction only under section 20 (b) as some of the defendants reside within the local limits of his jurisdiction. The position being thus cleared up we now proceed to examine the relevant provisions of the Bengal Money-lenders Act.

Section 36 of the Act gives power to the Court to re-open a decree passed in favour of the creditor, if that is necessary for giving the debtor any of the reliefs mentioned in that section. But if the decree is re-opened by the Court, it is made obligatory on the Court to pass a new decree. The provision is not that one Court should re-open the decree and another Court is to pass the new decree. It necessarily follows from this that the Court which can entertain a suit under S. 36, sub-s. (1) must be the Court which can also pass the new decree. Where the decree asked to be re-opened is a mortgage decree, the Court having jurisdiction over the place of residence of the defendant or some of the defendants creditors would not have jurisdiction to pass the new mortgage decree. Section 20, cls. (a) and (b) are thus necessarily excluded by reason of the provisions of S. 36, sub-s. (2), Bengal Money-lenders Act. That sub-section furnishes the clue to the intention of the Bengal Legislature, which in our judgment is that the suit which the debtor is given the right to institute under Sec. 36, sub-s. (1) must be instituted in the Court which had passed the decree for recovery of the loan at the suit of the creditor and in no other Court. The fact that in the case before us some of the immovable properties included in the mortgages are situate within the local limits of the Court exercising jurisdiction in the district of 24-Parganas is a fortuitous circumstance, which has no legal significance on the matter of jurisdiction of the Court, for as we have pointed out that if there was no indication in the Bengal Money-lenders Act, such a suit could only have been entertained by the Court of 24-Parganas, not because a portion of the immovable properties are there, but because some of the defendants reside within the district.

On principle the matter would stand on the same footing as the case where the mortgage decree had been passed by this Court in the exercise of its ordinary original jurisdiction and some of the mortgage properties were within that jurisdiction and the rest were within the local limits of the district of Hughli, but the mortgagee defendants, some or all, were residing in the district of 24-Parganas. In such a case on the view we have expressed above the Court of the Subordinate Judge at 24-Parganas would not have been able to entertain the suit by the judgment-debtors under sub-s. (1) of S. 36 as that Court would not have been in a position to pass a new mortgage decree on re-opening the mortgage decree passed by this Court, as none of the immovable properties included within the mortgage was within its local limits. We accordingly hold that the suit, which we have before us, was instituted in a Court which had no jurisdiction to entertain it. The appeal is accordingly dismissed. As the case is of first impression and as the inartistic drafting of S. 36, Bengal Money-lenders Act, is to a great extent responsible for inducing the plaintiffs to file their suit in a Court, where they thought they could have had relief at a much less cost than if they had invoked the jurisdiction of this Court, in its ordinary original jurisdiction, we direct each party to bear their respective costs throughout.

G.N./R.K. *Appeal dismissed.*

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EDGLEY AND BISWAS JJ.

Pabna District Board — Defendant 2 — Appellant

v.

Ranjit Chandra Lahiri, Plaintiff and others — Respondents.

Appeal No. 1351 of 1938, Decided on 30th July 1941, from appellate decree of Sub-Judge, 2nd Court, Pabna and Bogra at Pabna, D/- 12th May 1938.

(a) Bengal Local Self-Government Act (3 of 1885), S. 86-A — Sanction under S. 86-A must specify amount to be recovered.

The sanction of the Local Government under S. 86-A will not be valid or complete unless it expressly mentions the amounts the recovery of which is sought to be authorised thereby. [P 74*e*]

(b) Bengal Local Self-Government Act (3 of 1885), S. 86-A—Under S. 86-A toll can be levied only on bridge in respect of which sanction is given—New bridge different from old—Sanction in connection with old bridge cannot justify imposition of toll on new bridge.

Under S. 86-A the toll can be recovered only from persons using a bridge in respect of which sanction is given. Where, therefore, the new bridge is different from the old one any sanction that might have been obtained in connection with the old bridge cannot justify any imposition on any one passing over the new bridge. [P 74*f*, *g*]

(c) Bengal Local Self-Government Act (3 of 1885), S. 86-A (1)—Old bridge constructed out of District Board fund dismantled and new bridge constructed on same site by Road Board set up by Central Government — New bridge taken over by District Board though its cost borne by Road Board—Outstanding balance due on account of tolls in respect of old bridge cannot be treated as contribution within S. 86-A (1)—New bridge does not come within S. 86-A (1).

The old bridge constructed out of the District Board fund was dismantled and a new one on the same site was constructed by the Road Board set up by the Central Government. The new bridge was ultimately meant to be and was in fact taken over by the District Board but the cost was borne by the Road Board. The materials of the old bridge only of the value of Rs. 250 were utilized in the construction of the new bridge :

Held that the new bridge was different from the old and did not come within the purview of S. 86 A (1) as the outstanding balance which was due on account of tolls in respect of the old bridge could not be regarded as a contribution of the District Board to the new bridge. Even if the amount remaining unrealised on account of the old bridge and the value of the materials of the old bridge used in the construction of the new could be regarded as contribution the bridge could not be brought within S. 86-A (1) as the total fell far short of the limit of Rs. 5000 laid down in S. 86-A proviso (2).

[P 74*g*,*h*; P 75*e*,*f*,*h*; P 76*a*]

Hamidul Huq and Obaidul Huq — for Appellant.

Phanibhusan Chakrabarti and Amaresh Chandra Ray — for Respondents.

Biswas J. — This is an appeal on behalf of defendant 2, the District Board of Pabna, and arises out of a suit which was commenced by the plaintiff, who is a leading lawyer of Pabna, for refund of a sum of eight annas said to have been recovered from him as a bridge toll. The question is as to the legality of this imposition. The facts of the case are shortly as follows : In the year 1929 a bridge known as the Manoharpur Bridge was constructed by the District Board out of its own funds at a cost of Rs. 18,000 and it appears that the District Board thereupon obtained the sanction of the Local Government for the establishment of a toll-bar on this bridge and the levy of a toll on persons, vehicles and animals passing over the bridge under the provisions of S. 86A, Local Self-Government Act (Bengal Act 3 of 1885). That sanction was contained in letter dated 6th June 1929, which is Ex. E in the case. Recently, the Road Board which is a body set up by the Central Government undertook the construction of a new bridge on the same site. This bridge was ultimately meant to be, and was in fact, taken over by the District Board, but the cost was borne by the Road Board. Only some old materials from the old bridge which was admittedly dismantled for the purpose were used in its construction. During the progress of the work a diversion road was made through the river bed for the temporary passage of traffic.

The plaintiff's case is that he was required to pay a toll of two annas on each of four occasions when he drove his car, three times over the diversion road and once over the bridge. He says this was an unauthorised levy, and has accordingly brought this suit for recovery of the amount which he was thus called upon to pay. The plaintiff also asked for recovery of a sum of Rs. 10 as special damage for the wrongful levy. There were two other defendants in the suit besides the District Board, namely defendants 1 and 3. Defendant 3 is a person to whom the District Board had leased the right of realising the tolls, and defendant 1 who actually collected the money was a servant of defendant 3.

The learned Munsif decreed the suit so far as the tolls realized in respect of the diversion road were concerned, but in regard to the toll paid for driving the car over the bridge itself, he held the levy was justified and rejected the claim. He also rejected the prayer for special damage. In the result, he made a decree for six annas only in the plaintiff's favour. Appeals were taken against this decision to the learned Subordinate Judge by both parties. So far as the decree for six annas was concerned, it was upheld and has become final, and we are not concerned with it in the present appeal. As for the claim for two annas which was dismissed, the Court however reversed the judgment of the learned Munsif, holding that the imposition was illegal and not covered by any valid sanction, and in that view he passed a decree for this amount. Hence the present appeal by the defendant District Board. The matter has been argued at length before us

by Mr. Hamidul Huq on behalf of the Board, but we are not at all satisfied that he has made out a case in favour of his clients. The question depends on the effect of S. 86A, Local Self-Government Act. This section—to quote only the relevant portions—provides that:

> The District Board, with the sanction of the Local Government, may establish a toll-bar on any bridge in the district which has, after the date of the commencement of the Bengal Local Self-Government (Amendment) Act, 1908, been constructed or purchased out of the District Fund or to the cost of the construction or purchase of which contribution has, after the said date, been made out of the District Fund .... and may levy tolls at such toll-bar on persons, vehicles and animals passing over such bridge.

There is an important proviso to this section, which lays down that "no toll-bar shall be established or tolls levied otherwise than for the purpose of recovering" certain amounts which are specifically set out in cls. (a) to (d) of the proviso. Clause (a) authorises the recovery of "expenses incurred by the District Board in constructing, purchasing, contributing to or widening such bridge," and clause (d) of

> the capitalized value of the estimated cost to the District Board of maintaining such bridge ..... and of renewing it, if it requires renewal.

This is followed by a further proviso that

> no toll-bar shall be established or tolls levied on or in respect of any bridge ..... the cost or estimated cost of which, as indicated in cls. (a), (b) and (d) of proviso (1), was or is less than five thousand rupees.

It is not disputed that there was a proper sanction under this section in respect of the bridge which was constructed in 1929. As already stated, this sanction was contained in a letter of 6th June 1929 (EX. E), and it was expressed in terms of the section itself. It was directed therein that under S. 86M (2) of the Act the toll-bar should be removed as soon as the charges had been recovered, the period of recovery being limited to 12 years from the date of the sanction. Directions were also given for keeping a special account of the recoveries in a prescribed form. The total cost of construction was estimated by the District Board at the round figure of Rs. 18,000, and this was accepted by the Government as the amount recoverable. The letter went on to point out that the District Board had apparently overlooked the possibility of having to undertake the renewal of the bridge in due course as distinct from its maintenance by repairs, and it was stated that should such renewal be undertaken at a later stage and the cost thereof increase the charges recoverable on the authority of the sanction given, the District Board should make a further report to Government. With reference to this portion of the letter, we may state at once that in our opinion it is impossible to regard this as sufficient authority for recovery of the cost of future renewal without further sanction. We cannot accept the argument that the sanction under S. 86A need not specify the amounts to be recovered under one or more of the clauses set out in proviso (1). The section must be read as a whole, including the proviso, and if it is so read, there can be no doubt that the sanction will not be valid or complete unless it expressly mentions the amounts the recovery of which is sought to be authorized thereby.

It is admitted that the District Board did not in fact apply for any fresh sanction under S. 86A for the establishment of a toll-bar or the levy of tolls in respect of the new bridge, and it is mainly on this fact that the plaintiff relies for the purpose of showing that the toll which was levied on him was illegal. The terms of the section make it quite clear that the toll can be recovered only from persons using a bridge in respect of which sanction is given. If, therefore, the new bridge was different from the old one, it follows that any sanction that might have been obtained in connexion with the old bridge could not possibly justify any imposition on any one passing over the new bridge. From this point of view, there seems to be no answer to the plaintiff's claim, but as indicated, this rests on the assumption that the new bridge is not the same as the old one, and it rests also on the basis that another letter from Government dated 26th August 1935, EX. F in the case, to be presently referred to, does not amount to a specific sanction in respect of the new bridge.

So far as the first point is concerned, we are not at all convinced by Mr. Huq's arguments that the new bridge must be taken to be the old one in another garb. That is not so in fact, and both the Courts below have definitely held and proceeded on the view that the bridge which was completed in 1937 was an altogether new bridge, though it might have been erected on the same site as the former bridge The dimensions were different, the structure was different, and except that materials of the value of about Rs. 250 only were used from the old bridge, there is no sort of connexion whatever between the one and the other. As the old bridge had ceased to exist, it is obvious that no toll could be recovered, on the authority

of the sanction obtained for that bridge, from a person using the new bridge. This takes us to the other point which was raised by Mr. Huq on the strength of the letter of 26th August 1935. His contention was that this letter was in effect a new sanction which the District Board obtained from the Government for the new bridge. It appears, however, on reference to this document that no such sanction had been asked for by the District Board, and no such sanction was actually given by this letter. All that the District Board had asked for was a ruling from the Government on the question whether the District Board would be entitled to continue levying tolls on the old bridge even after it had been reconstructed with grants from the Central Road Fund. In reply the Government merely conveyed the legal advice which they had obtained on the point. It was stated

> that Government are advised that the balance outstanding on the old bridge should be considered as part of the total cost of the new bridge and should be taken as the contribution of the District Board towards the cost of the new bridge,

and it was finally added that "in the circumstances, the District Board would be entitled to continue levying the toll till the balance due was realized." Mr. Huq laid stress on this concluding sentence, but as we read it, it is only a part of the legal advice which the Government were conveying to the District Board. We are unable to hold that Government intended to convey any new sanction by this letter in respect of the new bridge. That ought to dispose of the point raised by Mr. Huq, and if this letter is not effective as a sanction, there is nothing else on which the defendant board can rely for the purpose of justifying the levy of the toll from the plaintiff. In the view we take of this letter, it is not necessary to refer to the other difficulties which stand in the appellant's way, but having regard to the importance of the case, we might perhaps notice one or two of the further points which were raised. For one thing, it is difficult to see how the present bridge could at all be brought within the description given in cl. (1) of S. 86A. On the facts of the case, the bridge was admittedly not a bridge constructed or purchased out of the District Fund. But it was argued that it was a bridge to the cost of construction of which a contribution had been made out of the District Fund within the meaning of this clause. Mr. Huq, however, was unable to point out what the contribution was, except to indicate that some materials of the old bridge had been used for the construction of the new bridge. Whether this could be regarded as a contribution out of the District Fund or not, a point which is not wholly free from difficulty, having regard to the provisions of Ss. 52 and 53, it does not appear that the contribution was anything approaching the limit which is laid down in proviso (2) of S. 86A. The evidence of the contractor to the District Board is that the value of the materials used was Rs. 250 and this evidence remains unchallenged, and was accepted by both the Courts below as correct.

Mr. Huq, realizing the difficulty of his case, sought to argue that the outstanding balance which was due on account of tolls in respect of the old bridge should also be regarded as a part of the contribution of the District Board to the new bridge. This is an argument which one finds it extremely difficult to appreciate, much less to accept. This is no doubt the view which was indicated by Government in their letter of 26th August 1935. But one does not see how any amount which might have remained unrealised on account of the old bridge could be regarded as a contribution by the District Board towards the cost of the new bridge. Mr. Huq referred us to cl. (b) of the proviso to S. 86A for the purpose of showing that such unrealized amount would be the loss which the District Board suffered by reason of the dismantling of the old bridge necessitated by the construction of the new bridge, and contended that it should, therefore, be regarded as a part of the board's contribution. Clause (b), however, is a special provision regarding loss which the Board may suffer in having to pay compensation to owners of private ferries. We do not think it is possible to draw any argument by way of analogy from this provision so as to cover the case of unrealized amounts of tolls in respect of a bridge. The very fact that special provision is made in cl. (b) suggests that if a similar rule was intended to apply in the case of unrealized tolls for bridges, the Legislature would have made a similar provision in specific terms. We are unable, therefore, to hold that the District Board's contribution to the construction of the new bridge can be said to amount to anything more than the value of the old materials.

It may be further pointed out that from a statement of accounts which is on the record it appears that at the end of 1936-37 a total sum of Rs. 1688-9-0 only was still outstanding. Even if this sum be added to the value of the old materials which were used, the

total would fall far short of Rs. 5000, the limit laid down in proviso (2). Mr. Huq drew attention to the fact that the amount outstanding at the end of the previous year was much higher and much nearer to this limit, namely, a sum of Rs. 4739-7-0. This cannot however justify any inference as to the precise amount outstanding at the material date. The new bridge was completed somewhere about May 1937, and it may be added that the plaintiff's car actually passed over the bridge on 11th June in that year. We are satisfied, therefore, that on no account can the new bridge be regarded as one which comes under cl. (1) to S. 86A, and this ought to put the defendant District Board out of Court. The result is that in our opinion the decree made by the learned Subordinate Judge must be affirmed, and this appeal dismissed with costs. We order accordingly.

Edgley J.—I agree.

G.N./R.K. *Appeal dismissed.*

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PANCKRIDGE J.

Tapendra Chunder Goopta

v.

Jogendra Chunder Goopta and others.

Application in Suit No. 1025 of 1935, Decided on 7th May 1941.

(a) Solicitor and client — Costs — Attorney practising on original side of High Court can ask High Court to direct that personal property recovered under judgment obtained by his exertions stand security for costs of recovery — Power to make aforesaid order is discretionary — Fund in Court — Solicitor's lien is absolute charge thereon — Order directing payment to parties out of fund in Court cannot be said to override attorney's lien or show that attorney has waived it — Assertion of his lien by attorney against client on whose behalf he is applying for payment of fund in Court is improper.

An attorney practising on the original side of the High Court has subject to the rules, the rights enjoyed at common law by solicitors, attorneys and proctors in England prior to the Judicature Act, 1873, under which the three classes of practitioners were abolished, and all became solicitors of the Supreme Court of Judicature and can ask the High Court to direct that personal property, recovered under a judgment obtained by his exertions, stand security for the costs of recovery. The power of the High Court to make an order enforcing the lien is however discretionary. An attorney's position is even stronger with regard to a fund in Court. When there is a fund in Court, the solicitor's lien independently of the statute, and without any declaration thereunder, is an absolute charge thereon, and has priority over any other assignment or charging order obtained with or without actual notice : ('35) 22 A I R 1935 Cal 168, *Rel. on.* [P 77*c*,*d*]

An order for payment to the parties out of the fund in Court never formally reserves the attorney's lien and consequently the order cannot be said to override the lien or show that attorney has waived it. [P 77*f*]

It is improper for an attorney to assert his lien against the client on whose behalf he is making an application for order for payment of fund in Court. [P 77*f*,*g*]

(b) Solicitor and client — Firm of solicitors dissolved — Dissolution amounts to discharge of solicitors by themselves — But they do not lose their lien over fund in Court recovered by their exertions before dissolution.

The dissolution of a firm of solicitors amounts to a discharge of the solicitors by themselves but it does not entail loss of their lien over a fund in Court recovered by their exertions before dissolution : (1843) 2 Hare 587, *Ref.* [P 77*g*,*h*; P 78*a*]

(c) Partnership Act (1932), S. 69 (2) — Firm registered — Retirement of partner dissolves firm — Partners shown in register as partners — Firm so far as registration is concerned must be deemed to be registered and can sue.

The retirement of a partner occasions the dissolution of the firm but so far as registration is concerned the firm must be deemed to be still registered and so long as the partners suing are shown in the register as partners, the firm, notwithstanding the retirement of one of the original partners, remains a registered firm and can sue : ('40) 27 A I R 1940 Bom 257, *Rel. on.* [P 78*e*,*f*,*g*,*h*]

B. C. Ghose — for Applicant.

S. R. Das — for Respondents.

Order.—This is an application by a firm of attorneys, who carry on business under the name and style of H. N. Dutta & Co., and another attorney, Mr. D. C. Mitter. H. N. Dutta & Co. consist of three partners. When the warrant of attorney in this case was executed, Mr. D. C. Mitter was a member of the firm in addition to the three gentlemen who are now partners. Mr. Mitter has ceased to be a member of the firm with effect from 31st May 1940. I notice that both the firm and the former partner, and for that matter the attorney representing the defendant in this application, observe the now prevalent custom of misdescribing themselves as solicitors, a breach of the legal profession not recognized by the Charter or rules of the original side, except in so far as under chap. 2 of the rules solicitors of the Supreme Courts of Judicature in England and Northern Ireland are entitled to be admitted as attorneys of this Court. At the time when the notice of this application was served, the firm, as at present constituted, was not registered under Ss. 58 and 59, Partnership Act. It is argued that this is a proceeding to enforce a right arising from a contract within the meaning of S. 69 (2) of that Act, and that therefore it cannot be instituted as long as the firm is unregistered. I may say at once that if I find this to be

the only ground on which the application can be resisted I am willing to preserve the status quo in order that the firm may obtain registration, if they have not already done so, and thereafter take out a fresh application.

The circumstances in which the present application is made are these. In 1935 the defendant Jogendra Chandra Goopta, whom I shall hereafter call "the client", gave a warrant of attorney to the firm of H. N. Dutta & Co., to act for him in the present suit, which is a suit for the partition of his father's estate. The Official Receiver is now receiver of the estate and a preliminary decree for partition was made on 19th November 1936. There are difficulties in tracing some of the securities belonging to the estate, and the Commissioner has decided to make an interim partition of the admittedly available assets. The scheme was approved by the Court on 15th May 1940 and by the order then made the Official Receiver was directed to make payment out of the funds in his hands to the parties concerned in terms of the scheme. By an interim return the Commissioner has allotted the client a sum of Rs. 22,000, and directed that it should be paid to him in cash or in Government securities of the equivalent value. The attorneys now apply for an order that a lien or charge be declared on that sum in the hands of the Official Receiver for their costs, charges, and expenses, in reference to the suit.

In India there are no legislative enactments dealing generally with the rights and liabilities of attorneys. It is however well settled that attorneys practising before the old Supreme Court, and on the original side of the present High Court, had and have, subject to the rules, the rights enjoyed at common law by solicitors, attorneys, and proctors in England prior to the Judicature Act, 1873, under which the three classes of practitioners were abolished, and all became solicitors of the Supreme Court of Judicature. One of the many cases in which this has been recognized is 61 Cal 1005.[1] I think it has never been disputed that among these rights is the right of an attorney to ask this Court to direct that personal property, recovered under a judgment obtained by his exertions, stand security for the costs of recovery. This so called "lien" has been extended by statute in England to real estate. Its present statutory recognition is to be found in S. 69, Solicitors' Act, 1932. That section makes it clear that the power to make an order enforcing the statutory lien is discretionary, and I take it the same is true of the common law lien. It would seem that an attorney's position is even stronger with regard to a fund in Court. I take the following passage from Cordery's "Law relating to Solicitors" Edn. 4, page 492:

> When there is a fund in Court, the solicitor's lien independently of the statute, and without any declaration thereunder, is an absolute charge thereon, and has priority over any other assignment or charging order obtained with or without actual notice.

In my opinion, the circumstances of this case are such that the attorneys have prima facie a right to an order substantially in the form of the order made by Ameer Ali J. in 61 Cal 1005[1] and set out at p. 1009 of the report of the unsuccessful appeal. One argument which is employed by the client is that the form of the order of 15th May which directed payment to the parties either overrides the lien, or alternatively shows that the attorneys have waived it. I do not accept this. In my experience orders for payment out of a fund in Court never formally reserve the attorney's lien, and I agree with Mr. B. C. Ghose that it would be improper for an attorney to assert his lien against the client on whose behalf he is making an application. The real opposition to the application is based on the change in the constitution of the firm of H. N. Dutta & Co. as from 31st May last. It is stated in Cordery, Edn. 4, p. 133, that the dissolution of a firm of solicitors amounts to a discharge of the solicitors by themselves. The leading case of (1843) 2 Hare 587[2] shows that this is so; but it is perhaps not without significance that there the client only prayed for an order for delivery of the cause papers to the new solicitor upon the latter's undertaking to hold them without prejudice to any right of lien to which the old solicitors or either of them might be entitled, and to return the same undefaced to the old solicitors within fourteen days after the hearing of the cause, and that the order for delivery was made upon those terms. It would appear from (1843) 2 Hare 587[2] that on dissolution of a solicitors firm its members, although they discharge themselves, do not necessarily have their lien on the cause papers for their costs up to the date of discharge. However, even on the assumption that such lien is lost, it does not logically

1. ('35) 22 AIR 1935 Cal 168 : 154 I C 781 : 61 Cal 1005 : 38 C W N 1031, Premsukhdas Singhania v. N. C. Bural and Pyne.

2. (1843) 2 Hare 587 : 12 L J Ch 387 : 7 Jur 573 62 R R 247, Griffiths v. Griffiths.

follow that in such circumstances they lose their lien over a fund in Court recovered by their exertions before dissolution.

Where the solicitors discharge themselves in circumstances which amount to misconduct, the position may be different; but nothing which has happened in this case has in my judgment deprived the former gentlemen who were acting as the client's attorney upto 1st June 1940 of their right to have their costs taxed up to that date and secured upon the fund in Court. I understand that the client will be put to considerable inconvenience if payment is held up pending taxation. The attorney's untaxed costs amount to Rs. 6455-10-0. It may be assumed that there will be some reduction on taxation. I think the proper order is one for taxation up to 31st May 1940 and a declaration of charge on the sum of Rs. 22,000 now in the hands of the Official Receiver for the applicants' taxed costs. The client however will be permitted to withdraw Rs. 17,000 from the Official Receiver on his undertaking to pay any balance ultimately found payable by him over and above the sum of Rs. 5000 remaining with the Official Receiver.

The part of the judgment which I have just read was written by me after I had heard the application on the 13th of August 1940. After that date I fell ill, and was unable to deal further with the matter. I realized that I had not fully considered the point with regard to the objection taken to the maintainability of the application under S. 69 (2), Partnership Act. I have now heard Mr. Ghose upon the point, and I am in possession of more accurate information than was at my disposal when writing the earlier portion of the judgment. The dates are as follows: The firm of H. N. Dutt & Co. was duly registered shortly after the passing of the Partnership Act, and the registration showed as partners the four gentlemen who were acting as the client's attorneys up to 1st June 1940. On 31st May 1940, Mr. D. C. Mitter retired from the firm. Information of this was given to the Registrar on 18th June 1940. The summons was taken out on 24th July 1940, the returnable date being 26th July 1940. On 27th July 1940, an application was made to the Registrar to register the firm with the present partners, and the firm was so registered on 29th July 1940. This application was heard on 13th August 1940. Mr. Ghose has drawn my attention to a case which has been reported since I first dealt with the application. That case is I. L. R. (1940) Bom 715.[3] The headnote of that case is as follows:

On 13th November 1933, the plaintiff firm was registered under the Partnership Act. The firm in respect of certain of its transactions with the defendant filed the suit on 26th October 1939, and on 24th January 1940, notified the Registrar of firms of the change in the constitution of the firm by reason of the death of one of the partners on 11th May 1937. On issue raised whether the plaintiffs were a firm duly registered under the Partnership Act, 1932:

***Held* that notwithstanding the dissolution of a partnership by death of a partner, the firm so far as registration is concerned is to be deemed to be still registered.**

That so long as the partners suing were shown in the register as partners, the firm, notwithstanding the death of one of the original partners, remained a registered firm and could sue.

I have been taken through the relevant portions of Blackwell J.'s judgment more than once, and I fully agree with the view he expressed. As far as the dates are concerned, the facts of that case do not seem to me to be distinguishable, nor do I think that the situation is affected by the fact that the constitution of the firm was modified in that case by the death, and in this case by the retirement, of one of the originally registered partners. The only point on which the cases can be distinguished is the form of the entry in the register of firms. Though I have not before me the actual document in which information was furnished to the Registrar of Mr. D. C. Mitter's retirement, the firm is shown in an entry dated 20th June 1940, as having given notice of dissolution, and in the remarks column the word "dissolved" appears. Against the words "How dissolved?" there is this statement: "As one of the partners Mr. D. C. Mitra retired." Blackwell J.'s judgment recognises that the retirement of a partner does occasion the dissolution of a firm, generally speaking, but having regard to the whole entry, it appears to me to be really from the point of view of registration the recording of the retirement of a member of a registered firm, and in my opinion the form of entry in the register does not take the case outside the ambit of the Bombay authority. I see no reason to modify the order appearing in the earlier part of the judgment, but the applicants may have the costs of this application. Certified for counsel. I find that the client is reluctant to give the undertaking as to payment of any balance. I therefore modify the order I already made and in lieu thereof I give him

3. ('40) 27 A I R 1940 Bom 257: 190 I C 148: I L R (1940) Bom 715: 42 Bom L R 497, Pratapchand Ramchand & Co. v. Jahangirji Bomanji.

liberty to withdraw the sum in Court leaving a balance of Rs. 6500 subject to taxation.

G.N./R.K. *Order accordingly.*

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LODGE AND PAL JJ.

Kedar Nath Sen — Accused — Petitioner

v.

Amulya Ratan Sanyal — Complainant

— Opposite Party.

Criminal Revn. Petn. No. 647 of 1941, Decided on 7th August 1941.

(a) Presidency Towns Insolvency Act (1909), S. 28 (2) — Official Assignee's function is primarily administrative but judicial powers are given in matters like proof of debts — In exercising judicial powers Official Assignee is Court within S. 195 (1) (b), Criminal P. C.—In accepting or rejecting proof of debt for purposes of S. 28 (2), Official Assignee acts as Chairman of meeting — He is therefore not Court within S. 195 (1) (b), Criminal P. C.

In an insolvency proceeding the function of the Official Assignee is chiefly and primarily administrative. At the same time he is given judicial powers also in certain respects along with his administrative powers such as in the matter of proof of debts. While exercising such judicial powers the Official Assignee discharges the function of a Court and becomes a Court within the meaning of S. 195 (1) (b), Criminal P. C. But at a meeting of creditors convened and conducted by the Official Assignee for the consideration of the proposal for a composition or scheme, the Official Assignee in accepting or rejecting the proof of debt for the purpose of S. 28 (2) does only discharge his function as the Chairman of the meeting and is therefore not a Court within the meaning of S. 195 (1) (b), Criminal P. C.: ('14) 1 AIR 1914 Mad 474, *Rel. on.* [P 80*h*; P 81*e*]

(b) Presidency Towns Insolvency Act (1909), S. 30—After adjudication debtor can settle with his creditors only by composition under Act.

A debtor after adjudication cannot settle with his creditors out of Court. Such settlement is possible only by a composition or scheme under the Act: ('17) 4 AIR 1917 Bom 239, *Rel. on.* [P 81*f*]

(c) Presidency Towns Insolvency Act (1909), S. 30 — Adjudication annulled on approval of scheme—Court retains jurisdiction to give effect to it.

The proceedings in insolvency do not terminate even on the annulment of adjudication on the approval of a composition or scheme and the Court retains jurisdiction to give effect to the scheme : ('28) 15 AIR 1928 Cal 21 and ('29) 16 AIR 1929 Mad 157, *Rel. on.* [P 82*b*]

(d) Presidency Towns Insolvency Act (1909), S. 28 (2)—Insolvency proceeding is proceeding within S. 195 (1) (b), Criminal P. C.—Proceeding for composition is one in relation to insolvency proceeding — Consequently use by debtor of false affidavit with knowledge of its being false in proceeding for composition constitutes offence within S. 195 (1) (b), Criminal P. C.

The proceeding for a composition or scheme is in relation to the original insolvency proceeding itself. The fact that the initiation of the proceeding is required to be before the Official Assignee whose primary function is administrative does not in the least affect its relation to the main proceeding. The insolvency proceeding is a proceeding in a Court within the meaning of S. 195 (1) (b), Criminal P. C. Consequently the use by the insolvent of an affidavit, showing a person as his creditor in a composition which to his knowledge was false constitutes an offence committed in relation to a proceeding in a Court within the meaning of S. 195 (1) (b), Criminal P. C.: ('32) 19 AIR 1932 Bom 185, *Disting.* [P 82*c*, *d*]

(e) Criminal P. C. (1898), S. 195 — Object.

The object of S. 195 is to minimize the possibility of needless harassment of litigants by rash, baseless or vexatious prosecutions at the instance of their opponents. [P 80*d*]

M. N. Banerjee and Parimal Mukherjee — for Petitioner.

S. N. Banerjee, Satindra Nath Mukherjee and Samarendra Nath Mukherjee — for Opposite Party.

Pal J. — This is a rule calling upon the Chief Presidency Magistrate, Calcutta, as also upon the complainant opposite party to show cause why the proceedings under S. 200, Penal Code, against the present petitioner pending in the Court of the Fourth Presidency Magistrate, Calcutta, should not be quashed on the ground that

on the prosecution story itself, the offence alleged having been committed in relation to a proceeding in a Court, a formal complaint in writing of such Court was necessary, as contemplated under Ss. 195 and 476, Criminal P. C.

The complainant in this case is one "Amulya Ratan Sanyal" as assistant in the employ of and on behalf of the Co-operative Hindusthan Bank Ltd. (in liquidation). The case of the complainant is that the petitioner, who is a debtor of the Co-operative Hindusthan Bank Ltd., and who was adjudged insolvent by an order made by this High Court on 13th June 1939, submitted, in or about the month of August a scheme of composition to the Official Assignee for acceptance of his creditors, and a meeting of the creditors was convened by the Official Assignee on 10th September 1940 to consider the said scheme; that the petitioner dishonestly and fraudulently procured from one H. C. Mallik an affidavit on behalf of an alleged creditor of his, his brother Satish Chandra Sen, for the purpose of proving that his said brother was a creditor in the insolvency for a sum of Rs. 4000 and "caused it to be filed before the Official Assignee who was bound by law to receive the same as evidence in support of the claim of the said creditor to rank as a creditor of the accused in his insolvency"; that the said affidavit in so far as it stated that the claim was still

outstanding was false inasmuch as the same had been given up on 23rd February 1940 in Suit No. 1624 of 1938 on the original side of this High Court; that on 10th September 1940, on the date of the aforesaid meeting of the creditors, the petitioner

with full knowledge of the falsity of the statements contained in the said affidavit used and/or attempted to use the said affidavit before the Official Assignee in order to include the said creditor as one of those who were supporting him in the scheme of composition submitted by him.

On these allegations the complainant prayed for a process against the petitioner for having committed an offence under S. 200 read with S. 199, Penal Code. On this complaint the learned Magistrate started a proceeding requiring the petitioner's attendance on 10th February 1941 to answer to a charge of 'using as true such declaration knowing it to be false brought against him by Amulya Ratan Sanyal under S. 200, Penal Code, and ultimately on 13th June 1941 framed charges against him in the following terms :

1. That you, Kedar Nath Sen, on or about 10th September 1940 at Calcutta, corruptly used or attempted to use as true, in support of your scheme of composition filed before the Official Assignee, Calcutta, a declaration (Ex. 4) made by one Hiran Chandra Mullick to the effect that you, Kedar Nath Sen were still truly and justly indebted to Satish Chandra Sen in the sum of Rs. 4000 and for which sum or any part thereof the said Satish Chandra Sen have had or received no manner of satisfaction, and you knew the said declaration to be false in a material particular, to wit, on the particular of your alleged indebtedness to Satish Chandra Sen and you further knew that your indebtedness to the said Satish Chandra Sen had ceased to exist as per terms of settlement and decree (Exs. 8 and 9) and which declaration was receivable as evidence as "proof of debt" under the Presidency Towns Insolvency Act and you thereby committed an offence punishable under S. 200, Penal Code, and within the cognizance of this Court.

Thereafter on 30th June 1941 the present rule was issued by this Court on the petition of the accused Kedarnath Sen. The point involved in this rule is whether or not the learned Magistrate was debarred from taking cognizance of the offence by S. 195 (1) (b), Criminal P. C. Section 195 (1) (b), Criminal P. C., lays down :

No Court shall take cognizance ... of any offence punishable under any of the following sections of the same Code (Penal Code), namely Ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court ...

The object of S. 195, Criminal P. C., is to minimize the possibility of needless harassment of litigants by rash, baseless or vexatious prosecutions at the instance of their opponents. Private prosecution in every case is more likely to be inspired by the avenging spirit and indeed in a system of criminal administration where the party wronged rather than a public official is given the conduct of prosecution the vice of over-eagerness to obtain convictions predominates. The evil may not be avoided altogether. But at least in the case of offence where the act to a great extent affects the dignity and prestige of the Courts concerned, it is deemed inexpedient to allow such acts to be the sports of personal passions. The offence in this case is alleged as punishable under S. 200 read with S. 199, Penal Code. The question, therefore, is whether the offence is alleged to have been committed in or in relation to any proceeding in any Court, within the meaning of S. 195 (1) (b), Criminal P. C. From what has been stated above it is clear that the offence is alleged to have been committed in a proceeding before the Official Assignee for a scheme of composition with the creditors of the petitioner. The exact allegation in this respect in the petition of complaint is

that on the date of the said meeting (the meeting of creditors convened by the Official Assignee to consider the scheme of composition), viz., on 10th September 1940, the said accused with full knowledge of the falsity of the statements contained in the said affidavit used and/or attempted to use the said affidavit before the Official Assignee in order to include the said creditor as one of those who were supporting him in the scheme of composition submitted by him.

The question, therefore, ultimately resolves to this: Whether the proceeding before the Official Assignee relating to the scheme of composition is a proceeding (1) in a Court, or (2) in relation to a proceeding in a Court.

As regards the first point, viz. whether the proceeding before the Official Assignee can be said to be 'a proceeding in a Court', the answer turns upon whether the Official Assignee while discharging this function can be said to be a Court within the meaning of S. 195 (1) (b), Criminal P. C. There can be no doubt that in an insolvency proceeding the function of the Official Assignee is chiefly and primarily administrative. At the same time it cannot be denied that the Official Assignee is given judicial powers also in certain respects along with his administrative powers. He, for example, is given judicial powers in the matter of proof of debts. It is conceded by Mr. Banerjee appearing to show cause in this rule that while exercising such judicial powers the Official Assignee discharges the functions of a Court and becomes a Court within the meaning of the section. His contention, however, is that while convening and conducting the meeting

of creditors for the consideration of the proposal for a composition or scheme, the Official Assignee discharges a purely administrative function. While discharging this function, he may have to exercise the powers of examining, admitting or rejecting proofs of debts; but such powers, even though couched in terms of similar powers under Sch. 2, Presidency Towns Insolvency Act, read with S. 48 of that Act, are not inconsistent with the powers purely administrative. In the exercise of administrative powers, it may be his duty to ascertain certain facts; but this would not make him a Court within the meaning of the section. Mr. Banerjee refers us to S. 26 (2), Presidency Towns Insolvency Act, and the Rules in Sch. 1 of the Act, particularly Rr. 9 and 15 of that schedule, and contends that the power of admitting or rejecting proof of debt as conferred upon the Official Assignee by these rules is purely for the purpose of enabling him to discharge his administrative function in the conduct of the meeting convened by him.

It is difficult to say that there is no force in this contention. The creditors who are entitled to vote in the meeting are those whose debts are proved. Under the Presidency Towns Insolvency Act, a creditor may, in order to entitle himself to vote, prove his debt even at the meeting; and the Official Assignee as Chairman of the meeting has power to accept or reject the proof; but his decision is subject to appeal to the Court. If he is in doubt, he should allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained. Acceptance or rejection of proof of debt for such a purpose is perfectly consistent with administrative function only. Any act of judgment that he may have to exercise in this connexion will not convert him for the time being into 'a Court'. No doubt S. 28 (2), Presidency Towns Insolvency Act, while speaking of the acceptance of the proposal by the majority of creditors uses the words "whose debts are proved" and it might be contended that when such acceptance of the proposal by the creditors is calculated to produce a permanent effect on the rights of the creditors so far as the composition or scheme is concerned, it is reasonable to take these words as referring to the proof of debts under the Rules of Sch. 2, read with S. 48 of the Act. But the true character of the acceptance by the creditors under S. 28 (2) is that it is merely a resolution to entertain the proposal as one deserving of consideration. The very creditor who might have voted for the acceptance of the proposal may oppose its approval by the Court and this is expressly so provided in S. 29 (2) of the Act. In our judgment, therefore, in accepting or rejecting the proof of debt for the purpose of S. 28 (2) the Official Assignee does only discharge his function as the Chairman of the meeting. He is therefore not a Court within the meaning of S. 195 (1) (b), Criminal P. C. This view finds support in 37 Mad 107.[1]

Whatever difficulty there may be in holding the Official Assignee to be a Court within the meaning of S. 195, Criminal P. C., while he is functioning in connexion with the proposal for a composition or scheme, it seems to us clear that 'the scheme or composition' itself as well as the entire proceeding concerning the same, is "in relation to" the insolvency proceeding. A debtor after adjudication cannot settle with his creditors out of Court. Such settlement is possible only by a composition or scheme under the Act: A.I.R. 1917 Bom 239[2] at p. 241. The provisions of the Presidency Towns Insolvency Act as to composition and scheme of arrangement apply to composition or scheme after adjudication. Under the Provincial Insolvency Act, 1907, S. 27 (1), a proposal for a composition or scheme could be submitted by the debtor either before or after an order of adjudication. Under the Act of 1920 as well as under the Presidency Towns Insolvency Act, a proposal can only be submitted after an order of adjudication has been made. Under the Presidency Towns Insolvency Act a proceeding for composition or scheme is initiated by the submission to the Official Assignee of a proposal for the composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs by the insolvent after the making of an order of adjudication (S. 28 (1), Presidency Towns Insolvency Act). The Official Assignee thereupon convenes a meeting of the creditors and places the proposal before the meeting. The proposal will be taken to be accepted if a majority in number and three-fourths in value of all the creditors whose debts are proved resolve to accept it. The essence of a composition or scheme is a proposal by the debtor and its acceptance by the creditors in the above manner. After the proposal is accepted in the above manner, either the insolvent or the Official Assignee may apply to

1. ('14) AIR 1914 Mad 474 : 14 I C 593 : 37 Mad 107 : 13 Cr L J 241, Beardsell & Co. v. Nilgiri Abdul Gunni Saheb.
2. ('17) 4 A I R 1917 Bom 239 : 40 I C 289 : 18 Cr L J 641 : 41 Bom 464 : 19 Bom L R 349, Re Shivalal Rathi.

a the Court to approve it. (Section 29, Presidency Towns Insolvency Act.) A time shall be appointed for hearing the application with notice to the creditors who have proved their debts. At the hearing any creditor may be heard by the Court in opposition to the application notwithstanding that he might have voted for the acceptance of the proposal at the meeting. It is really the approval of the Court which makes the scheme binding. Where the Court is of opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors or in any case in which the Court is required to refuse the insolvent's discharge, b the Court must refuse to approve the proposal. (Section 29 (2) and (4), Presidency Towns Insolvency Act.) If the Court approves the proposal, the terms must be embodied in an order of the Court and the adjudication must be annulled. (Section 30, Presidency Towns Insolvency Act.)

The jurisdiction of the insolvency Court does not terminate even on the approval of a composition or scheme. Though the adjudication is annulled, the composition is made with the approval of the insolvency Court and the Court retains jurisdiction to give effect to it: 54 Cal 650[3] at p. 653. The c proceedings in insolvency do not terminate even on the annulment of adjudication on the approval of a composition or scheme : A.I.R. 1929 Mad. 157.[4] The effect of the approval of a scheme is to substitute the scheme for the bankruptcy. The scheme remains under the control of the insolvency Court. Under the Presidency Towns Insolvency Act the payment of any instalment due under a composition may be enforced by an application to the Court: (Section 30 (2)). The above short sketch of the provisions of the Presidency Towns Insolvency Act relating to a composition or scheme makes it amply clear d that the proceeding for a composition or scheme is in relation to the insolvency proceeding itself. The fact that the initiation of the proceeding is required to be before the Official Assignee whose primary function is administrative does not in the least affect its relation to the main proceeding. From its initiation before the Official Assignee to its approval by the Court, the whole thing is in relation to the insolvency proceeding and any offence alleged to have been committed in this proceeding is, in our judgment, committed in relation to the insolvency proceeding. This insolvency proceeding admittedly e being a proceeding in a Court within the meaning of S. 195 (1) (b), Criminal P. C., it follows that the offence alleged in the present case must be taken as "alleged to have been committed in relation to a proceeding in a Court" within the meaning of S. 195 (1) (b), Criminal P. C., and, consequently, in the absence of any complaint in writing of that Court, the Magistrate was debarred from taking cognizance of the same.

Mr. Banerjee contended that the words "in relation to" as used in the section are not wide enough to include "the relation" f between a composition or scheme and the insolvency proceeding itself. His contention is that no doubt a proposal for a composition or scheme can be initiated only in connexion with an insolvency proceeding. But as its being carried to the Court is dependent on certain contingencies, viz., (1) its acceptance by the specified majority at the meeting and (2) thereafter the matter being taken to the Court by the insolvent or the Official Assignee, it may never reach the Court and may thus be never related to the proceeding in Court. In support of his contention Mr. Banerjee relied on 56 Bom 213[5] which was a case of an offence under S. 193, Penal Code, g and in which Beaumont C. J. observed :

> Then there is a fourth case in which an offence is committed under S. 193, Penal Code, in respect of proceedings in a Court of law which are contemplated but which in fact are never started. . . . In such a case it appears to me clear that Section 195, Criminal P. C., does not apply. . . .

In our opinion this case has no application to the case before us. The proceeding for a composition or scheme is, in our opinion, in relation to the original insolvency proceeding and in order to bring it into this relation with the original proceeding it is not necessary that it should be carried up to the Court. Without anything more such a h proceeding before the Official Assignee is one in relation to the original insolvency proceeding and consequently an offence under S. 200 read with S. 199, Penal Code, alleged to have been committed in course of this proceeding is hit by the provisions of S. 195 (1) (b), Criminal P. C. The rule is accordingly made absolute and the proceedings under S. 200, Penal Code, pending in the Court of Mr. H. K. De, Fourth Presidency Magistrate, Calcutta, against the petitioner

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3. ('28) 15 A I R 1928 Cal 21 : 105 I C 90 : 54 Cal 650, Re Krishna Kishore Adhikary.
4. ('29) 16 AIR 1929 Mad 157 : 115 I C 815 : 56 M L J 458, Kamireddi v. Devasi Harpal.
5. ('32) 19 A I R 1932 Bom 185 : 137 I C 134 : 33 Cr L J 386 : 56 Bom 213: 34 Bom L R 294, Indra Chand v. Emperor.

are quashed. Let the petitioner be discharged from the bail bond.

Lodge J. — I agree.

G.N./R.K. *Rule made absolute.*

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LORT-WILLIAMS J.

Krishna K. Mukherjee — Plaintiff

v.

Haripada Bhattacharjee — Defendant.

Application in Suit No. 363 of 1941, Decided on 18th June 1941.

Arbitration Act (1899), S. 19 — Contract — Arbitration clause—Suit by plaintiff in respect of matters relating to contract — Defendant alleging breach of provisions as to payment by plaintiff and claiming to have rescinded contract on that ground — Dispute arises out of contract—Defendant is entitled to order under S. 19 staying suit.

Where in a suit by the plaintiff in respect of matters relating to a contract with an arbitration clause the defendant alleges breach by the plaintiff of the provisions as to payment and claims to have rescinded the contract on that ground the dispute is one arising out of the contract and therefore the defendant is entitled to an order under S. 19 staying the suit : 41 C W N 563, *Rel. on* ; *Indian and English case law referred.* [P 85c,e]

S. R. Das Gupta and S. N. Roy Chowdhuri — for Plaintiff.

N. C. Chatterjee and P. B. Mukherji — for Defendant.

Order.—In this case the plaintiff alleges that by an agreement in writing dated 14th December 1940, executed by the plaintiff and the defendant, the defendant agreed to give the plaintiff the exclusive right to sell, wholesale or retail, certain toilet articles in the markets of Bengal, that the plaintiff agreed thereby to purchase from the defendant a minimum quantity of the goods, and that the defendant agreed to sell such goods on a sixty days credit basis, provided the bills of the defendant covering the delivery challans as accepted by the plaintiff-were accepted and payments thereof on the due dates were guaranteed by the plaintiff's bankers who must be a scheduled bank of Bengal. The defendant agreed to pay the plaintiff a consolidated commission on goods sold, and the agreement was for a term of five years with an option to renew. Thereupon the plaintiff acted as sole distributor for a short period, and goods were supplied by the defendant, but on 3rd January 1941 the defendant gave notice purporting to treat the agreement as cancelled. On 7th January, however, the defendant withdrew the cancellation, and it was agreed that the parties would continue to act in accordance with the agreement. Thereafter, further goods were supplied on the plaintiff's orders. But after 16th January the defendant refused to accept any further orders and supplied other dealers without the plaintiff's consent in breach of the agreement. On 3rd February 1941, the defendant determined the agreement. Clause 15 of the agreement provides that

> any violation of the aforesaid terms and conditions will entitle either party to determine this agreement, and if there be any dispute the same will have to be referred to an arbitrator approved by both parties, and the award of the arbitrator will be finally binding on both.

The present application is on behalf of the defendant under S. 19, Arbitration Act, to restrain the plaintiff from proceeding with the suit and for an order appointing an arbitrator. In his affidavit, the defendant states that on 21st December 1940, he sent the plaintiff three bills for acceptance and payment to be guaranteed by the plaintiff's bankers in accordance with the terms of the agreement. On 23rd December 1940, he received a letter from the plaintiff saying that he was worried about money matters and would be able to clear his position with his bankers either on 23rd or 26th December when the bank would reopen. On 27th December 1940, he received another letter from the plaintiff informing him that the bills could not be passed through the bank before 2nd January 1941. Consequently, on 3rd January the defendant wrote to the plaintiff intimating that as he had failed to comply with the provisions of cl. (4) of the agreement, that is, the clause providing for the sixty days' credit, etc., the agreement stood cancelled under the provisions of cl. (15). On 6th January the plaintiff wrote saying that he had no banking account but was arranging with the Bengal Central Bank to get his bills accepted. Thereafter, the defendant received a letter from the Bengal Central Bank Ltd., intimating that he was to present his bills and further orders were placed by the plaintiff which the defendant refused to deliver. On 13th January the plaintiff begged him to deliver certain goods as a special favour, and he did so on the understanding that they had nothing to do with the agreement dated 14th December 1940, which had already been cancelled, and he denied that the notice of cancellation was ever withdrawn. It has been contended on behalf of the plaintiff that as according to the defendant, the contract was no longer in existence, it follows that there was no arbitration clause in existence, and therefore the suit ought not to be stayed. The principles to be applied in such cases as this have been frequently stated both by the

English and the Indian Courts. Thus, in 53 Bom 573,[1] the headnote is as follows:

Where a contract contains an arbitration clause, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to as it, together with the other terms of the contract, is set aside. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies on a contract he must rely on it for all purposes.

In his judgment Kemp J. having stated the position in the terms described in the headnote, referred to the case in (1915) A C 499[2] as a case in which the contract was repudiated and with it the arbitration clause. In that case an insurance company repudiated the claim in toto on the ground of fraud, and it was held that the repudiation of the claim on a going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. But, in the later case in (1917) 2 K B 433,[3] the company relied on a term in the contract to avoid liability, and it was held that the dispute was referable to arbitration. This also was an insurance case in which the policy recited that the assured had made a proposal and declaration which were agreed to be the basis of the contract, and that they were conditions precedent to any liability on the part of the insurers. In the case of any false declaration all benefit under the policy was to be forfeited. The company alleged that the proposal and declaration were false, and it was held that the truth or untruth of the statements was a matter to be referred to arbitration. In that case Lord Reading C. J. said that the phrase "avoiding the policy" was loosely used, and that in truth the company relied upon a term of the policy which prevented the claimant recovering and

if the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract of which the force and effect are not declared by the contract itself, and that in resisting the claim the company were not avoiding the policy but relying on its terms. Therefore, the question whether or not the statements were true was a question arising out of the policy.

Kemp J. also referred to the case in (1919) 1 K B 593.[4] That case also concerned a claim against an insurance company, in respect of an accident. The company denied liability on the ground that the assured had misstated his occupation in the proposal. It was held that the company by relying on the terms of the policy which rendered it void in certain events did not thereby repudiate the policy as a binding contract between the parties, and were entitled to rely upon the arbitration clause as a defence to the action. (1915) A C 499[2] was distinguished on the ground that where the insurance company is repudiating a contract in the sense that they are disputing the existence of any binding contract at all, the action was not to be stayed. But where the company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract, then the suit ought to be stayed, and the case in (1917) 2 K B 433[3] was cited as an instance of the latter class of cases. The principles to be applied were again stated by Clauson J. in (1928) 1 Ch 17.[5] In that case there was an agreement in writing for the sale of a business subject to certain conditions. The plaintiff refused to complete the purchase owing to non-fulfilment of one of the conditions, the effect of which, he contended, was that he was no longer bound by the agreement. The defendants insisted that the condition was satisfied and went to arbitration. The plaintiff then issued a writ claiming a declaration that the agreement was determined, and the defendants asked for a stay. It was held that:

If the condition were in fact not fulfilled, the plaintiff's obligation under the contract came to an end in accordance with the terms expressed in the contract itself and not by reason of the occurrence of an event "dehors" the consideration of the contracting parties, and that, therefore, the agreement to refer the dispute to arbitration was still binding and the action must be stayed.

The learned Judge distinguished that case from cases where a contract having been entered into with an arbitration clause comes to an end, not because one of the parties to the contract is, according to its terms as construed with reference to the events which have happened released from his primary obligation under it, but because the contrac-

1. ('29) 16 A I R 1929 Bom 242 : 121 I C 437 : 53 Bom 573 : 31 Bom L R 426, India Electric Co. Ltd. v. General Electric Trading Co.
2. (1915) 1915 A C 499 : 84 L J K B 640 : 1915 W C & I Rep 239 : 112 L T 531 : 59 S J 205 : 31 T L R 132, Jureidini v. National British and Irish Millers Insurance Co. Ltd.
3. (1917) 2 K B 433 : 86 L J K B 1155 : 1917 W C & I Rep 241 : 117 L T 247 : 33 T L R 395, Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.
4. (1919) 1 K B 593 : 88 L J K B 706 : 1919 W C & I Rep 181 : 83 J P 125 : 63 S J 352 : 120 L T 556 : 24 Com Cas 237, Woodall v. Pearl Assurance Co., Ltd.
5. (1928) 1 Ch 17 : 96 L J Ch 446 : 137 L T 475 : 71 S J 604, De La Garde v. Worsnop & Co.

tual relation between the parties is destroyed, either owing to some fraud or some entirely external circumstance supervening, such a circumstance as supervened in the case in the Privy Council in (1926) A C 497,[6] where the contract had been frustrated by reason of the interposition of the Government by requisitioning the ship which was the subject-matter of the contract. It has been remarked in several cases that the difficulties which sometimes arise in trying to apply these principles to particular cases are caused really by using the words inaccurately or loosely. This was referred to by Greene L. J. (as he then was) in (1936) 2 ALL E R 952[7] at p. 956. The learned Judge said as follows :

Now, the class of case where the defendant insurance company is denying the existence of a contract is totally different from the class of case where the defendant, while admitting the existence of a contract, is relying on some clause in it to escape liability. It is very important in my view that language should be accurately used and there is great danger in the use of such words as "repudiation;" repudiation of a contract may mean that having admittedly made a contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the word "repudiation" is where you say "there never was a contract at all between the parties." If it turns out there was a contract, the act of one party denying the existence of it is to repudiate it but supposing it turns out he was right and there never was a contract, then "repudiation" is used in a different sense from that in which it would be used when an existing contract is broken by a refusal to perform.

In conclusion I desire to refer to the case in 41 C W N 563[8] tried by Panckridge J., for the headnote only, which, in my belief, accurately states in alternative form the principles to be adopted. It is as follows :

When one party to a contract alleges breach by the other of provisions as to payment, some written and some unwritten, and even claims to have rescinded the contract on that ground, the dispute is one arising out of the agreement.

But when his case is that there was no valid contract, having been entered into on his behalf by a person who had no authority to do so, the dispute is not one arising out of the agreement.

When a suit has been brought by the first party for a declaration that the contract has been rescinded and does not subsist and for an injunction restraining the second party from referring the dispute to arbitration in accordance with an arbitration clause in the contract, the latter is entitled, in the first case, to an order under S. 19, Arbitration Act, staying the suit, but in the second case he is not.

In my opinion the present case comes within the first of these categories, and the defendant is entitled to an order under S. 19, Arbitration Act, staying the suit. There will be an order in terms of the notice of motion.

G.N./R.K. *Suit stayed.*

6. (1926) 1926 A C 497 : 95 L J P C 121 : 134 LT 737 : 31 Com Cas 199 : 24 Ll Rep 210 : 17 Asp M C 8 : 42 T L R 359, Hirji Mulji v. Cheong Yue Steamship Co.
7. (1936) 2 All E R 952, Toller v. Law Accident Insurance Society Ltd.
8. ('36) 41 C W N 563, Harinagar Sugar Mills Ltd. v. Skoda (India) Ltd.

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B. K. MUKHERJEA AND BISWAS JJ.

Janakinath Guha Ray — Plaintiff — Appellant

v.

Korban Ali (on his death, Bazler Rahaman and others) and others — Defendants — Respondents.

Appeal No. 1217 of 1937, Decided on 14th February 1941, from appellate decree of Sub-Judge, 3rd Court, Tipperah at Comilla, D/- 31st March 1937.

(a) Bengal Tenancy Act (8 of 1885), S. 52 — —Excess area—Measurement—Previous measurement unscientific while subsequent scientific — 5 to 10 per cent. deduction may be made according to circumstances of case—Deduction should be made from total area and not from apparent excess—To make deduction previous measurement need not be shown to be inaccurate.

Before the Court allows the plaintiff any additional rent for any additional area, it has got to come to a finding as to what the extent of the increase is. If the standard of measurement is the same, prima facie the apparent excess must be taken to be the real excess. But when the subsequent measurement is made by trained surveyors in a scientific way, whereas the previous measurement was a private measurement made by the landlord many years before, without the aid of any scientific instrument, it would not be improper for the Court to make some deductions from the survey area with a view to reduce the two areas to a common standard for comparison. In order that the comparison may be fair and proper, it is always desirable to allow some margin. The rule of 5 or 10 per cent. which is laid down by the settlement authorities though not a rule of law, and even though somewhat arbitrary, is based upon experience and should be adopted by the civil Courts as a matter of practice and should be applied according to the circumstances of each case. [P 87*a*, *b*, *d*, *e*]

If any deduction is to be made it should be made out of the total area and not from the apparent excess. [P 86*g*]

The previous measurement need not be proved to have been faulty or erroneous for the purpose of making deductions: ('26) 13 AIR 1926 Cal 616, *Not appr.*; ('14) 1 A I R 1914 Cal 451 and 40 C W N 1022, *Ref.* [P 87*c*, *d*]

(b) Bengal Tenancy Act (8 of 1885), S. 52 — Question whether deduction in area should be allowed is of fact.

The question whether any deduction should be allowed at all is one of fact and not of law. [P 86*h*; P 87*a*]

Jatindra Mohan Choudhury, Jitendra Nath Sannyal, Promotho Kumar Chakrabarty and Sibakali Bagchi — for Appellant.

Bankim Chandra Banerjee, Paresh Chandra Sen and Upendra Kumar Roy (for Deputy Registrar) — for Respondents.

B. K. Mukherjea J.—This appeal is on
a behalf of the plaintiff and it arises out of a suit for recovery of arrears of rent and cesses in respect of a tenancy which previously bore a rental of Rs. 74-13-0 a year. The plaintiff's case was that there being an increase in the area of the tenancy, the tenants agreed to pay rent at the rate of Rs. 90-8-3 a year amicably and that was the rate at which rents were sought to be recovered from the tenants for the period in suit. In the alternative the plaintiff's case was that even if no such amicable arrangement was proved, he was entitled to an increased rent for excess area on the basis of the kabuliat
b which created the tenancy and the total rent payable on the present area of the holding would be Rs. 100-14-0. The defendants in their written statement denied that they ever agreed to pay any increased rent and contended inter alia that there was no increase in the area of the tenancy and that they held the lands in suit at a consolidated rent of Rs. 74-13-0 a year.

Both the Courts below disbelieved the plaintiff's story that the defendants agreed to pay rent at the rate of Rs. 90 and annas odd a year. It was found also by both the Courts below that the tenancy was created
c by a kabuliat of the year 1986 B. S. under which a quantity of land measuring 11 kanis and 14 gandas was let out to the defendants' predecessors at a rental of Rs. 74-13-0 a year. The rent was assessed not on this entire area but upon 10 kanis of land, the balance of 1 kani and 14 gandas being left out of account as it was unproductive and yielded no produce. The kabuliat contained a recital that if on remeasurement of the land, any excess area was found, increased rent would have to be paid at the kabuliat rate or at the rate payable for adjoining lands, if the same be higher. The plaintiff's case was that the measurements made during the cadastral
d survey operation showed that the area of the holding was 16·08 acres which was equivalent to 13 kanis and 8 gandas. There has thus been an increase by 3 kanis 8 gandas; the rent being previously assessed on 10 kanis of land, and the rent that he would be entitled to for the excess area at the kabuliat rate would be Rs. 25 odd annas a year.

The trial Court held that there was no evidence that the quantity of land measuring 1 kani and 14 gandas, which was left out as unproductive at the time of the settlement had since then been reclaimed. The original area of the holding must therefore be taken to be 11 kanis and 14 gandas, and to
e find out the excess, what should be deducted from the present area was not 10 kanis, but 11 kanis and 14 gandas. The Munsif further held that some allowance should be made for close measurements and a reduction of 10 per cent. from the apparent excess was taken to be a fair and reasonable allowance on that account. The Munsif accordingly held that the real excess was 1 kani and 14 gandas and for that, proportionate rent at the kabuliat rate was Rs. 11-3-0 a year. The result was that the Munsif decreed the plaintiff's claim for rent at the rate of Rs. 86 a year. There were appeals taken against this decision by both the plaintiff and the
f defendants. The Subordinate Judge, who heard the appeals modified the judgment of the trial Court and held that 10 per cent. deduction should be made not out of the excess as was done by the Munsif, but it must be made from the total area that was shown in the record of rights and on that calculation the real area of the holding at the present day would be 12 kanis and 1 ganda. The plaintiff, therefore, was entitled to get additional rent for the additional area of 7 gandas only and the Subordinate Judge gave the plaintiff a decree for rent at the rate of Rs. 77-8-0 a year. It is against this decision
g that the present second appeal has been preferred to this Court.

Mr. Choudhury, who appears in support of the appeal has not challenged the mode of calculation adopted by the Subordinate Judge. He has conceded that if any deduction is to be made, it must be made out of the entire area and not from the apparent excess. He contends, however, that the Courts below erred in law in allowing any deduction at all when there was no evidence or finding that the previous measurement, on the basis of which the settlement was made, was in any way inaccurate or wrong.
h In support of this contention he has referred us to the decisions in A I R 1926 Cal 616[1] and 23 I C 794.[2] Mr. Roy, who appears for the respondents has on the other hand contended that the Courts below were quite right in making the allowance and he has relied in support of his contention upon a decision of this Court which is to be found in 40 C W N 1022.[3]

To us it seems that the question is really

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1. ('26) 13 A I R 1926 Cal 616 : 91 I C 763, Chundi Churn Law v. Balaram Gope.
2. ('14) 1 A I R 1914 Cal 451 : 23 I C 794, Baidya Nath v. Jawahir Mandal.
3. ('35) 40 C W N 1022, Jaynuddin Sheik v. Ramesh Chandra Roy.

a one of fact and not of law. Before the Court allows the plaintiff any additional rent for any additional area, it has got to come to a finding as to what the extent of the increase is. If the standard of measurement is the same, prima facie the apparent excess must be taken to be the real excess. But when, as in the present case, the subsequent measurement is made by trained surveyors in a scientific way, whereas the previous measurement was a private measurement made by the landlord many years before, without the aid of any scientific instrument, it would, we think not be improper for the Court to make some deductions from the survey area with a b view to reduce the two areas to a common standard for comparison. The kabuliyat in the case before us was executed more than 60 years ago, and as is well known, the landlords in making the measurements do not ordinarily take into account the boundary Ails. They also do not follow any scientific method in the measurement of irregular and ill-shaped plots. The Ails are, however, taken into consideration in cadastral survey and for the closeness of the cadastral measurements, the technical rules and instructions of the Settlement Department provide for an allowance of 10 or 5 per cent. as the c circumstances require. It seems to us that in the absence of any better materials, it would be proper for a civil Court to adopt as a matter of practice the rules laid down by the settlement authorities according to which a deduction of 1 cotta per bigha is allowed when the original measurement is proved to have been done with more than usual accuracy and in all other cases a deduction of 2 cottas per bigha is permitted. We do not agree with the broad proposition of law laid down by Chakravarty J. in A.I.R. 1926 Cal. 616[1] that no deduction could be allowed unless and until it is proved affirmatively that the previous measurement d was inaccurate. As I have already said, the earlier measurement need not be proved to have been faulty or erroneous. But as the same method was not employed in the two measurements, and one of them was scientific while the other was not, in order that the comparison may be fair and proper, it is always desirable to allow some margin. The rule of 5 or 10 per cent. which is laid down by the settlement authorities is certainly not a rule of law; but even though somewhat arbitrary, it is based upon experience and we think that it may be of considerable help to the civil Courts in deciding cases of this description. In the present case it appears from the kabuliyat that the measurement at the time of the settlement was made e with some degree of care. The kabuliyat itself makes some allowance for inaccuracy in measurements. We think, therefore, that in these circumstances we should follow the 5 per cent. rule as laid down by the settlement authorities and make that deduction from the total area as recorded in the settlement records.

The result, therefore, is that the plaintiff will be entitled to additional rent for one kani of land which we find to be in excess of the original area according to this calculation; and the rent payable for the total area is assessed by us at the round figure of f Rs. 82. The plaintiff will have a decree at that rate for the period in suit with proportionate costs and damages at the rate of 15 per cent. There will be no order for costs in this appeal. The plaintiff will be entitled to proportionate costs in both the Courts below.

Biswas J. — I agree.

G.N./R.K. *Order accordingly.*

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* A. I. R. (29) 1942 Calcutta 87

NASIM ALI AND PAL JJ.

New Standard Bank Ltd., by B. K. Dutta, Managing Director — g
Plaintiff — Appellant

v.

Probodh Chandra Chakravarty —
Defendant — Respondent.

Appeals Nos. 85 of 1938 and 29 of 1939, Decided on 1st May 1941, against decree of Sub-Judge, 2nd Court, Tipperah, D/-15th December 1937 and against decree of Dist. Judge, Tipperah, D/- 28th January 1938, respectively.

(a) Contract Act (1872), S. 62 — Whether all rights and liabilities under old contract are extinguished by novation is question of fact.

Section 62 deals with one mode of discharge of contract by consent, namely, novation. By this section if the parties to a contract agree to substi- h tute a new contract the original contract is discharged. This may happen if the parties agree to substitute a new contract either between themselves or between different parties the consideration being the discharge of the old contract. Whether all rights and liabilities under the old contract have been extinguished by novation is a question of fact depending on the circumstances of each case. In each case the question is not only whether a new debtor has consented to assume liability but whether the creditor has agreed to accept his liability in substitution of the liability of the original debtor. [P 90*a*,*b*]

(b) Contract Act (1872), S. 62—S. 62 does not apply after breach of original contract.

The use of the words "the original contract need not be performed" imply that the performance of the same could still be required. Therefore the section will not apply where the agreement to sub-

stitute a new contract for the original one is made after the breach of the original contract : *Case law referred.* [P 90*c*,*f*]

(c) Contract Act (1872), S. 41 — Actual performance is necessary.

Section 41 requires actual performance and falling short of novation does not absolve the debtor from liability. [P 90*f*]

*** (d) Contract Act (1872), Ss. 63, 62, 41 — Even subsequent to breach, contract may be discharged by accord and satisfaction.**

Whatever difficulties there might be in applying the provisions of Section 62 to a contract after its breach, where a breach of contract has taken place the cause of action that arises from the breach may be discharged by accord and satisfaction under Ss. 41 and 63. Accord is the agreement that the debtor shall pay and that the creditor shall accept something in satisfaction of the cause of action. Satisfaction is the actual execution of such agreement : (1933) 2 K B 616, *Rel. on.* [P 90*g*]

(e) Contract Act (1872), S. 63 — Scope — It should not be enlarged by implication of English law.

Section 63 makes a wide departure from the English law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine : ('28) 15 AIR 1928 P C 99, *Foll.* [P 91*a*]

(f) Contract Act (1872), S. 43 — Discharge of contract by accord and satisfaction by one of debtors—Other debtors are also released.

Under the English law accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43. [P 91*h*]

Dr. Sarat Chandra Basak, Upendra Kumar Roy and Nani Gopal Das — for Appellant.

Dr. Sudhis Roy, Nagendra Chandra Chowdhury and Ajit Kumar Dutta — for Respondent.

Judgment.—The facts which are not in dispute in these two appeals are these : A limited company named House of Labourers Ltd., was incorporated in the year 1926. Another Company named Steel Construction Co. Ltd., was incorporated in the year 1929. On 31st December 1930, Probodh Chandra Chakravarty (the respondent in these two appeals) for self and on behalf of the House of Labourers Ltd., executed a promissory note for Rs. 10,000 with interest at 12 per cent. per annum with half yearly rests in favour of a company known as the Rice and Oil Mills Ltd., Comilla. On 15th December 1931, the Steel Construction Co., took over the assets and liabilities of the House of Labourers Ltd. and at about the same time the Rice and Oils Mills Co. was converted into a company called the New Standard Bank Ltd. (the appellant in these two appeals). On 23rd September 1932 an order was made by the original side of this Court for winding up of the Steel Construction Co., and a liquidator was appointed. On 28th November 1932 Probodh for himself and on behalf of the Steel Construction Co., jointly borrowed from the appellant bank Rs. 1891 on a promissory note agreeing to pay interest at the rate of 12 per cent. with half yearly rests. On 23rd December 1932 the appellant bank filed a claim before the liquidator of the Steel Construction Co. for Rs. 1891-10-0 as the money due to them from the said company on the handnote up to 28th November 1932. They also in this claim included Rs. 12,147-11-0 due to them from the House of Labourers Ltd. on the promissory note dated 21st December 1930 upto 28th November 1931 stating that this amount was mentioned in the balance sheet of the Steel Construction Ltd., as due to them from the said company. On the next day by a resolution of the House of Labourers Ltd. Probodh a director of the said company was authorised to renew the handnote dated 31st December 1930 in favour of the appellant bank.

On 25th December 1932 Probodh for self and as director of the House of Labourers Limited executed a renewed handnote for Rs. 12,270 in favour of the appellant bank, the interest stipulated being the same as in the original handnote. On 1st May 1933 the operation of the order for winding up the Steel Construction Co. was stayed on certain conditions and a reconstruction scheme of the said company was approved by the original side of this Court. On 21st September 1933, the House of Labourers Ltd. executed a conveyance assigning its assets and liabilities in favour of the Steel Construction Company. In April 1934 the House of Labourers Ltd., went into voluntary liquidation and Probodh was appointed liquidator. On 5th June 1934, the reconstruction scheme of the Steel Construction Company was revoked and the proceedings for winding up of the said company were revived. On 5th October 1934, Probodh as liquidator of the House of Labourers Ltd., instituted a suit (Suit No. 1) in the Court of the Subordinate Judge of Comilla for possession of the properties conveyed on 21st September 1933 on declaration that the assignment was void. This suit has been subsequently transferred to the original side of this Court and is still pending. On 27th November 1935, the appellant bank instituted a suit (Suit No. 61) against Probodh and the liquidator of the Steel Construction Co. Ltd. in the Court of the Subordinate Judge of Comilla for recovery of Rs. 2685-10-6 due on the handnote

dated 28th November 1932. On 9th December 1935 Peerless Tea Company Ltd., a creditor of the Steel Construction Company obtained leave under S. 153, Companies Act, to convene a meeting of the creditors and shareholders of the Steel Construction Company for consideration of a fresh reconstruction scheme of the said company. The material portions of this proposed scheme are as follows :

. . . . . .

11. The new Standard Bank Limited are entitled to a sum of Rs. 16,000 or thereabouts to be paid in the manner following :

By allotment to them of fully paid up shares in the company to be issued in accordance with this scheme to the face value of Rs. 12,000. By assignment of debts to the amount of Rs. 4000.

. . . . . .

(14) The amount due to the respective creditors and the debts due from the debtors shall be ascertained by the company but in case of any difference it will be referred to Mr. R. Roy whose decision shall be final.

On 2nd January 1936 the appellant bank instituted a suit (Suit No. 62) in the Court of the Subordinate Judge of Comilla for recovery of Rupees 17,415 against the House of Labourers Ltd. and Probodh due on the renewed handnote dated 25th December 1932. On 1st February 1936 the appellant bank authorised their managing director to attend the meeting ordered to be convened on 9th December 1935 for consideration of the proposed reconstruction scheme of the Steel Construction Co. Ltd. with the following reservations :

(a) That the New Standard Bank Ltd. does not give up their claim against the House of Labourers Ltd. in liquidation and another relating to which a suit is pending in the First Subordinate Judge's Court, Comilla; and (b) That this scheme is not to be regarded as novation of contract or as a discharge so far as the joint debtor with Steel Construction Co. Ltd. to New Standard Bank Ltd. is concerned.

These reservations however were not pressed by the managing director of the appellant bank at the meeting of 9th February. On 6th May cl. (11) of the proposed scheme was unanimously amended and a scheme of construction with certain modifications was approved. The material portions of this scheme are :

(1) The winding up will be set aside.

(2) The company will be carried on under a Board of Directors consisting of five Directors of whom three will be nominated by the New Standard Co. Ltd., one by the Peerless Tea Co. Ltd., the remaining will be elected from the shareholders of the Company from amongst themselves.

(3) The Company shall appoint the New Standard Bank Ltd., as its Managing Agents for a term of ten years.

* * * *

(11) The New Standard Bank Ltd. are entitled to a sum of Rs. 16,000 or thereabouts to be paid in the manner following:

By allotment to them of fully paid up shares in the company to be issued in accordance with this scheme to the face value of 3/4th of the debt as ascertained not exceeding. . . . . Rs. 12,000.

By assignment of debts to the 1/4th of the amount of the debt as ascertained not exceeding . . . . Rs. 4000.

* * * *

(14) The amount due to the respective creditors and the debts due from the debtors shall be ascertained by the company but in case of any difference it will be referred to Mr. R. Ray whose decision shall be final.

(14a) Pending the allotment of new shares and the election of the Board of Directors Messrs. J. C. Bhattacherji, B. K. Dutta, J. A. Graham, N. C. Dutta and Madhusudan Sen Gupta, Retired Superintendent Engineer, be appointed to carry out the scheme with a provision that three of them will form a quorum and that in case of any casual vacancy the continuing numbers will be entitled to fill up the vacancy from amongst the creditors.

On 15th June 1936 this scheme was sanctioned by this Court on its original side. Thereafter the appellant bank received Rs. 16,000 in accordance with this scheme. On 17th July 1937 the appellant bank filed an application on the original side of this Court for leave to proceed with Suit No. 62 pending in the Court of the Subordinate Judge of Comilla against both the defendants in that suit for recovery of the balance after deducting the amount paid to them in accordance with the reconstruction scheme. This application was dismissed by Lort-Williams J. on 10th August 1937, on the ground that the appellant bank agreed to the scheme without any reservation of any further claim against the House of Labourers Ltd. and that the scheme was accepted as a final liquidation of the claims of the bank both against the Steel Construction Co. Ltd., and the House of Labourers Ltd.

An appeal against this order by the appellant bank was dismissed. In accordance with this order the House of Labourers Ltd. were struck off from the category of the defendants in the Suit No. 62 and the appellant bank amended their plaint by limiting it to the recovery of Rs. 5519-12-0 from Probodh alone being the balance due to them after deducting Rs. 11,895-4-0 received by them on account of the claim in this suit in accordance with the scheme of reconstruction. The Steel Construction Co. were also struck off from the category of the defendants in Suit No. 61. In this suit also the appellant bank amended their claim by limiting it to recovery of Rs. 835-2-0 against Probodh alone being the balance due to them after deducting Rs. 1850-8-6 paid to them in accordance with the reconstruction scheme. The suits were then contested by

Probodh. The trial Judge has held that the
a debt which is the subject-matter of Suit No. 62 was not put an end to by any novation of contract. He has also held that the liability of Probodh in both the suits was extinguished by acts which happened after the institution of these suits namely, satisfaction in pursuance of the final scheme of composition sanctioned by this Court on its original side. He accordingly dismissed both the suits. Hence these two appeals by the plaintiff bank.

Section 62, Contract Act, deals with one mode of discharge of contract by consent, namely, novation. By this section if the
b parties to a contract agree to substitute a new contract the original contract is discharged. This may happen if the parties agree to substitute a new contract either between themselves or between different parties the consideration being the discharge of the old contract. Whether all rights and liabilities under the old contract have been extinguished by novation is a question of fact depending on the circumstances of each case. In each case the question is not only whether a new debtor has consented to assume liability but whether the creditor has agreed to accept his liability in substitution
c of the liability of the original debtor. In 15 Cal 319,[1] this Court held that S. 62, Contract Act, does not apply where the agreement to substitute a new contract for the original one is made after the breach of the original contract. The actual language of the section seems to limit its operation to cases before the breach of the contract. The section enacts that in the circumstances laid down in it "the original contract need not be performed." This implies that the performance of the same could still be required. In the case referred to above this Court observed :

> Section 62 is but a legislative expression of the common law; and its provisions do not apply after
d there has been a breach of the original contract.

Since this decision, however, there has been a good deal of controversy as to the scope of this section. In 29 M L J 125[2] Seshagiri Aiyar J. was not prepared to dissent from the view taken by the Calcutta High Court in the above case. But Kumaraswamy Sastri J. was unable to see any grounds for introducing the principles of common law in construing the sections of the Contract Act. According to him there was

> no reason why after breach the parties should not agree to vary the terms or why a plaintiff who consents to such variation should not be held bound by the terms of his agreement.
e

Later on in 45 Mad 180,[3] Ayling Offg. C. J. and Odgers J. approved of the remarks of Kumaraswamy Sastri J. and dissented from the views of the Calcutta High Court as expressed in the above case. In 63 Cal 194[4] our learned brother Panckridge J. referring to 15 Cal 319[1] observed as follows :

> I think that if one does not go beyond the actual language of S. 62 there is something to be said for this view : "Parties to the contract" ordinarily signifies parties to an existing contract rather than parties to a contract that has already been discharged by breach. I find some difficulty, however, in applying this principle to a debt, for it appears strange if the mere failure to pay an outstanding debt on demand brings the case out of the scope of
f S. 62.

To these observations it might have been added that the section uses the words "the original contract need not be performed," implying thereby that the stage contemplated by the section is the one at which performance of the original promise could yet be required. Section 41 deals with another mode of discharge of contract. Under this section the contract is discharged if the promisee accepts performance from a third person other than the promisor. This section requires actual performance and falling short of novation does not absolve the debtor from liability.
g Whatever difficulties there might have been in applying the provisions of S. 62, Contract Act, it is beyond all controversy that where a breach of contract has taken place the cause of action that arises from the breach may be discharged by accord and satisfaction. Accord is the agreement that the debtor shall pay and that the creditor shall accept something in satisfaction of the cause of action. Satisfaction is the actual execution of such agreement.

> Accord and satisfaction is the purchase of a release from an obligation whether arising under a contract or tort by means of any valuable consideration not being the actual performance of the obli-
h gation itself. The accord is the agreement by which obligation is discharged and the satisfaction is the consideration which makes the agreement operative: (1933) 2 K B 616[5] at pp. 643-44.

By S. 63, Contract Act, every promisor may dispense with or remit wholly or in part the performance of the promise made to him or may accept instead of it any satisfaction which he thinks fit. This section makes a

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1. ('88) 15 Cal 319, Monohar v. Thakurdas.
2. ('16) 3 A I R 1916 Mad 823 : 29 I C 449 : 29 MLJ 125, Ramih Bagavathar v. Somasi Ambalam.
3. ('22) 9 A I R 1922 Mad 314 : 67 I C 905 : 45 Mad 180 : 42 M L J 236, K. M. P. R. N. M. Firm v. P. Purumal Chetty.
4. ('36) 63 Cal 194 : 40 C W N 808, Brijmohan v. Mahabir.
5. (1933) 2 K B 616 : 102 L J K B 775 : 149 L T 545, British Russain Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd.

wide departure from the English law inasmuch as it does not refer to any agreement and valuable consideration. It should not, therefore, be enlarged by any implication of English doctrine: 55 I A 154[6] at p. 160. Before the institution of the two suits out of which these appeals arise the appellant bank included in their claim before the liquidator of the Steel Construction Co. the two debts for recovery of which these two suits have been brought. So far as the debt due on the handnote executed by the Steel Construction Co. Ltd., was concerned, the plaintiff bank were the creditors of the said company. So far as the other handnote is concerned they were the creditors of the House of Labourers Ltd. but they included the debt due on this handnote in their claim as this debt was mentioned in the balance sheet of the Steel Construction Co. Ltd. In the suit to recover the debt due on the promissory note executed by the House of Labourers Ltd. they did not implead the Steel Construction Co. as defendants. In the scheme proposed by the Steel Construction Co. Ltd., on 9th December 1935, the company offered to pay Rs. 16,000 by debentures and assignment of debts on the footing that the appellant bank were entitled to a sum of Rupees 16,000 or thereabouts and that the amount of the debt due to them would be ascertained by the company and in case of any difference the decision of the liquidator would be final.

The appellant bank were not at first willing to accept the offer so far as the debt which was the subject-matter of suit No. 62, namely, the debt due from the House of Labourers Ltd., was concerned. They also were not willing at first to give up their claim against Probodh in Suit No. 61. When the proposed reconstruction scheme of the Steel Construction Co. which included the above-mentioned offer by the company to the appellant bank, came up for consideration at the meeting ordered to be convened under S. 153, Companies Act, Managing Director of the appellant bank who was deputed by the appellant bank to represent them at the said meeting accepted without any reservation the amendment of the original proposal as indicated in para. 11 of the scheme sanctioned by the Court. The amount due to the appellant bank was, thereafter, ascertained by the liquidator and the appellant bank received Rs. 16,000 without any reservation in full satisfaction of their claims including their claim in the two suits Nos. 61 and 62. It is clear from the facts and circumstances of the present case that although Probodh was a joint promisor in the two handnotes in suit he was not at all personally benefited by any of these two loans. It is also clear that on account of this fact the two debtor companies took upon themselves the entire liability of these two handnotes and the Steel Construction Co. Ltd. having taken over the liabilities of the House of Labourers Ltd. paid Rs. 16,000 in full satisfaction of all claims of the appellant bank including the claims of the two handnotes in suits.

Much reliance was placed by the appellant upon (1875) 10 Ch A 211.[7] That was a case under the Bankruptcy Act. The appellant bank were not the creditors of the Steel Construction Co. Ltd. in respect of the debt due on the handnote executed by the House of Labourers Ltd. This debt therefore could not have been affected by any scheme under S. 153, Companies Act. But the appellant bank agreed without any reservation to receive from the Steel Construction Co. Ltd. a certain amount in satisfaction of this debt. They also agreed to receive a certain amount without any reservation in full satisfaction of their debt due from the Steel Construction Co., Ltd. The facts of this case therefore are clearly distinguishable from the case in (1875) 10 Ch A 211.[7] The appellant bank received without any reservation Rs. 11,895-4-0 in full satisfaction of their debt due on the handnote executed by the House of Labourers Ltd. Assuming that this did not amount to discharge of the debt by novation it certainly amounted to discharge of the debt under S. 41, Contract Act. The appellant bank also received without any reservation Rs. 1850-8-6 in full satisfaction of the debt due on the handnote executed by the Steel Construction Co. Ltd. This amounted to discharge of the cause of action in suit No. 61 under S. 63, Contract Act. Under the English law, accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt discharges the claim of the creditor against all (Leake on Contract, Edn. 8, pp. 683-684). There is no reason why this principle would not apply to cases of joint and several liability under S. 43, Indian Contract Act. This is indeed a principle of general application and can be traced to the doctrines of the Roman law. In Roman law :

6. ('28) 15 A I R 1928 P C 99 : 108 IC 678 : 9 Lah 510 : 55 I A 154 (P C), Chunna Mal-Ram Nath v. Mulchand Ram Bhagat.

7. (1875) 10 Ch A 211: 44 L J Bk 34: 31 L T 745: 23 W R 251, Ex parte Jacobs; In re Jacobs.

Obligation of this sort went by the name of correality or solidarity. Such an obligation bound each promisor for the whole. And yet though there might be two obligations, one thing only turned on them. If therefore any one paid what was due he put an end to the obligation of all, and set all free.

In such an obligation two or more persons were liable for the whole, but it was due only once, so that if the sum due was once paid, the whole was ended. Each debtor might be compelled to pay the whole or any part of the debt. If one of the debtors paid the whole or part of the debt, the other debtors were wholly or pro tanto released. But when a debtor was released by a cause that did not affect the joint obligation (as if he was made captive and enslaved), the other debtors were not to any extent released. In Roman law these cases fell into two groups, the essential difference being that in classical law, in one group the bringing of an action by, or against, one, barred or released, all the others. In other group roughly speaking, only satisfaction ended the obligation. To the first group the name correality was applied, the second case was commonly called simple solidarity. Anything which completely destroyed a correal obligation as to one debtor, without affecting his personality (as St. Paul puts it, destroyed the debt, but not the debtor) destroyed it altogether. In both the cases of correality and solidarity, whether there was one obligation, or more, there was at any rate only one thing due. One sum of money due and there was a very ancient rule expressed in the maxim *non bis in idem*—the same thing—must not be claimed twice.

As the appellant bank after the institution of the two suits adjusted the claims in the two suits at certain amounts without any reservation and as the adjusted claims have been paid in full further claims against Probodh in these two suits are no longer maintainable. The learned Subordinate Judge was therefore right in holding that the two debts for enforcing which the two suits, viz., Nos. 61 and 62 were instituted had been discharged and the plaintiff bank were not entitled to recover anything from Probodh. The appeals therefore fail and are dismissed. There will be no order as to costs in the appeals. The cross-objections are not pressed and are therefore dismissed but without costs.

K.S./R.K. *Appeals dismissed.*

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NASIM ALI AND PAL JJ.

Smt. Radharani Dassi w/o Narayan Chandra Ghose — Defendant 3 — Appellant

v.

Smt. Binodamoyee Dassi w/o Abinash Chandra Ghosh, Plaintiff and others — Respondents.

Appeal No. 103 of 1938, Decided on 25th July 1941.

(a) Civil P. C. (1908), S. 11—Right of decree-holder obtained on attachment is claim under judgment-debtor.

Attachment does not create any specific charge on the property attached. It does not by itself give the attaching decree-holder in strictness a title to the attached properties but it is the basis of the decree-holder's right to assert his judgment-debtor's interest in the property attached and the right created in favour of the decree-holder by attachment is a claim under the judgment-debtor within the meaning of S. 11 : ('31) 18 A I R 1931 P C 114 and ('24) 11 AIR 1924 Cal 744, *Rel. on*; ('28) 15 AIR 1928 Cal 130, *Doubted*. [P 95c]

(b) Res judicata—Co-defendants—Essentials for applicability of doctrine stated.

The limits within which the doctrine of res judicata should be applied as between co-defendants are these : (a) that the co-defendants were necessary or proper parties in the former suit; (b) that there was a conflict of interest between them; (c) that there was a necessity to decide that conflict in order to give the plaintiff appropriate relief, and (d) that there was a decision of the question between the co-defendants : ('31) 18 A I R 1931 P C 114; ('32) 19 A I R 1932 P C 161 and ('35) 22 A I R 1935 P C 139, *Foll.* [P 95e]

In execution of a decree against *B* and *C*, property of *A* was attached on the ground that *B* and *C* had obtained rights under a gift deed executed by *A*. *A*'s claim was allowed whereupon the decree-holder filed a suit against *A* impleading *B* and *C* also as pro forma defendants; but they did not appear. It was held in that suit that *A*'s life interest passed to *B* and *C* under the gift and that it was liable to be sold in execution of the decree. Subsequently *A* filed a suit that the gift was fraudulent, inoperative and void against the decree-holder and *B* and *C*. It was contended that the suit as against *B* and *C* was barred by res judicata by the decision in the suit by the decree-holder. It was not known whether *B* and *C* were party to the claim case by *A* :

Held that on these facts it could not be said that the present suit was barred by res judicata. [P 95g]

(c) Civil P. C. (1908), O. 21, R. 63 — Judgment-debtor not party to claim allowed—Order cannot be said to be against him — Decree-holder is entitled to file suit—Judgment-debtor may not be necessary party.

An order in a claim case is conclusive as against the party against whom it is made. It is conclusive only as regards the properties which are the subject-matter of the claim. Where a claim is allowed but the judgment-debtor is not a party to the claim case it cannot be said that the order in the claim case is against the judgment-debtor. [P 95e, f]

The attaching decree-holder is the person against whom the order in the claim case is made. He is, therefore, entitled in a suit under O. 21, R. 63 to establish the right which he claims to the property

attached. In such a suit the judgment-debtor may not be a necessary party. [P95*f*, *g*]

(d) Res judicata—Difference between doctrine of res judicata and estoppel, explained.

The doctrine of res judicata no doubt resembles the doctrine of estoppel in some respects; but the two are materially different. The former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, while the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position : 8 All 324, *Expl.* [P 98*a*, *b*]

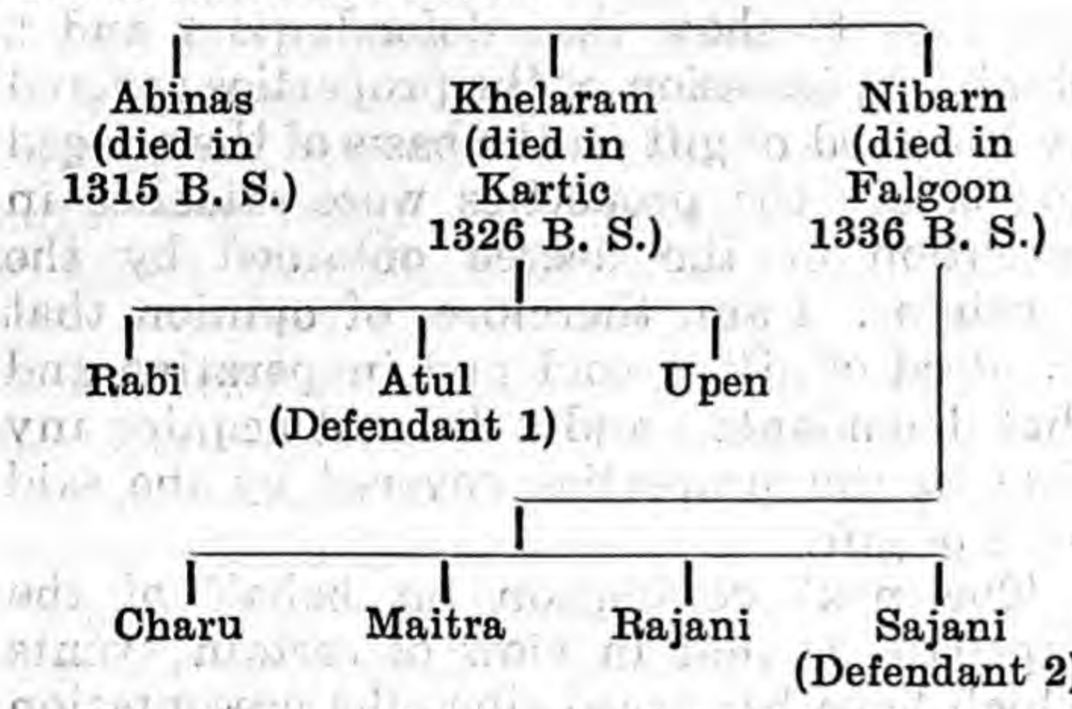
(e) Civil P. C. (1908), S. 60 — "Property" — All interests in properties available to judgment-debtor can be attached.

The word 'property' in S. 60 is used there in a very wide sense. All the interests in the properties which are available to the judgment-debtor for his benefit can be seized in execution. Even if the property does not belong to the judgment-debtor if he has acquired any right or power in respect of the same which can be sold by him for his benefit, such right or power will be seizable property within the meaning of the section : ('24) 11 A I R 1924 Cal 744, *Rel. on.* [P 99*a*]

Benoyendra Prosad Bagchi and Amiya Prasad Maitra — for Appellant.

Gopendra Nath Das and Kshitindra Kumar Mitra — for Respondents.

Nasim Ali J. — The following genealogy about which there is no dispute will explain the facts of the case :



The facts which are not in dispute in this appeal are these : Abinash acquired the properties included in sch. Ka of the plaint, with his own earnings. As he had no son he and his wife liked defendants 1 and 2 very much. The latter used to live at the house of Abinash during his life-time. After Abinash's death Binoda Moyee being an illiterate pardanashin lady, the properties inherited by her from Abinash were managed and looked after by defendants 1 and 2. On 6th Kartic 1326 B. S.=23rd October 1919, a deed of gift was executed by Binoda Moyee and Nibaran. The material portion of this document is this :

Recipients of the deed of gift :

. . . Atul Chandra Ghosh . . . . and Sri Sajani Kanta Ghosh . . . .

Executant of the deed of gift :

. . . Binodamoyi Dassi, widow of late Abinas Chandra Ghosh . . . Sri Khelaram Ghosh and Sri Nibaran Chandra Ghosh, sons of late Dinanath Ghosh, by caste Sadgope . . .

This deed of gift in respect of the moveable and immovable properties mentioned in the schedules below is executed to the following effect :

I am Srimati Binodamoyi Dasi. My husband the late Abinash Chandra Ghosh . . . acquired . . . various properties, moveable and immovable . . . with his own earnings and when after remaining in possession and enjoyment of the same, he died leaving me as his sole heir, I inherited all those properties and have been till now possessing and enjoying them. But as I, being a woman, cannot properly manage these properties, you, two have been protecting and managing the properties since the death of my husband and if you had not managed all those properties in that way, they would have been destroyed. Moreover, I am highly pleased with you as you hold me in great respect and reverence and have been assisting me in performing my Bratas, Basanti Pooja, and other religious observances. But I have only a life interest in all these properties and have no authority in law to dispose them of. Sj. Khelaram Ghosh and Sj. Nibaran Chandra Ghosh, the elder and the younger brothers, respectively, of my husband, are the reversionary heirs, and you, Atul Chandra Ghosh, are the son of the said elder brother of my husband and you, Sajani Kanta Ghosh, are the son of the said younger brother of my husband. For these reasons, I, who have got the life-interest in the properties, and my husband's said elder and younger brothers, who are the next reversioners we three, jointly by this deed of gift make an absolute gift of our present and future rights and interests in the said properties as also in the properties purchased by myself. From this day you, down to your sons, grandsons and other successors-in-interest go on enjoying and possessing in great felicity all the properties, either left by my husband or purchased by me, mentioned in the schedule by exercising all kinds of rights therein including the rights of gift, sale &c. . . . . On the strength of this deed of gift you go on enjoying and possessing the properties either by inducting new tenants therein or by evicting old tenants therefrom or by possessing them yourselves, after mutating your name in the records of the zemindars and of the Collectorate. So long as I, Sm. Binodamoyi Dassi, will remain alive, you will allow me to reside in the house at Kasibati, and will maintain me in a befitting manner and to the best of your abilities will perform the Bratas and Basanti Pooja etc., according to the conventions. You will not be entitled to object to these. The approximate value of the said properties gifted away is Rupees Nineteen Thousand Seven Hundred and ninetyfive only. (Rs. 19,795).

I, Sri Khelaram Ghosh and I, Sri Nibaran Chandra Ghosh, we two, do hereby make a gift to you in conjunction with the said Binodamoyi Dassi, of the interest we have in the properties of the schedule as future reversioners. At no time shall we claim those properties on any ground whatever, nor shall our other heirs or legal representatives be entitled to do so and even if we or they do, it will not be valid. There are ample reasons why a gift of those properties should be made to you. Being very much pleased with you at your conduct and diligence we make a gift of our future rights to you . . . . .

This document was registered on 9th February 1920. Defendant 3 obtained a decree

against defendant 2 in the year 1926 and attached the properties mentioned in Schedule Kha of the plaint in execution of the said decree. 8th September 1936 was fixed for the sale of these properties. On 7th September 1936, Binodamoyee raised the present suit in the Court of the Second Subordinate Judge at Hooghly for a declaration that the deed of gift dated 23rd October 1909 was a fraudulent, inoperative and void document. Her case in substance is this : She is an illiterate old pardanashin lady. She is incapable of personally managing her own properties and defendants 1 and 2 have been carrying on the management on her behalf all along. After the death of her husband defendants 1 and 2 asked her to execute an amukternama in their favour. As she had implicit faith in them she agreed to execute an amukternama. Defendants 1 and 2 got the deed of gift registered by her, representing to her that the same was an amukternama. She was not aware of the contents of the said deed of gift; it was never read over to her. She had no independent advice at the time when she executed and registered the deed of gift. She was all along under the impression that the said document was an amukternama and that her properties were being managed on the strength of that amukternama. She came to know of the attachment of the properties in suit on 16th Bhadra last (1st September 1936.) The suit was contested by defendant 3. Her case is as follows : Binodamoyee executed the deed of gift with full knowledge and understanding of all its contents out of her own free will and on independent advice. Binodamoyee's allegation that she executed the deed of gift under the impression that it was an amukternama is absolutely false. Ever since the execution of the deed of gift defendants 1 and 2 are in possession of the properties observed by the said deed. The trial Judge decreed the suit on 26th November 1937. He declared that the deed of gift was a fraudulent, inoperative and void document. Defendant 3 presented this appeal in this Court on 15th March 1938.

The first contention on behalf of the appellant is that the trial Judge was wrong in his appreciation of the facts of the case and that his decision that the deed of gift is fraudulent, inoperative and void is not borne out by the evidence on record. The value of the properties covered by the deed of gift as stated in it is about Rs. 20,000. Binodamoyee was about 62 years old at the time when the deed of gift was executed by her. She is illiterate and pardanashin. In the deed of gift there is no mention as regards the amount which she is to get for her maintenance from the donees. There cannot be any doubt that the gift was an improvident gift. She had no independent advice. The writer and the attesting witnesses to the deed of gift were not called by the appellant to prove that the document was read over or explained to her or that she understood the contents of this document. There is no satisfactory explanation as to why they were not called. The appellant examined one Upendra Nath Ghosh. This witness said that the plaintiff executed a deed of gift, but in his cross-examination he stated that he was not present at the time when this deed was executed. Binodamoyee in her evidence said that she was unaware of the contents of this document. The evidence in this case clearly shows that she had implicit confidence in defendants 1 and 2. Defendants 1 and 2 admittedly were managing the properties at the time. Plaintiff's evidence that defendants asked her to execute an amuktearnama for the management of her properties is consistent with probabilities. The trial Judge was, therefore, right in believing her evidence. There is no satisfactory evidence in this case to show that defendants 1 and 2 obtained possession of the properties covered by the deed of gift on the basis of the alleged gift before the properties were attached in execution of the decree obtained by the appellant. I am, therefore, of opinion that the deed of gift is void and inoperative and that defendants 1 and 2 did not acquire any title to the properties covered by the said deed of gift.

The next contention on behalf of the appellant is that in view of certain events which have happened since the presentation of the appeal in this Court the plaintiff's claim is now barred by res judicata. The subsequent events on which the appellant relies are these : One Sarat Chandra Ghosh was added on the petition of the plaintiff as a defendant in this suit on 3rd July 1937, while this suit was pending before the trial Judge on the ground that he had attached the kha schedule properties in execution of a decree obtained by him against defendants 1 and 2. Sarat was subsequently discharged from the category of the defendants on his own application on the ground that he had withdrawn the attachment. After the disposal of the present suit by the trial Judge Sarat again attached kha schedule properties. Thereupon, Binodamoyee made an

application under O. 21, R. 58, Civil P. C., for releasing this property from attachment. This claim was allowed on 26th February 1938. Sarat thereafter brought a suit under O. 21 R. 63, Civil P. C., in the second Court of the Subordinate Judge at Hooghly against Binodamoyee. In this suit defendants 2 and 3 were impleaded as pro forma defendants but they did not appear in this suit. The suit of Sarat was contested by Binodamoyee. On 5th May 1939, Sarat's suit was decreed by the Subordinate Judge. He found that Binodamoyee's life interest passed by the deed of gift to the donees and that this life interest was liable to be sold in execution of the decree obtained by Sarat. Binodamoyee then preferred an appeal against this decree to this Court but this was dismissed for her failure to pay the paper book costs. On these facts the argument on behalf of the appellant is this: The decision in Sarat's suit operates as res judicata between the plaintiff and defendant 3 inasmuch as (a) defendant 3 claims under defendants 1 and 2, and (b) it has been decided finally that defendants 1 and 2 have acquired life interest in the properties in schedule kha by gift from the plaintiff.

Attachment does not create any specific charge on the property attached. It does not by itself give the attaching decree-holder in strictness a title to the attached properties but it is the basis of the decree-holders' right to assert his judgment-debtors' interest in the property attached: 51 Cal 548.[1] I see no reason why this right created in favour of the decree-holder by attachment cannot be considered as a claim under the judgment-debtor within the meanin of S. 11, Civil P. C. To hold otherwise would produce the result that the unsuccessful claimant in the former suit would be able to re-agitate the same dispute with the judgment-debtor as soon as the judgment-debtors' property is attached by a creditor by the simple device of instituting a suit against the judgment-debtor and the attaching creditor. It may be that this view is not consistent with the decision in 55 Cal 448.[2] But the authority of that case has been very much shaken by the decision of the Judicial Committee in 58 I A 158.[3]

The plaintiff and defendants 1 and 2 were co-defendants in Sarat's suit. The limits within which the doctrine of res judicata should be applied as between co-defendants are these: (a) that the co-defendants were necessary or proper parties in the former suit; (b) that there was a conflict of interest between them; (c) that there was a necessity to decide that conflict in order to give the plaintiff appropriate relief; and (d) that there was a decision of the question between the co-defendants. *See* cases in 58 I A 158,[3] 59 I A 247[4] and 62 I A 224.[5] An order in a claim case is conclusive as against the party against whom it is made. It is conclusive only as regards the properties which are the subject-matter of the claim case. Order 21, R. 63 authorises the party against whom an order in the claim case is made to institute a suit to establish the right which he claims to the property attached. Where a claim is allowed but the judgment-debtor is not a party to the claim case it cannot be said that the order in the claim case is against the judgment-debtor. The petition of Binodamoyee under O. 21, R. 58 is not before us and we do not know whether defendants 1 and 2 were parties to the claim case. Where a claim is allowed the attaching decree-holder is the person against whom the order in the claim case is made. He is therefore entitled in a suit under O. 21, R. 63 to establish the right which he claims to the property attached. In such a suit the judgment-debtor may not be a necessary party. But whether he is a proper party in such a suit would depend upon the pleadings. The pleadings, however, are not before us.

On the materials before us it is not possible to determine whether the decision in Sarat's suit operates as res judicata between the plaintiff and the defendants 1 and 2. The result therefore is that this appeal is allowed. The decree of the trial Judge is set aside. The finding of the trial Judge that the deed of gift executed by the plaintiff in favour of defendants 1 and 2 is void and inoperative is affirmed. The case is sent back to the trial Judge in order to enable him to determine the question whether the decision in Sarat's suit operates as res judicata between the plaintiff and defendants 1 and 2 after taking such evidence as the parties may choose to adduce on this point. If the trial Judge finds

1. ('24) 11 AIR 1924 Cal 744 : 83 I C 233 : 51 Cal 548 : 39 C L J 418, Najimunnessa Bibi v. Nacharuddin Sardar.
2. ('28) 15 A I R 1928 Cal 130 : 105 I C 647 : 55 Cal 448 : 32 C W N 248, Rukeya Banu v. Nazira Banu.
3. ('31) 18 A I R 1931 P C 114 : 132 I C 598 : 58 I A 158 : 53 All 103 (PC), Muni v. Tirloki Nath.
4. ('32) 19 A I R 1932 P C 161 : 137 I C 328 : 10 Rang 322 : 59 I A 247 (PC), Maung Sein Done v. Ma Pan Nyun.
5. ('35) 22 A I R 1935 P C 139 : 157 I C 485 : 14 Pat 611 : 62 I A 224 (PC), Kedar Nath Goenka v. Ram Narain Lal.

that the said decision operates as res judicata between the plaintiff and defendants 1 and 2 the suit will be dismissed. Otherwise the suit will be decreed. Costs in this appeal will abide the result. Hearing fee is assessed at ten gold mohurs.

Pal J.—I agree. But I would like to add a few words on the question as to whether the claim of defendant 3 in the present suit is a claim under defendants 1 and 2. The English law on the point is summarised thus in Halsbury's Laws of England :

> A judgment inter partes raises an estoppel only against the parties to the proceeding in which it is given, and their privies, i. e., those claiming and deriving title under them.

Later on the learned author says :

> An execution creditor is not a privy to the debtor and is not bound by an estoppel which prevents the debtor from denying the title of a third person who has in fact no property in the goods.

The following cases are relied on as supporting this proposition : (1859) 4 H & N 660,[6] (1829) 9 B & C 577,[7] (1886) 18 Q B D 451.[8] (1829) 9 B & C 577[7] was an action of trover brought by the plaintiff (against whom a commission of bankrupt had issued) against his assignees to recover goods which they had, as such assignees, sold. It appeared that the plaintiff himself had assisted the assignees by giving directions as to the sale of the goods and that, after the issuing of the commission, he gave notice to the lessors of a farm which he held that he had become bankrupt and that he was willing to give up the farm and, in consequence, the lessors received the lease and accepted possession of the premises. In the present action his case was that the commission of bankrupt was invalid as he was not a trader within the meaning of the statute. Two questions arose for decision: (1) Whether the plaintiff was estopped from disputing the validity of the commission under which the defendant acted; (2) if he was not, whether the commission was valid. The second was a question *juris positivi* and depended entirely upon the construction of the then Bankrupt Statutes (34 & 35 Hen. VIII c. 4; 13 Eliz. c. 7; 1 Jac. I c. 15; 21 Jac. I, c. 19; 6 Geo. IV, c. 16). On a construction of these statutes, it was held that the plaintiff was not a trader and consequently was not liable to be adjudged bankrupt. On the first question also it was held that so far as the defendants (commission of bankrupt) was concerned the plaintiff was not in any way estopped. Bayley J. observed :

> There is no doubt but that the express admission of a party to the suit or admission implied from his conduct, are evidence, and strong evidence, against him, but we think that he is .... not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth with respect to that person and those claiming under him and that transaction; but as to third persons he is not bound. It is well established rule of law that estoppel binds parties and privies and not strangers.

In (1859) 4 H & N 660,[6] one William Johnston obtained a decree against R. H. Martin and in execution of this decree certain pieces of furniture were seized on 18th October 1858, by the Sheriff under a writ of *fi fa*. One George Richards, an auctioneer residing in London, laid claim to the furniture and proved that in May 1858, one Hord, father-in-law of Martin, applied to him for a loan, and offered a bill of sale of the furniture at Rose Cottage, Stevenage. Richards went down to Stevenage and there in the presence of Martin, a bill of sale of the goods in question was duly executed by Hord on 27th May and registered on 1st June 1858. Martin stated to Richards that the furniture were Hord's and went with Hord before a Magistrate where Hord in Martin's presence made a statutory declaration, that the goods were his (Hord's) own property. The execution creditor (the defendant) proved in this case that the furniture seized had been sold and supplied by him to Martin and were seized under the *fi fa* against Martin at his suit. Upon this evidence the learned Judge asked the jury, (1) whether there had been any dealing between Hord and Martin so as to make the furniture the property of Hord as between himself and Martin; and (2) if not, whether in point of fact there had been an actual transfer of the goods from Martin to Hord. The jury found that there has been no actual transfer from Martin to Hord. The case was decided in favour of the creditor. Pollock, C. B. said :

> A sheriff who comes to seize the goods of a debtor armed with a writ of execution in favour of a creditor, is not bound by estoppels which might have prevented the debtor himself from claiming the goods.

Martin, B. observed :

> There is no doubt but that Martin stood by and assented while his father-in-law assigned the goods to the claimant, who lent his money and took the assignment honestly. But Martin was no party to the assignment. There was therefore only a title by estoppel as against him .... It is clear that, if an action of trover had been brought against Martin by the present claimant, Martin would have been estopped. But no authority has been cited to shew

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6. (1859) 4 H & N 660 : 28 L J Ex 322 : 5 Jur (NS) 520 : 1 F & F 447 : 118 R R 672, Richards v. Johnston.

7. (1829) 9 B & C 577, Heane v. Rogers.

8. (1886) 18 Q B D 451 : 56 L J Q B 293 : 56 L T 591 : 35 W R 355, Richard v. Jenkins.

that a judgment-creditor is party or privy to the acts of the judgment debtor. The *fi fa* directs the Sheriff to seize the goods of the debtor. The Sheriff is a stranger to the debtor and the only question for him is—Are these goods the goods of the debtor or not ? . . . . We must say that the Sheriff and the execution creditor are not bound by the estoppel which would affect the execution debtor.

Watson, B. and Channell, B. also took the same view. Watson, B. observed :

Though Martin may be estopped, there was no transfer of any kind, no pretence of any transfer from Martin to Hord : therefore the property did not pass at all.

Channel, B. said :

Whatever may have been the case as against Martin, there was no estoppel which could prevail against the execution creditor.

In course of the hearing of this case Martin, B. is reported to have observed that the execution creditor claims adversely to his debtor, and Pollock C. B. enquired if there was any authority that an execution creditor could not claim any property which the execution debtor had disabled himself from claiming: (1886) 18 Q B D 451:[8] LORD ESHER, M.R., BOWEN L. J. AND FRY L. J. In this case the defendant, the execution creditor having recovered a judgment against one Williams, took out execution against him and certain goods found to be in his possession were seized by the sheriff under a *fieri facias* issued upon the judgment. The plaintiff claimed those goods as belonging to him. It appeared that the plaintiff had prior to 1884 made a demise of a brick field and had let therewith certain personal chattels to the debtor, Williams. These personal chattels were the goods seized. The plaintiff became bankrupt in 1884 but did not inform the trustees in bankruptcy that he owned these goods. The debtor, Williams, the tenant of the brick field yard, being unaware of the plaintiff's bankruptcy continued to pay him money for the hire of the goods. The case of the plaintiff was that though as result of his bankruptcy the property in the goods would vest in the trustee in bankruptcy, his hirer was estopped from denying his title as he continued to pay him the hire money even after the bankruptcy. The question to be decided in this case was whether the goods are the goods of the claimant as against the execution creditor. Assuming that the execution debtor was estopped from saying that the goods were not the claimant's and that if the claimant brought an action against the execution debtor in respect of the hire of the goods, the execution debtor would have no defence, Lord Esher, M. R. observed :

Even then there would be merely an estoppel between those parties and such an estoppel would give the claimant no real title to or interest in the goods. Such an estoppel merely prevents the party who is estopped from saying as against some other party that the goods do not belong to such other party, though in fact they do not belong to him; and it only takes effect as between parties and privies. If the execution creditor could for this purpose be said to claim through and under the execution debtor so as to be in privity with him he might be estopped. But I do not think he can be said so to claim; he claims through and by the law as against the execution debtor and not through and under him. That appears to me to be the effect of what was said by the Judge in (1886) 18 Q B D 451,[8] though no doubt that case was not on all fours with the present.

Fry L. J. said :

The question we have to answer is whether the goods at the time of the seizure were the property of the claimant as against the execution creditor. It seems to me clear that the claimant had at the time no property in the goods. At the utmost he had only a right by way of estoppel against the execution debtor. Assuming that he had that, such an estoppel is only effective as between parties and privies. In my opinion the execution creditor is not a party or privy to the estoppel, and is not bound by it.

It was found in this case that the goods were in the possession of the execution debtor and therefore prima facie they were his. The question in issue was not whether the goods were really the execution debtor's but whether they were the goods of the claimant as against the execution creditor. The claimant therefore was to shew affirmatively that he had some title to or interest in the goods as against the execution creditor. If it appears on the facts that the claimant had no title to the goods he must fail. Similarly the following passage occurs in Bigelow's "Law of Estoppel:"

No privity exists between creditor and debtor; there is neither devolution nor subordination of rights in the relation . . . no privity in law . . . for the legal relation between debtor and creditor is one of antagonism rather than of confidence or of mutual dependence, nor by estate, for they have none in the debtor's land. . . The truth is the relation of judgment creditors to their debtor's real estate is anomalous. They have a lien upon it by virtue of statute law, but they have no interest in it such as makes them privies in estate with the debtor.

It may be noticed here that though the learned authors referred to above use the word "privy" which does not occur in S. 11, Civil P. C., some of the authorities relied on by them in support of the proposition use expressions similar to the one used in the Civil Procedure Code. Lord Esher, for example, in (1886) 18 Q B D 451,[8] says that the execution creditor cannot be said to claim through and under the execution debtor. According to his Lordship, he claims through and by the law as against the execution

debtor and not through and under him. All
a the above cases, it must have been noticed, are cases on estoppel. The doctrine of res judicata no doubt resembles the doctrine of estoppel in some respects; but the two are materially different. The distinction between the two doctrines was explained by Mahmood J. in 8 ALL 324[9] at p. 332. "That the effect of the plea of res judicata" said the learned Judge,

> may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted.

But here the similarity between the two rules virtually ends :

b Perhaps the shortest way to describe the difference between the plea of res judicata and an estoppel is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts, has altered his position. In other words res judicata prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence.

The doctrine of "res judicata" differs from "estoppel" chiefly in not resulting from an act of party himself but from a decision of the Court. An execution creditor while
c claiming to take in execution a property in assertion of his debtor's title thereto may not claim through and under his debtor so as to be bound by his debtor's acts, and his claim may, for this purpose, be adverse to the debtor; yet, what he is claiming to take is nothing but his judgment-debtor's title and any determination of that title available to the judgment-debtor himself as against any claimant will be equally available to him. The plea of res judicata is not merely a plea of estoppel. It amounts to an assertion that the very legal rights of the parties are such as they have been determined to be
d by the judgment of a competent Court and no other Court should proceed to determine this again. A matter once formally decided is decided once for all as between the parties to the decision or as between those claiming under them. That which has been delivered in judgment must be taken for established truth. In all probability it is true in fact; even if not, it is expedient that it should be held as true none the less. The operation of the doctrine is thus the transformation of a question of fact into a question of law.

Section 11, Civil P. C., simply requires that the party in the subsequent suit must e claim under the party in the former suit. Here the execution creditor is claiming to assert the very title of his debtor. He claims the debtor's title and nothing else. In my judgment he is claiming under his judgment-debtor within the meaning of the section. The decisions of the Indian Court having direct bearing on the meaning and scope of S. 11, Civil P. C., seem to take the view that the execution creditor while claiming to take in execution the property of his judgment-debtor claims under him within the meaning of the above section. Thus, in A I R 1935 ALL 888[10] (Sulaiman C. J. and Bennet J.) certain property was attached by S in execution of f a decree against R as belonging to R. A suit filed by P to which both R and S were impleaded for a declaration that he was the absolute owner of the property was decreed. Subsequently, B, another creditor of R, attached the same property in execution of his decree and it was purchased by N. P then filed another declaratory suit. It was held that the question of title decided in prior suit was binding on R, and all the subsequent representatives. Sulaiman C. J. observed that as B attached the property subsequently to the decree he must be deemed to be a representative of R. Hence the g previous judgment operated as res judicata against R and also against his attaching creditor B. It was further observed by the learned Chief Justice :

> It will be intolerable for Ram Sewak if all simple creditors of Raghubir were to call upon him to prove his title over and over again.

In A I R 1934 Rang 206[11] (Dunkley J.) it was held that in a suit under O. 21, R. 63, Civil P. C., the decree-holder claims under his judgment-debtor within the meaning of S. 11, Civil P. C. The decree-holder in such a suit claims under his judgment-debtor because he is litigating to assert the title of his judgment-debtor to the property, and he ob- h tains his right to bring or defend the suit through his judgment-debtor: *see also* A I R 1936 ALL 722.[12] These are sufficient authorities for saying that the execution creditor claims under the judgment-debtor within the meaning of S. 11, Civil P. C., when he seeks to seize and sell the property as belonging to his judgment-debtor. The authority contrary to this view is to be found in

9. ('86) 8 All 324 : 1886 A W N 101, Sitaram v. Amir Begum.

10. ('35) 22 AIR 1935 All 888 : 156 I C 387 : 1935 A L J 1001, Ram Sewak v. Bahal.

11. ('34) 21 A I R 1934 Rang 206 : 151 I C 417, U Tha Lu v. Devanarain.

12. ('36) 23 AIR 1936 All 722 : 163 I C 239 : 1936 A L J 295, Ramjiwan v. Inder Bahadur.

55 Cal 448.[2] But the authority of that case is very much shaken by the decision of the Judicial Committee in 58 I A 158.[3]

In my opinion the question may be approached from another view point. Section 60, Civil P. C., lays down what properties can be taken in execution. The word "property" is used there in a very wide sense. All the interests in the properties which are available to the judgment-debtor for his benefit can be seized in execution. Even if the property does not belong to the judgment-debtor if he has acquired any right or power in respect of the same which can be sold by him for his benefit, such right or power will be seizable property within the meaning of the section: *See* in this connexion 51 Cal 548.[1] Assuming that the prior decision will operate as res judicata between the present plaintiff and the present defendants 1 and 2, defendants 1 and 2 would be entitled to sell the property so as to enable the purchaser from them to take the plea of res judicata as against the present plaintiff. Plea of res judicata is not strictly a mere plea of estoppel. The legal rights of the parties are such as they have been determined to be by the judgment of a competent Court. Consequently as against the present plaintiff defendants 1 and 2 can be said to have acquired a saleable interest in the property itself. The property can therefore be taken in execution by a creditor of defendants 1 and 2. The decision in 18 C W N 954[13] is an authority for this view.

K.S./R.K. *Case remanded.*

13. ('14) 1 AIR 1914 Cal 281 : 20 I C 815 : 19 C L J 441 : 18 C W N 954, Peari Mohan v. Durlavi Dassya.

A. I. R. (29) 1942 Calcutta 99

NASIM ALI AND PAL JJ.

Tarit Bhusan Rai and another, Defendants 16 and 17 and another — *Appellants*

v.

Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra, Plaintiff and others — *Respondents.*

Appeals Nos. 152 and 180 of 1938, Decided on 16th June 1941, from original decrees of Sub-Judge, First Addl. Court, Alipore, D/- 22nd March 1938.

(a) Hindu law — Religious endowment — Hindu idol—Nature and powers of, explained—Power of suing can be exercised only by its shebait—Person having mere right of worshipping has no right to sue on behalf of idol.

In view of the religious customs of the Hindus which have been recognized by Courts of law a Hindu idol like a juristic person under the English system has been vested with the capacity of holding properties and with the powers of suing or being sued; but it has no physical capacity to sue. The shebait of the Hindu idol is its manager in law; only he has the right to sue on behalf of the idol, for the protection of its interests. The worshippers of the idol are interested in the idol and as such are interested in the property dedicated to it for its maintenance. Their right to sue for the protection of the idol's property is founded upon their own interest, viz., the right of worship apart from and independent of the idol's right to sue for the protection of its own interests and properties. They have no right to exercise the idol's power of suing: *Case law referred.* [P 103*c*; P 104*a*,*b*]

(Points of similarity and difference between a minor and a Hindu idol stated; who are all entitled to sue on behalf idol and represent it explained by Pal J.) [P 103*d*,*e*,*f*; P 112*g*,*h*; P 115*g*,*h*; P 116*a*]

(b) Civil P. C. (1908), O. 9, R. 9 — Previous suit by person not having power to do so dismissed—No bar to subsequent suit.

Dismissal for default of a previous suit by a person having no power to do so (person who had no power to sue on behalf of idol) does not bar a fresh suit by the idol. [P 104*c*]

(c) Civil P. C. (1908), O. 9, R. 9 — Causes of action different in previous and subsequent suits — Dismissal of previous suit does not bar subsequent suit.

The dismissal of a suit under O. 9, R. 8 does not operate in favour of the defendant as res judicata. It imposes, however, when read along with O. 9, R. 9 a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. [P 104*c*]

The real cause of action in the previous suit was the attempt of the defendant to sell the debutter properties in an execution case which was dismissed for non-prosecution after the institution of the previous suit. The cause of action of the subsequent suit was a fresh attempt by the defendant to sell the debutter properties by starting another execution case:

Held (Per *Nasim Ali J.*) that the cause of action in the subsequent suit was not identical with the cause of action in the previous suit, and hence O. 9, R. 9 was not a bar to the subsequent suit: 16 Cal. 98 (P. C.), *Applied.* [P 104*e*]

(Per *Pal J.*) — When the subsequent execution was taken out against what the idol claimed to be its property a fresh invasion of its right took place giving rise to a fresh cause of action for it to come and seek the help of the Court, and not "in respect of the same cause of action" within the meaning of O. 9, R. 9, Civil P. C. [P 111*f*,*g*; P 112*c*,*d*]

(d) Practice — Analogy — Use of.

(Per *Nasim Ali J.*)—Analogy is a source of judicial principles and can be lawfully followed only as a guide to the rules of natural justice in the absence of any statutory prohibition. (Principle of law relating to right of minor to file fresh suit when previous suit has been dismissed owing to negligence of guardian, explained and applied to Hindu idol). [P 105*d*,*e*]

Per *Pal J.* — Analogy may indeed often serve a very useful purpose and perhaps helps the stability of the norms for decisions. This stability receives a special respect when the norms are

extended not merely to like or similar cases but also
a to the cases that are only approximately similar. But this projection of norms to new cases on the ground that these are approximately similar is not without its danger. (Extent to which analogy of minor applies to idol explained). [P 113*f*]

(e) Civil P. C. (1908), O. 9, R. 9 — Dismissal for default of previous suit by next friend of idol owing to negligence — Fresh suit by idol whether maintainable.

Per *Nasim Ali J.* — Order 9, R. 9 is no bar to a fresh suit by a Hindu idol when the previous suit by its next friend was dismissed for default owing to the negligence of the next friend in the conduct of the previous suit. (The negligence consisted in not producing the registered deeds of dedication. The law relating to minor on the point discussed and applied by analogy.) [P 105*e*]

b (*Pal J.*, also discusses the law relating to right of minor to file fresh suit on negligence of guardian and explains the limit of the analogy between minor and idol.) [P 116 to P 119]

(f) Hindu law—Religious Endowment—Dedication held absolute gift to idol.

Where the question is whether property conveyed by a deed of dedication is an absolute gift to the idol or whether it is truly reserved to the donor's own heirs subject to a charge of maintaining the idol and meeting all its suitable expenses, no fixed and absolute rule can be set up. The question can be settled only by a conspectus of the entire provisions of the document. [P 108*h*]

The dedication was by a transfer inter vivos. The deed on the face of it made absolute dedication to the deity. The donor absolutely divested himself of the property and the property was given over to
c the shebaits in præsenti giving full effect to the words of conveyance contained in the deed :

Held that the property was conveyed absolutely to the deity : 19 Cal. 513 (PC) and ('37) 24 A.I.R. 1937 P.C. 185, *Disting*. [P 108*h*]

(g) Civil P. C. (1908), S. 20—Cause of action —Meaning, explained.

Cause of action is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour: 16 Cal. 98 (PC), *Foll.* [P 111*d*, *e*]

d **(h) Civil P. C. (1908), O. 9, R. 8 and O. 47, R. 1—Order under O. 9, R. 8—Review—Whether lies** *(Obiter)*.

Per *Nasim Ali J.* — It is doubtful whether the order of dismissal can be set aside by an application for review under O. 47, R. 1. [P 104*f*]

Per *Pal J.* — When the infant applies in the previous suit itself for a review of the adverse decision, negligence of the next friend should afford a good ground for the purpose. [P 118*f*]

Atul Chandra Gupta and Bankim Banerjee (in 152) and Bhagirath Ch. Das (in 180) — for Appellants.

Panchanan Ghose, Paresh Ch. Shome and Rabiranjan Das Gupta (in both appeals), Bhagirath Ch. Das (in 152), Atul Ch. Gupta and Bankim Banerjee (in 180) — for Respondents.

Nasim Ali J.—The material facts which a are not in dispute in these two appeals are these : (1) On 21st Aswin, 1287 B. S. = 6th October 1869, one Bhagaban Chandra Basu made a gift of 2 bighas of land (now 5 and 6 Karim Buksh Lane) to his sister, Nilmoni Dassi by a registered deed of gift, (Ex. 7). On the same day he and his cousin, Biswanath Basu executed an arpannama potro, (Ex. 5 — deed of dedication). The material portion of this document is this :

Now in order that the deity Sheba (services) and periodical festivals etc., of the idol Sri Sri Iswar Sridhar Salagram Shila Thakur, established by us which we have been carrying on all along may remain in tact in future, I, Bhagwan Chandra Basu, f in view of my (advanced) age and state of health and having no wife and children, and being apprehensive of any hindrance being caused to the said services etc., to the deity (Deb Sheba) in future dedicate my interest in the above property for the services of the idol (Deb Sheba) and appoint Biswanath Basu, the shebait (thereof). All the properties appertaining to the 16 annas comprised of the respective share of both of us, mentioned above (1, 2, 9 and 10 Karim Buksh Lane) are dedicated entirely for Deb Sheba (services of the idol). Of us, (illegible), I, Biswanath Basu, having appointed me and being appointed to do services to the idol we both hereby promise as follows : That I, Biswanath Basu shall henceforth reside etc., in the said house and hold possession of the estate etc., and shall collect rent from tenants and make arrangement of collection and repair houses and do all acts in respect of the aforesaid estate dedicated by us as well as get g the same done and appropriate (illegible) the profits etc., and shall devote myself to the services to the deity (Deb Sheba) with the help of those profits and shall perform the prescribed acts (illegible) repairs etc., and (illegible) of the estate. After my death my full-sister Srimatya Nilmany Dasi and my wife Srimaty Thakur Dasi Dasi, if they survive me, shall both like myself jointly do services to the deity as my heirs and representatives and shall perform the puja (worship) and daily and periodical rites etc., of the deity by being appointed to do the work of Sheba and by residing in the said house and by managing the properties dedicated for Deb Sheba. After their death my two daughters, the elder Srimaty Bhuban Mohini Dasi, the younger Srimaty Purit Pabani Dasi shall both jointly be appointed to do the work of Sheba and being possessed of the properties dedicated for Sheba of the idol, they shall h make settlement etc., according to the aforesaid rules and shall perform the Sheba of the idol from the income thereof and after their death their heirs shall be appointed shebaits and be possessed of the properties dedicated for Sheba and shall perform the Sheba etc.—according to all the terms etc., mentioned above. None of them shall ever be competent to transfer the said property and even if done it will not be allowed. And whatever building or appurtenances etc. are made in the said house in future by us our heirs or representatives shall also be dedicated for the Sheba of the idol. None shall be competent to remove (illegible) any newly constructed building or appurtenances (illegible) or transfer the same by any machinations and even if done the same will not be allowed and be invalid. If ever for any government purpose or any unexpected and unavoidable (illegible (cause?) the

aforesaid property is to be sold or transferred, from the consideration money thereof other properties shall be purchased and the same shall be dedicated for the services of the deity on the above terms and the work of sheba, etc., of the deity shall be carried out from the income thereof. . . To the above effect we, of our respective free will, execute this deed of dedication (arpannamahpatra) by dedicating the aforesaid land and the aforesaid house, etc., for sheba of the idol.

Biswanath Basu died in the year 1881. On 29th June 1890 Nilmoni Dasi dedicated the properties which she obtained by gift from Bhagaban to the same deity, viz., Sree Sree Iswar Sridhar Saligram Thakur. She died in 1898. The wife of Biswanath, Thakurani Dasi died in 1902. Bhubanmohini, the eldest daughter of Biswanath died in 1913 without leaving any issue and Patit Paboni, the next daughter of Biswanath died in 1914 leaving a son Jogesh Chandra Chandra. On 20th August 1925, Jogesh Chandra brought a suit (title Suit No. 172 of 1925) in the Court of the Subordinate Judge at 24-Parganas for a declaration that the properties covered by the arpannama (Ex. 5 and Ex. 7) were secular properties and were his absolute properties (Ex. 13). In this suit his four sons, his wife, the wife of his eldest son and two sons of his eldest son were impleaded as defendants. The idol in whose favour the arpannamas (Ex. 5 and Ex. 7) were executed was not made a party to this suit. On 12th November 1925 the defendants in that suit filed their written statement (Ex. B). On 14th November 1935 the suit was decreed by consent and the properties were declared to be secular and absolute properties of Jogesh (Ex. 12A).

On 9th June 1927, Jogesh mortgaged one of the properties (9 and 10, Karim Buksh Lane) covered by the arpannama (Ex. 5) by a mortgage deed (Ex. C1) to one Sailendra Chandra Chandra Dutt (defendant 15 in the present suit). On 23rd July 1930 Sailen, sub-mortgaged Nos. 9 and 10, Karim Bux Lane to Tarit Bhusan Roy and Pulin Krishna Roy (defendants 16 and 17 in the present suit) by a deed of sub-mortgage (Ex. C). On 30th July 1932, defendants 16 and 17 brought a suit (title Suit No. 209 of 1930) in the Court of the Subordinate Judge, 24-Parganas, against defendant 15 and Jogesh for recovery of money due on the sub-mortgage (Ex. 15). This suit was decreed and the mortgagee put up the mortgaged property to sale in title Execution Case No. 109 of 1933. 25th October 1933 was fixed for sale. The mortgagee also obtained a decree on the basis of his mortgage in Title Suit No. 109 of 1932 in the Court of the Subordinate Judge, 24-Parganas.

On 23rd October 1933, Anupama, a daughter of Jogesh who was not a party in Title Suit No. 172 of 1925 brought a suit (Suit No. 106 of 1933) in the Court of the Subordinate Judge, 24-Parganas as next friend of the Idol Saligram Thakur for a proper construction of the two deeds of dedication (Ex. 5 and Ex. 7) and for a declaration that the properties dedicated by them, viz., municipal premises Nos. 1, 2, 5, 6, 9 and 10 Karim Bux Lane were absolute debutter properties and that the mortgage by Jogesh in favour of defendant 15 and the sub-mortgage by defendant 15 in favour of defendants 16 and 17 in the present suit were void and inoperative and were not binding on the plaintiff deity. In this suit there was a prayer for permanent injunction restraining the mortgagee and sub-mortgagees from selling the mortgaged properties in execution of their decrees. Jogesh, his four sons, four daughters, the wife of his son Girindra Chandra, the sons of his eldest son Srish Chandra, and the wife of his eldest son were impleaded as defendants in this suit. Interim injunction was issued on 23rd October 1933 but dissolved on 22nd November 1933. An appeal against this order was also dismissed. Thereafter issues in this suit were settled on 17th May 1934 and 6th July 1934 was fixed for the hearing of the suit. The Subordinate Judge while fixing the date of the hearing recorded the following order :

All tadbir must be finished before the date fixed or the suit will be fixed peremptorily for peremptory hearing and no tadbir will be allowed hereafter.

On 6th July 1934 plaintiff prayed for time to make tadbir. Thereupon the Subordinate Judge passed the following order : "Seven days time more is allowed for the last time. Fix 14th July 1934 for fixing the date of hearing." On 14th July 1934, the plaintiff prayed for summons to witnesses. The Court thereupon said : "Fix 6th September 1934 for peremptory hearing. Summons to witnesses be issued, parties to come ready accordingly." On 25th August 1934, the suit was transferred to the Additional Subordinate Judge for disposal. On 6th September 1934, plaintiff prayed for an adjournment. Thereupon the Court ordered : "Time allowed. Suit adjourned to 14th November 1934, for peremptory hearing. The parties do come ready on that date." On the last mentioned date plaintiff again prayed for an adjournment. The Court thereupon made the following order :

Heard both sides. Sreemati Anupama prays for an adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The

husband is also present in Court today. I grant adjournment cost of Rs. 4 to each of defendants 16 and 17 as a condition precedent to the hearing of the suit.

On 19th November 1934, plaintiffs' pleader applied for time on the ground that the parties were about to come to terms. The Subordinate Judge however rejected the prayer and dismissed the suit for default and awarded cost to the mortgagee and the sub-mortgagees who were ready on that day to go on with the case. On 14th December 1934, plaintiff filed an application under O. 9, R. 9, Civil P. C., for setting aside the dismissal order passed on 19th November 1934. The Subordinate Judge heard this application on 31st August 1934 and passed the following order:

On 14th November 1934, the case was fixed for hearing. The plaintiff filed the petition for time on the ground of her husband's illness and 19th November 1934 was fixed for positive hearing. On 19th November 1934, plaintiff's pleader applied for time on the ground that the parties were about to come to terms. Defendant 16's pleader said that the application was a bogus one as there was no such talk and it was clear that he was not agreeable to any terms of compromise. When there is no chance of getting an adjournment, it is common place dodge to speak to the Court that there is a talk of compromise and so the case may be adjourned for its materialisation. As there was no sufficient cause for plaintiff's non-appearance on the date fixed for peremptory hearing there is no sufficient reason for setting aside the order of dismissal.

Title Execution Case No. 109 of 1933 was dismissed for non-prosecution after the institution of Title Suit No. 196 of 1933. Thereafter defendant 15 again put his mortgage decree in Execution Case No. 107 of 1935 and put up the mortgaged property to sale. Jogesh died on 27th April 1935. On 13th January 1936, the idol Sree Sree Iswar Sridhar Saligram Thakur represented by his next friend Krishna Chandra Chandra, one of the shebaits instituted the present suit in the Court of the Subordinate Judge, 24-Parganas. In this suit the other co-shebaits, the daughters of Jogesh including Anupama Dassi, the wife of Girindra Chandra Chandra, the sons of the eldest son of Jogesh, the priest of the idol (defendant 14) the mortgagee (defendant 15) and the sub-mortgagees (defendants 16 and 17) were impleaded as defendants. The allegations of the plaintiff so far as they are material for the purposes of the present appeal are these :

The properties which were the subject-matter of title Suit No. 196 of 1933 were made debutter by the deed of dedication (Ex. 5). This suit brought on behalf of the plaintiff deity was dismissed on 19th November 1934, for default owing to and by reason of the gross negligence and laches of Anupama Dasi defendant 9 who represented the plaintiff deity in that suit as his next friend and that the said next friend was further guilty of gross negligence and laches in not preferring an appeal against the order of the Subordinate Judge dated 31st August 1935, dismissing the application under O. 9, R. 9, Civil P. C. That there was good ground of appeal against the same. The present suit is therefore not barred by O. 9, R. 9, Civil P. C. Defendant 15 is about to sell wrongfully municipal premises No. 9 and 10, Karim Bux Lane, in execution of the mortgage decree obtained by him on the basis of the mortgage executed in his favour by Jogesh on 9th July 1927 (Ex. C1) in Execution Case No. 107 of 1935. The said mortgage constituted a breach of trust by Jogesh who was in possession of the mortgaged properties as shebait on the basis of an arpannama Ex. 5. The mortgage as well as the decree passed on the mortgage are not binding on the plaintiff deity. On these allegations the deity prays for a declaration that the properties which were the subject-matter of Title Suit No. 196 of 1933 are absolute debutter properties of the plaintiff deity and that municipal premises Nos. 9 and 10, Karimbux Lane are not liable to be sold in Execution Case No. 109 of 1935.

The suit was contested by defendant 15, the mortgagee and defendants 16 and 17, the sub-mortgagees. The defences of these defendants so far as they are material for the purposes of the present appeal are: (1) that the disputed properties were not made absolute debutter (Ex. 5); (2) Title Suit No. 196 of 1933 having been dismissed under O. 9, R. 8, Civil P. C., the present suit is barred under O. 9, R. 9 of the Code. The trial Judge has overruled both these defences and has decreed the suit. Hence these two appeals — one (F. A. No. 180 of 1938) by defendant 15 the mortgagee and the other (F. A. No. 152 of 1938) by the sub-mortgagees (defendants 16 and 17). Only two grounds were urged on behalf of the appellants in these two appeals: (1) That the properties in suit were not absolutely dedicated to the family idol but they were charged only with the expenses of debsheba (the worship of the idol). (2) That the suit is barred under O. 9, R. 9, Civil P. C., in view of the admitted fact that Title Suit No. 196 of 1933 which was instituted by the plaintiff idol was dismissed under O. 9, R. 8 of the Code.

First ground.—The plaint properties are three in number. Exhibit 5 covers the first property. Exhibit 7 covers the other two

properties. These two documents clearly show that the properties in suit were dedicated absolutely to the plaintiff idol. There is therefore no substance in this ground.

Second ground. — The reasons given by the Subordinate Judge in support of his finding that the O. 9, R. 9 of the Code is not a bar to the present suit are: (a) Plaintiff idol is a perpetual minor and is entitled to the protection given by law to the minors against the negligent actings of their guardian. (b) Anupama was guilty of gross negligence in the conduct of the previous suit. The plaintiff deity is, therefore, entitled to re-open in the present suit the questions raised in the previous suit. Mr. Gupta's contention on behalf of the appellants is that a Hindu idol is a juristic person like any other juristic person under the English system and not a minor or a perpetual minor. In 36 C. L. J. 478[1] Mukherji J. said:

> We need not describe here in detail the normal type of continued worship of a consecrated image—the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy: the vivified image is regaled with the necessaries and luxuries of life in due succession even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest.

These observations were approved by the Judicial Committee in 52 I. A. 245.[2] In view of the religious customs of the Hindus which have been recognized by Courts of law a Hindu idol like a juristic person under the English system has heen vested with the capacity of holding properties and with the powers of suing or being sued *(Ibid)*. A juristic person under the English system has no body or soul. It has no rights except those which are attributed to it on behalf of some human beings. The lump of metal, stone, wood or clay forming the image of a Hindu idol is not a mere moveable chattel. It is conceived by the Hindus as a living being having its own interests apart from the interests of its worshippers. It is a juristic person of a peculiar type.

The points of similarity between a minor and a Hindu idol are: (1) Both have the capacity of owning property. (2) Both are incapable of managing their properties and protecting their own interests. (3) The properties of both are managed and protected by another human being. The manager of a minor is his legal guardian and the manager of an idol is its shebait. (4) The powers of their managers are similar. (5) Both have got the right to sue. (6) The bar of S. 11 and Order 9, R. 9, Civil P. C., applies to both of them.

The points of difference between the two are: (1) A Hindu idol is a juristic or artificial person but a minor is a natural person. (2) A Hindu idol exists for its own interest as well as for the interests of its worshippers but a minor does not exist for the interests of anybody else. (3) The Contract Act (Substantive law) has taken away the legal capacity of a minor to contract but the legal capacity of a Hindu idol to contract has not been affected by this Act or by any other statute. (4) The Limitation Act (an adjective law) has exempted a minor from the operation of the bar of limitation but this protection has not been extended to a Hindu idol.

From the above it is clear that there is some analogy between a minor and a Hindu idol but the latter is neither a minor nor a perpetual minor. Although in law an idol has the power of suing it has no physical capacity to sue. This absence of physical capacity is perhaps referred to by the Judicial Committee when they said in 31 I. A. 203[3] that the right of suit is not vested in the idol. Who is then entitled to exercise the idol's power of suing? This is a matter of substantive law:

> Its (idol's) interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances on analogy be given to the manager of the estate of an infant heir: 52 I. A. 245.[2]

"The manager of the estate of an infant heir" apparently means the legal guardian of an infant. The powers of the legal guardian of an infant include the power to sue on behalf of the infant. The shebait of a Hindu idol is its manager in law. On the analogy of the power of the legal guardian of an infant the shebait of a Hindu idol has the right to sue on behalf of the idol, for the protection of its interests. In this sense it may be said as was said by the Judicial Committee in 31 I. A. 203[3] that the right of suit vests in the shebait. It has been held

1. ('23) 10 A.I.R. 1923 Cal. 60 : 72 I. C. 1026 : 36 C.L.J. 478, Rambrahma Chatterjee v. Kedar Nath.
2. ('25) 12 A.I.R. 1925 P. C. 139 : 87 I. C. 305 : 52 Cal. 809 : 52 I. A. 245 (P.C.), Pramatha Nath v. Pradyumna Kumar.
3. ('04) 32 Cal. 129 : 31 I. A. 203 : 8 Sar. 698 : 8 C. W. N. 809 (P. C.), Jagadindra Nath Roy v. Hemanta Kumari Debi.

by this Court that a suit for a declaration that illegal alienations of private debutter properties by a shebait are invalid is maintainable at the instance of a prospective shebait, 35 C.W.N. 768,[4] or any member of the founder's family who is entitled to worship the idol: 41 C.W.N. 1349,[5] 45 C. W. N. 699[6] and 45 C. W. N. 709.[7]

A Hindu idol as has been already stated is a juristic person having its own interests apart from the interests of its worshippers. 31 I. A. 203[3] and 52 I. A. 245[2] are authorities for the proposition that its power of suing for protecting its own interests is to be exercised by it through its de jure or de facto shebait. The worshippers of the idol are interested in the idol and as such are interested in the property dedicated to it for its maintenance. Their right to sue for the protection of the idol's property is founded upon their own interest viz., the right of worship apart from and independent of the idol's right to sue for the protection of its own interests and properties. They have no right to exercise the idol's power of suing. Anupama was not a shebait de jure or de facto. She was not a prospective shebait. She had only the right of worshipping the idol. She brought the previous suit in her capacity as a person interested in the idol's property. She had no legal capacity to exercise the idol's power of suing on its behalf. If she did, the idol is not bound by the results of the exercise of such powers. The previous suit instituted by her as next friend of the idol was not, therefore, the idol's suit. Order 9, R. 9, Civil P. C., is not, therefore, a bar to the present suit.

The dismissal of a suit in terms of S. 102 (O. 9, R. 8, Civil P. C.), was plainly not intended to operate in favour of the defendant as res judicata. It imposes, however, when read along with S. 103 (O. 9 R. 9 of the Code) a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now, the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (Per Lord Watson in 15 I.A. 156.[8])

The real cause of action in the previous suit was the attempt of the appellants to sell the debutter properties in execution case No. 109 of 1933. This execution case, however, was dismissed for non-prosecution after the institution of the previous suit. The cause of action of the present suit is a fresh attempt by the appellants to sell the debutter properties by starting another execution case, namely, 107 of 1935. It cannot be said, therefore, that the cause of action in the present suit is identical with the cause of action in the previous suit. In this view of the matter, O. 9, R. 9 is not a bar to the present suit. When a suit is dismissed under O. 9, R. 8 of the Code the suit can be restored under O. 9, Rule 9 if there was sufficient cause for the non-appearance of the plaintiff. Where the suit is dismissed under R. 8 for default of the plaintiff owing to gross want of care and diligence on his part the suit cannot be restored under R. 9. In view of the decision of the Judicial Committee in 49 I.A. 144,[9] it is doubtful whether the order of dismissal can be set aside by an application for review under O. 47, R. 1, Civil P. C.

There is a divergence of opinion among the Judges of High Courts in India as regards the substantive right of a minor to bring a separate suit for setting aside the decree passed against a minor owing to the negligence of the next friend or guardian ad litem of the minor in the conduct of the suit. The reasons given by the Judges who are in favour of the view that such a suit is maintainable by a minor are these : (1) Under the English common law such a suit is maintainable. (2) In India there is no statute prohibiting such a suit. (3) There is no reason why this protection given to the minors in England should not be extended to minors in India on grounds of justice, equity and good conscience. (4) The real basis of the binding character of the decree against a minor is the effect of his having been duly represented by a proper person. If the guardian of a minor is grossly negligent of his duties he ceases to represent the minor properly and effectively and the result is the same as if no guardian had been in existence. The wilful and wanton negligence on the part of a guardian disqualifies him

4. ('31) 18 A.I.R. 1931 Cal. 776 : 135 I. C. 273 : 54 C. L. J. 544 : 35 C. W. N. 768, Girish Chandra v. Upendra Nath.

5. ('37) 24 A.I.R. 1937 Cal. 559 : 174 I.C. 122 : 41 C. W. N. 1349, Panchkari Roy v. Amode Lal Burman.

6. ('41) 28 A. I. R. 1941 Cal. 248 : 196 I. C. 241 : I. L. R. (1941) 1 Cal. 309: 45 C. W. N. 699, Sashi Kumari Devi v. Dhirendra Kishore Roy.

7. ('41) 28 A. I. R. 1941 Cal. 562: I. L. R. (1941) 2 Cal. 128 : 73 C. L. J. 453 : 45 C. W. N. 709, Nirmal Chandra v. Jyoti Prosad.

8. ('89) 16 Cal. 98 : 15 I.A. 156 : 5 Sar. 243 (P.C.), Mt. Chand Koer v. Partab Singh.

9. ('22) 9 A.I.R. 1922 P.C. 112 : 72 I.C. 566 : 3, Lah. 127 : 49 I. A. 144 (P.C.), Chajju Ram v. Neki.

—Per Sulaiman J., (as he then was), 54 ALL. 646.[10]

The reasons given by the Judges who have taken the opposite view are these : (1) An infant in England has no such right. (2) There is no just and equitable ground for conferring such a right on a minor in as much as (a) the person who has obtained the decree against the minor is not in a position to see that the next friend or the guardian of the minor carries out his duties properly, (b) if the next friend or guardian ad litem fails in his duty it is difficult to see why he should be deprived of the fruits of the decree in his favour if he has proceeded in good faith in accordance with the rules of the Code. The peculiar anxiety of Courts to protect an infant who cannot protect himself at the expense of the finality of suits against infants will cause injustice to the innocent person who has got a decree in his favour against the infant—Per Beaumont C. J., I.L.R. (1939) Bom. 340.[11]

The preponderance of authority however is in favour of the view that a decree passed against a minor owing to the gross negligence of his guardian is not binding on the minor and that such a decree can be set aside or declared to be not binding on the minor in a separate suit brought by the minor. Under O. 32, R. 9, Civil P. C., the Court may remove the next friend of a minor if the interest of the next friend is adverse to that of the minor or he does not do his duty. The effect of the decision of the Judicial Committee in 36 I.A. 168[12] is that when the interest of the guardian ad litem is adverse to that of the minor the decree is not binding on the minor.

The power of the shebait of a Hindu idol to institute a suit on behalf of the idol is analogous to the power of the legal guardian of an infant to institute a suit on behalf of the minor. Anupama was not the shebait of the idol. Her power to bring the suit on behalf of the idol cannot be higher than that of the shebait of the idol. The idol therefore cannot be in a worse position than it would have been if the suit had been brought by the shebait. Analogy is a source of judicial principles and can be lawfully followed only as a guide to the rules of natural justice in the absence of any statutory prohibition. If the view taken by the majority of the Judges of the High Courts in India namely that O. 9, R. 9, Civil P. C., is no bar to a fresh suit by a minor when the previous suit by his next friend was dismissed for default owing to the negligence of the next friend in the conduct of the previous suit is correct there is no reason why this protection should not be extended to a Hindu idol in this country as I am aware of no statutory law in this country prohibiting the extension of such protection.

The Subordinate Judge has found that Anupama who was the next friend of the plaintiff idol in the previous suit was guilty of negligence in the conduct of this suit. This finding of the Judge is justified by the facts and circumstances disclosed by the evidence in this case. The properties in suit are undoubtedly debutter properties. If Anupama had simply produced the registered deeds of dedication, there would have been an end of the defence in that suit. Mr. Gupta appearing on behalf of the appellants did not assail the finding of the trial Judge that she was grossly negligent in the conduct of the previous suit. The allegation of the plaintiff idol in the plaint of the present suit that Anupama was guilty of gross negligence in the conduct of the previous suit was not specifically denied in the written statement of the appellants.

In the plaint of the present suit there is no express prayer for setting aside the order of dismissal in the previous suit or for a declaration that it is not binding on the plaintiff idol. There is however no dispute about the material facts on which the Court can give such relief. There is nothing in the law which disentitles the plaintiff idol to get these reliefs in the present suit. I therefore see no reason why the order of dismissal in the previous suit should not be set aside or declared to be not binding on the plaintiff idol. For the reasons given above I hold that the present suit is not barred by O. 9, R. 9, Civil P. C., that the properties in suit are absolute debutter properties and that municipal premises NOS. 9 and 10 Karim Bux Lane, are not liable to be sold in execution of the mortgage decrees obtained by defendants 15, 16 and 17. The appeals are accordingly dismissed with costs to plaintiff-respondent.

Pal J. — This is an appeal by defendants 16 and 17 in a suit for declaration that the properties described in SCH. A of the

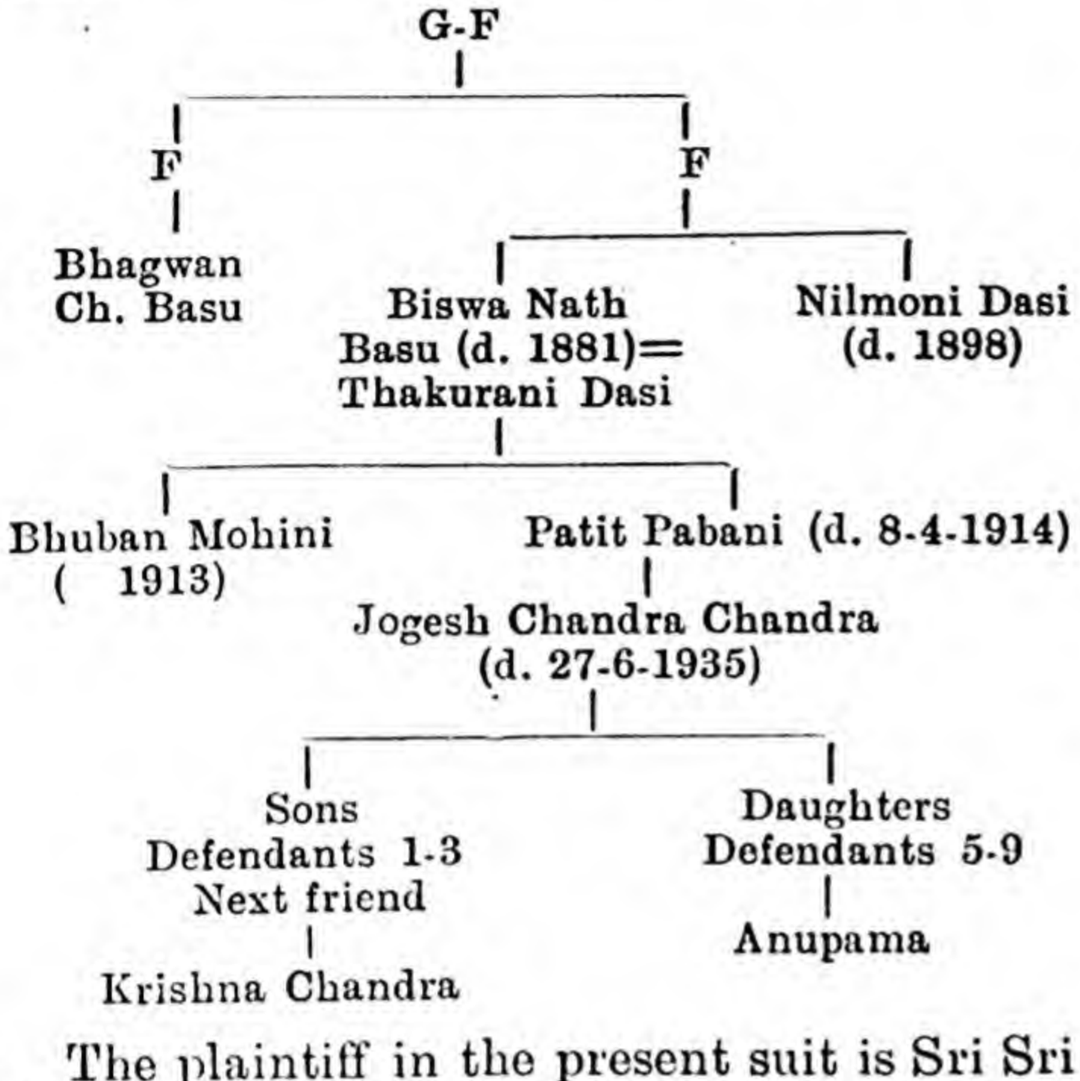
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10. ('32) 19 A.I.R. 1932 All. 293: 138 I.C. 465: 54 All. 646: 1932 A.L.J. 437 (F.B.), Mt. Siraj Fatma v. Mahmmed Ali.

11. ('39) 26 A.I.R. 1939 Bom. 66: 180 I.C. 51: I.L.R. (1939) Bom. 340: 41 Bom.L.R. 59 (F.B.), Krishna Das Padmanabhrao v. Vithoba Annappa.

12. ('09) 31 All. 572: 3 I.C. 864: 36 I.A. 168: 6 A.L.J. 822 (P.C.), Mt. Rasid-un-Nisa v. Mahammad Ismail Khan.

plaint constitute the absolute debutter properties of the plaintiff deity and that the same is not liable to sale in the Execution Case No. 107 of 1935 of the second Court of the Subordinate Judge at Alipore nor in execution of the mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932. The following genealogical table will be helpful in understanding the facts of the case :



The plaintiff in the present suit is Sri Sri Iswar Sredhar Salagram Sila Thakur. It was the ancestral family deity of Bhagavan Chandra and Biswa Nath. The property in suit originally belonged to Bhagavan Chandra Basu and Biswa Nath Basu. They dedicated the same to the deity on 6th October 1869. By the deed of dedication the following scheme for the shebaitship of the deity was made. Biswa Nath Basu was to be the first shebait. After his death his full-sister, Nilmani Dasi, and his wife, Thakurdasi Dasi, would be the joint shebaits. After their death his two daughters, Bhuban Mohini and Patit Pabani, would be the joint shebaits. After their death their heirs should be appointed shebaits. On 20th August 1925, Jogesh Chandra Chandra, the then shebait, and father of the present next friend of the deity, instituted the Title Suit No. 172 of 1925 in the Court of the 2nd Subordinate Judge District 24-Parganas, making his wife, adult son, minor sons and daughters, son's wife and son's minor children parties defendants. Jogesh Chandra had three more daughters, viz., the present defendants 7 to 9. They were not made parties to this suit, perhaps because, being married, they ceased to be members of his family. The suit was for a declaration that the properties described in the schedules to the plaint were secular in character and were the absolute properties of Jogesh Chandra.

Schedule (Ka) plots (a) and (b) and Sch. (Kha) of that suit are the properties in plot Nos .1, 2 and 3 respectively of the present suit. In this suit of 1925 the defendants appeared, filed a written statement on 12th November 1925, and prayed that the suit may be decreed but with costs to the defendants. On 14th November 1925, the suit was decreed with the consent of the defendants declaring the properties in the suit to be secular in character and also to be the absolute property of Jogesh Chandra Chandra. On 9th June 1927, Jogesh Chandra Chandra borrowed Rs. 15,000 and gave in mortgage the property No. 1 of the present plaint to one Sailen Chandra Dutta. On 23rd July 1930, the mortgagee Sailen Chandra Dutta submortgaged the property to Rai Tarit Bhusan Roy and Pulin Krishna Roy to secure a loan of Rs. 8500. Thereafter Sailen Chandra instituted Title Suit No. 209 of 1930 on the said mortgage and obtained a final decree in it.

On 30th July 1932, Rai Tarit Bhusan Roy and Pulin Krishna Roy instituted Title Suit No. 189 of 1932 in the Court of the 2nd Subordinate Judge at Alipore on the sub-mortgage, making their mortgagor as also Jogesh Chandra Chandra parties defendants. They also obtained a final decree in this suit. In 1933 Sailen Chandra proceeded to execute his decree in Execution Case No. 109 of 1933; the property was advertised for sale in execution of the decree, the date of sale being fixed on 25th October 1933. Thereupon on 23rd October 1933, the Title Suit No. 196 of 1933 was instituted in the Court of the 2nd Subordinate Judge, Alipore, purporting to be by the Idol Sri Sri Iswar Sridhar Salgram Sila Thakur by its next friend Sreematy Anupama Dasi, (1) for a declaration *(a)* that the properties in suit were the absolute debutter properties of the plaintiff deity, *(b)* that the mortgages and the mortgage decrees were not binding on the deity; and (2) for a permanent injunction restraining the decree-holders from executing the decrees against the property. The next friend in this suit, Anupama Dasi, was one of the three married daughters of Jogesh Chandra who were not made parties in his suit of 1925. It may be noticed here that according to the terms of the deed of dedication and in the events that have happened Anupama was not and can never be a shebait. Her only probable interest was that of a wor-

shipper. In fact in para. 12 of her plaint the only interest claimed by her was that of a worshipper of the deity.

This suit was instituted when Jogesh was still alive. He was made defendant 1 in the suit. His children, wife, son's wife and son's children were all made defendants in this suit. They were defendants 2 to 14. The mortgagee and the sub-mortgagees were made defendants 16 and 17 and 18 respectively. It may be mentioned here that defendants 16, 17 and 18 were interested only in item 1 of the properties mentioned in the plaint. An application for a temporary injunction for restraining defendant 16 from selling the property in item 1 in Execution Case No. 109 of 1933 was made in that suit. On 22nd November 1933, the Court refused the prayer for injunction, being of opinion that "the intended sale will not by itself prejudice the rights, if any, of the plaintiff." He, however, directed that the property should be sold subject to a declaration that it was the subject-matter of a suit in that Court and the doctrine of lis pendens would apply and that the purchaser would purchase the right, title and interest of the judgment-debtor Jogesh Chandra subject to the said lis. After several adjournments the suit was fixed for hearing on 14th November 1934. On this date the next friend prayed for an adjournment and the Court made the following order :

Heard both sides. Srimati Anupama Dasi prays for adjournment on the ground that her husband being ill, steps could not be taken on her behalf. She had prayed for too many adjournments and all necessary papers ought to have been produced long ago. The husband is also present in Court to-day. I grant adjournment only up to 19th November 1934. The suit will be heard positively on that date. Plaintiff to pay adjournment cost of Rs. 4 to each of defendants 16 and 17 as a condition precedent to hearing of the suit.

On 19th November 1934, she again prayed for an adjournment. The Court made the following order :

The lawyer for the plaintiff prays for further adjournment. The grounds put forth by him are that the plaintiff and defendants 17 and 18 have come to terms regarding this suit and that the plaintiff has already approached the Solicitor for defendant 16 for amicable settlement and that there is a reasonable chance of a compromise being arrived at. Defendant 16 is present in Court and from his attitude it is clear that he is not agreeable to any compromise. The suit was definitely fixed for hearing to-day and nobody can be held responsible if the plaintiff has not come prepared for the hearing. Adjournment is refused and case ordered to be proceeded with. The lawyer for the plaintiff has no further instruction and no witness for the plaintiff are (sic) present. Suit is dismissed with costs.

Thereafter an application under O. 9, R. 9, Civil P. C., was filed purporting to be on behalf of the plaintiff deity by the same next friend and the Miscellaneous Case No. 2 of 1934 was started. During the pendency of this miscellaneous case, Jogesh died on 27th April 1935. The miscellaneous case was heard and dismissed on 31st August 1935, it being held that there was no sufficient cause for default. It appears that Execution Case No. 109 of 1933 was allowed to be dismissed for non-prosecution during the pendency of the Title Suit No. 196 of 1933 (plaint para. 25). At any rate the property in question was not sold in that execution proceeding and the said execution case was allowed to be dismissed for non-prosecution. A fresh Execution Case No. 107 of 1935 for the execution of the decree in Title Suit No. 209 of 1930 was started after the dismissal of the aforesaid Title Suit No. 196 of 1933.

On 13th June 1936, the present suit was instituted by the deity, this time by its next friend, Krishna Chandra Chandra, a son of Jogesh Chandra. This next friend was defendant 6 (minor) represented by his mother as guardian in his father's suit of 1925, where he supported his father's claim. He was defendant 5 (major) in the previous suit of 1933 (Title Suit No. 196 of 1933). By the terms of the deed of dedication, he is one of the present shebaits of the deity, the other shebaits being defendants 1 to 3. The idol in the present suit through its present next friend alleges that the previous suit was dismissed by the gross negligence of the then next friend. Various questions of law and fact were raised in this case in the Court of first instance. The learned Subordinate Judge found: (1) that the arpannama (the deed of dedication) and the other deeds referred to in the plaint were genuine and bona fide and that they were intended to be given effect to and were given effect to and that there was an absolute grant in favour of the deity; (2) that the plaintiff deity was duly installed as claimed in the plaint and had been in existence even before the time of the dedication; (3) that the predecessors-in-title of Jogesh Chandra Chandra possessed and managed the property as shebaits of the plaintiff deity and that there was no doubt that from 1869 up till 1925 the properties were managed by successive shebaits as the properties of the plaintiff deity; (4) that the properties were, and were always treated as the absolute debutter properties of the deity and were not the secular properties of the judgment-debtor Jogesh Chandra; (5) that the decree in Title Suit No. 172 of 1925 was not binding

on the plaintiff deity; (6) that the mortgages in favour of defendants 15, 16 and 17 were not binding on the plaintiff deity; (7) that the decrees passed in Title Suits Nos. 209 of 1930 and 189 of 1932 were not binding on the plaintiff; and (8) that Jogesh Chandra having accepted the shebaitship could not claim adverse possession against the deity from 1925.

On these findings and being of opinion that the present suit of the plaintiff was not barred by O. 9, R. 9, Civil P. C., the learned Subordinate Judge decreed the suit in full. Defendants 16 and 17 have preferred the present appeal and defendant 15 has preferred the analogous appeal (F. A. No. 180 of 1938). As has been noticed above, the appellants are interested only in item 1 of the properties involved in the suit, and the learned advocates appearing for the appellants confined the appeals to this item of the property only. It is faintly contended in this appeal that the dedication as evidenced by the arpannama (Ex. 5) of 6th October 1869, was not an absolute one and that the property did not become an absolute debuttar property by that dedication. In support of this contention reliance was placed on 19 I.A. 108,[13] 48 I.A. 143[14] and 64 I.A. 203.[15] In the first of the cases cited above, there were certain directions as regards the income of the property and these did not exhaust the same. Lord Hobhouse observed:

> There is no indication that the testator intended any extension of the worship of the family Thakurs. He does not, as is sometimes done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shows no intention save that which may be reasonably attributed to a devout Hindu gentleman, viz., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakurs whom he venerates most. But the effect of that when the estate is large is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property.

There the property was of such a magnitude that after meeting all the charges directed by the will there would still be a very large surplus. In fact the testator directed that out of the surplus each adopted son would receive Rs. 1000 monthly. But of the residue after that he said nothing. The dedication was by will. The testator began by saying:

> I do while of sound mind dedicate and give to Sree Sree Isshur Annapoorna Thakooranee .... all the ancestral and self acquired movable and immovable properties, zamindaries, and putnee .... to which I am entitled and of which I am in possession.

Later on he proceeded to give directions regarding the disposal of the income of the same property. The testator said:

> Out of the income of the property dedicated to the Deb Sheba etc., after performing the sheba of the above named Annapoorna Thakooranee ..... after performing the daily and fixed rites and ceremonies as they are now performed and made, out of the profits which shall remain each adopted son shall receive at the rate of Rs. 1000 monthly.

Of these adopted sons the Judicial Committee observed:

> It would require very strong and clear expressions indeed to show that a Hindu gentleman contemplated introducing as shebaits of his family Thakur persons unknown to himself and strangers to his family. There is not a trace in this will to show any such intention ....

The monthly allowance for the adopted sons was therefore not a gift *sub modo* to the idol. Consequently, though in one part of the will, the property purported to be given absolutely to the deity, in another part the income of the property was directed to be disposed of in a manner showing that the property was not to be the absolute property of the deity. These circumstances gave rise to an occasion for construing the will and for finding out the real intention of the testator. Similar was the case in 64 I.A. 203.[15] In that case also, the property was found to be such that its income was more than sufficient for the worship and there was an ultimate direction for the building of houses for the residence of the heirs with the surplus. This was held not to be a gift *sub modo* to the idol. Thus the facts in those cases were very different from those in the present. In the present case however the dedication is by a transfer inter vivos. The deed on the face of it makes absolute dedication to the deity. The donor absolutely divests himself of the property and the property is given over to the sebaits in praesenti giving full effect to the words of conveyance contained in the deed. There is nothing in any part of the deed which would in any way affect the import conveyed by the words of absolute dedication used in the dedication. Where the question is whether property conveyed by a deed of dedication is an absolute gift to the idol or whether it is truly reserved to the donor's own heirs subject to a charge of maintaining the idol and meeting all its suitable expenses, no fixed and absolute rule can be set up. The question can be settled only by a conspectus of the

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13. ('92) 19 Cal. 513 : 19 I.A. 108 : 6 Sar. 150 (P.C.), Surendro Keshub Roy v. Doorga Sundari.

14. ('21) 8 A.I.R. 1921 P.C. 20 : 63 I.C. 34 : 43 All. 291 : 48 I.A. 143 (PC), Har Narayan v. Surja Kunwari.

15. ('37) 24 A.I.R. 1937 P.C. 185 : 168 I.C. 765 : I.L.R. (1937) 2 Cal. 447 : 31 S.L.R. 538 : 64 I.A. 203 (PC), Iswari Bhubaneshwari v. Brojo Nath Dey.

entire provisions of the document. In the present case the deed of dedication on the face of it purports to convey the whole property absolutely to the deity and no circumstances have been established which would entitle us to apply the principles laid down in the above cases to the facts of the present case.

The only other substantial point urged in the appeal is that the present suit is precluded by O. 9, R. 9, Civil P. C., in view of the order of dismissal under O. 9, R. 9, Civil P. C., made in the previous suit No. 196 of 1933. The learned Subordinate Judge overruled this contention for the reasons that may be summarised thus : (1) Under the Hindu law the idol is a juridical person, in perpetual minority and capable of holding property through his manager (shebait). The general principles of law which are applicable to suits by minors through next friend are applicable to the case of such an idol. (2) It is the duty of the Court, as far as possible to prevent the minor being injured by fraud, laches or negligence of his next friend or guardian for the suit. Though a minor be properly represented by a next friend and though there be no fraud or collusion on the part of the next friend if the next friend be guilty of gross negligence a minor is not bound by a decree or order made in a suit or proceeding to which he is a party. This rule applies not only to decrees made after a judicial adjudication on the question in issue, but also to cases where an act or omission operates as a statutory bar to the institution of a new suit. (3) There are generally two courses open to a minor who seeks to set aside a decree or other orders on the ground of fraud or negligence. He may either apply by way of review to the Court which makes the decree or order, or he may bring a suit to set aside the decree or order. He might also apparently bring a fresh suit on the same cause of action. (4) The above rule of law is based mainly on the decision in 22 Cal. 8.[16] It was held in that case that :

> Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in S. 103, Civil P. C., to the institution of a fresh suit by such person when the disability has ceased.

(5) This principle of law is deducible not from S. 44, Evidence Act, but from the English law on the point, as being the law of equity and good conscience applicable in India in the absence of any statutory provision as has been found by Trevelyan J., in 22 Cal. 8.[16] (6) The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. (7) The law as laid down in 22 Cal. 8,[16] remains good law even after 64 I.A. 17,[17] as a protection, not of the ordinary litigants, but, of the minors who had suffered loss on account of the negligence of their next friends in the previous litigation. This rule is based on principles of equity and good conscience, and can be invoked by the minors alone not under S. 44, Evidence Act, but under the case laws which introduced the special protection for persons under disability. The appellants assail these reasons as untenable. Order 9, R. 8, Civil P. C., lays down :

> Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted shall dismiss the suit so far as it relates to the remainder.

It may be noticed here that in the previous suit No. 196 of 1933 the then defendants 4 to 14 (the present next friend and defendants 3 to 8 and 10 to 13 of the present suit) filed their written statement on 3rd May 1934 and this was accepted by the Court on 7th May 1934. It is, however, not in evidence in the present case what was their defence in that suit and whether they admitted the claim of the plaintiff deity. The other contesting defendants 16, 17 and 18 (present defendants 15, 16 and 17) were concerned only with one item of property in that suit, viz., item (a) of Sch. Ka of that suit which is item 1 of the present suit. Order 9, R. 9, Civil P. C., runs as follows :

> Where a suit is wholly or partly dismissed under R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for the non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal. . . .

Assuming that the suit No. 196 of 1933 was

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16. ('95) 22 Cal. 8, Lalla Sheo Churn Lal v. Ramnandan Dobey.

17. ('37) 24 A.I.R. 1937 P.C. 1 : 166 I.C. 1 : I.L.R. (1937) Mad. 263 : 64 I.A. 17 (P.C.), Venkata Seshayya v. Kotiswara Rao.

a a suit by the present plaintiff, it was wholly dismissed under R. 8 of O. 9, Civil P. C., on 19th November 1935. The present plaintiff by its then next friend did apply for an order to set the dismissal aside under O. 9, R. 9, Civil P. C. The dismissal was not set aside. So the plaintiff is prima facie precluded from bringing a fresh suit in respect of the same cause of action by the provisions of O. 9, R. 9, Civil P. C. In order to invoke the aid of this bar the defendants must show (1) that the prior suit was instituted by the present plaintiff, (2) that the present suit is in respect of the same cause of action in respect of which the prior suit was institu-
b ted, (3) that the prior suit was dismissed under O. 9, R. 8, Civil P. C.

The order made in the previous suit will be relevant under S. 40, Evidence Act. In the present case the existence of the order is admitted by the plaintiff in the plaint itself (Plaint, paras. 22, 23 and 24). In paras. 21 and 24 of the present plaint all the facts relevant for the purpose of determining whether or not the prior suit was instituted by the present plaintiff, the idol, are given. Assuming for the present that the Suit No. 196 of 1933 was a suit instituted by the present plaintiff, if the sameness of the cause
c of action is established then prima facie the previous order of dismissal under O. 9, R. 8, Civil P. C., will prevent the Court from taking cognizance of the present suit under the provisions contained in O. 9, R. 9, Civil P. C. Assuming that the cause of action in respect of which the present suit is instituted is the same as in the previous suit one obvious way of removing this bar is contained in S. 44, Evidence Act, which lays down that

"any party to a suit .... may show that any judgment, order or decree which is relevant under S. 40 .... and which has been proved by the adverse party, was delivered by a Court not competent to
d deliver it, or was obtained by fraud or collusion."

It is not alleged in the present case that the order was obtained by any fraud or collusion. The only allegation is that the order was the result of gross negligence on the part of the then next friend of the idol. The question therefore is (1) whether this negligence of the next friend affected the jurisdiction of the Court so as to render it "a Court not competent to deliver the order" within the meaning of S. 44, Evidence Act; (2) whether apart from the provisions of S. 44, Evidence Act, there is any principle of law by which gross negligence on the part of the next friend would affect the consequent order of dismissal so as to render it inoperative as a bar to a fresh suit under e O. 9, R. 9, Civil P. C.

In my judgment, however, the cause of action in respect of which the present suit has been brought is not the same as that in respect of which the previous suit was instituted. As has been stated above, the present appellants confined their appeals to item 1 of the properties in suit. So far as this item is concerned, in the previous suit (1) the title of the plaintiff deity was based on the registered arpannamah or deed of dedication dated 21st Aswin 1276 B. S. (corresponding to 6th October 1869) by Bhagwan Chandra Basu and Biswanath Basu; (2) the Suit No. 172 of 1925 was f characterized as collusive and as not affecting the title of the deity; (3) *(a)* the mortgage dated 9th June 1927, by Jogesh Chandra Chandra to defendant 15, *(b)* sub-mortgage by defendant 15 to defendants 16 and 17 dated 23rd July 1930, *(c)* the final mortgage decree for sale against Jogesh Chandra in Title Suit No. 209 of 1930 on the basis of the mortgage dated 9th June 1927, *(d)* the final mortgage decree in Title Suit No. 186 of 1932 on the sub-mortgage, and *(e)* the execution case No. 109 of 1933 in execution of that decree were all impeached as not binding on the deity and not available against the property. The cause of action was stated to be (1) the g starting of the execution proceeding in Execution Case No. 109 of 1933 and (2) the existence of (a) of the decree in Title Suit No. 172 of 1925, (b) the deeds of mortgage and the sub-mortgage and (c) the mortgage decrees. The reliefs claimed in that suit were (1) declaration on a proper construction of the deeds of dedication, that the properties constituted the absolute debutter properties of the plaintiff deity; (2) declaration that the mortgage and the sub-mortgage, the mortgage decrees in Title Suit No. 209 of 1930 and in Title Suit No. 189 of 1932 and the execution proceedings in Execution Case No. 109 of 1933 h were void, inoperative and not binding in any way upon the deity; (3) permanent injunction against the then defendant 16 (present defendant 15) prohibiting and restraining him from executing the said mortgage decree in Title Suit No. 209 of 1930 by the sale of the property (item 1); and (4) permanent injunction against the then defendants 17 and 18 (present 16 and 17) prohibiting and restraining them from executing their mortgage decree in Title Suit No. 189 of 1932 by the sale of the property (item 1). There were also prayers for the removal of defendant 1 from the position of a shebait and for making a scheme of

management and proper worship of the deity. In the present suit, all the above allegations and assertions are repeated, the title of the plaintiff is founded on the same basis and the same infringements are alleged. In para. 21 of the plaint it is stated why the previous suit No. 196 of 1933 was instituted by the plaintiff "through defendant 9 Sm. Anupama Dasi as the next friend" and in para. 24 it is stated how the said suit was dismissed for default under O. 9, R. 8, Civil P. C., through the gross negligence of the then next friend. Then in para. 25 the fresh occasion for the present suit is given and it is stated thus:

> That, though defendant 15 got the said Execution Case No. 109 of 1933 referred to in paras. 18 and 21 above dismissed for non-prosecution since and after the institution of the said Title Suit No. 196 of 1933 on behalf of the plaintiff Deity, the plaintiff has come to learn through its next friend that the said defendant 15 has again put his said mortgage decree in Title Suit No. 209 of 1930 in execution, in Execution Case No. 107 of 1935 in the second Court of the Subordinate Judge at Alipur and is about to sell wrongfully the property described in item 1, sch. 'A' below which constitutes one of the absolute debutter properties of the plaintiff deity and which cannot be lawfully sold in the said execution case and that 15th day of January next is fixed for auction sale of the same.
>
> That the plaintiff deity is therefore compelled to bring this fresh suit to protect its right, title and interest in the properties in suit and is entitled to a declaration that the properties in suit described in the Sch. 'A' below constitute the absolute debutter properties of the plaintiff deity and as such the said property described in item 1 of the said Schedule is not liable to be sold in the said execution case No. 107 of 1935 pending in the local second Court of the Subordinate Judge at Alipore, or in execution of the said mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932 referred to above and respectively obtained by defendant 15 and defendants 16 and 17 against the said Jogesh Chandra Chandra since deceased.

The relief claimed in the suit is a declaration, (1) that the properties .... constitute absolute debutter property of the plaintiff deity and (2) that item 1 of the said properties is not liable to sale, (a) in the Execution Case No. 107 of 1935 ..... nor (b) in execution of the mortgage decrees in Title Suit No. 209 of 1930 and Title Suit No. 189 of 1932. "The cause of action", in the language of their Lordships of the Judicial Committee, has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 15 I.A. 156.[8]

It is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case. There is do doubt that the two suits are based on certain common allegations. The suit of 1925, the mortgage of 1927 and 1930, the mortage decrees of 1930 and 1932 are the common impeachable facts assailed in both the suits. In none of these transactions however the idol was a party and consequenly these were not such invasion of the idol's right as would render it incumbent upon it to take the help of the Court. The mortgages were all simple mortgages and none of these transactions was accompanied or followed by any overt act interfering with the possession and enjoyment of the idol. The fact that the idol has all along been in undisputed possession and enjoyment of the properties has been established in this case and is not in dispute in this appeal. The idol's right was more effectively invaded when execution against the property was taken out in 1933. This execution case having ultimately been abortive, the threat, if any, to the idol's right was also gone. Then, again, when the present execution was taken out against what the idol claims to be its property a fresh invasion of its right took place giving rise to a fresh cause of action for it to come and seek the help of the Court. No doubt, though not necessary, the idol came to Court as a matter of fact on the occassion of the previous invasion of its right. Had there been any adjudication in respect of any matter in issue there that fact might affect it in the subsequent suit. But till barred by any such adjudication it is entitled to seek the help of the Court upon each successive invasion of its right. Each such invasion will give rise to a fresh cause of action and a suit in respect of such an invasion will be a suit in respect of a fresh cause of action and not "in respect of the same cause of action" within the meaning of O. 9 R. 9, Civil P. C.

In 36 Mad. 383,[18] the Madras High Court held that though attachment of a person's land, as if it belonged to another, gives the owner a cause of action, on which he could have brought a suit, but did not, yet the sale of the same at a later date is a fresh and greater invasion of his right and gives him a fresh cause of action. It may be added that if the owner in such a case brought a suit on the occasion of attachment and allowed that suit to be dismissed under O. 9, R. 8, Civil P. C., his suit on the occasion of the subsequent sale would not have been affected

18. ('13) 36 Mad. 383: 13 I.C. 96 : 22 M.L.J. 108 : (1911) 2 M.W.N. 531, Ananta Razu Garu v. Narayana Razu Garu.

by the provisions of O. 9, R. 9, Civil P. C., the latter suit being in respect of a fresh cause of action. The principle underlying the decision of the Calcutta High Court in 51 Cal. 548[19] also supports the same view.

The suit of 1925, the mortgages of 1927 and 1930 and the mortgage decrees of 1930 and 1932 no doubt might supply sufficient cause of action without anything more to the idol for a declaratory relief. If a previous suit founded on such cause of action were allowed to be dismissed for default under O. 9, R. 8, Civil P. C., another suit on that cause of action alone would have been barred by O. 9, R. 9, Civil P. C. But that is not the position here. The prior suit was founded not on these facts alone but on another additional fact, viz., that an execution was taken out against the property. This last named fact was really the clear and unequivocal threat to the idol's right and supplied the cause of action on which the suit of 1933 was founded. The suit was no doubt dismissed under O. 9, R. 8, Civil P. C. But the threat was also removed by the inaction of the invader. The execution case was also dismissed for non-prosecution. After this it was not incumbent upon the idol to do anything. A fresh invasion of its rights was made by taking out a fresh execution. This was a fresh attempt to cast a cloud on the idol's title and created a new cause of action in its favour. No doubt the reluctance or prolonged failure of the plaintiff to assert his claim in the civil Courts imposes on the Courts the clear and imperative duty of cautious reserve before accepting the plaintiff's contentions. But the plaintiff had in this case successfully discharged this heavy burden of proof to the satisfaction of the Court below and this could not be assailed in this appeal.

In my judgment the cause of action in respect of which the present suit has been brought is not the same on which the previous suit by the idol was founded and consequently the rule of bar laid down in O. 9, R. 9, Civil P. C., is not at all applicable to it. In this view, no other consideration does really arise in this case. The other questions would arise for consideration only if the present suit could be said to be in respect of the same cause of action as in the suit of 1933—only if the bar imposed by O. 9, R. 9, Civil P. C., was otherwise available to the defence. Though in the plaint itself the plaintiff states that the suit of 1933 was its own suit, all the relevant facts for the purpose of determining how and by whom that suit was instituted and in what right the then next friend purported to act as the next friend of the idol have been given in the plaint. There is no dispute about these facts, and, in my judgment, in view of them the then next friend had no right to represent and cannot be said to have represented the idol at all.

Before proceeding further, it would be advisable to keep in mind that as the rule of law now stands there are several distinct rights of suit in respect of the endowed property, viz., (1) the idol itself as a juristic person has the right of suit like all other owners; (2) the shebait, the recognized human agency through which the idol must, from its very nature, act, has a distinct right, distinct from, and, in normal cases, in supersession of the idol's right of suit (31 I. A. 203[3]); (3) the prospective shebaits as persons interested in the endowment have a right of suit; (4) worshippers and members of the family have right of suit. The question before us is not who else can sue in his own right but who else, other than a shebait, can represent the idol when the suit is in enforcement of the idol's right of suit. Ordinarily the shebaits alone will have the right to represent the idol. In special cases the Court may appoint some one to represent it. The rules of law that can be gathered from the decided cases in this respect appear to be—(1) that normally a shebait alone can represent an idol in a suit or proceeding; (a) that where there are several shebaits, the entire body of them will represent the idol; (b) that under some special circumstances even a co-shebait can represent the idol; 45 C. W. N. 709.[7] (2) that it is only under some special circumstance that the idol may be represented by *(a)* a prospective shebait; *(b)* a worshipper or any person interested in the endowment; (3) that when persons other than the shebaits come to represent the idol, they can represent the idol only by an appointment by the Court.

Anupama Dasi, the then next friend, had no greater interest than that of being a possible worshipper. As such a worshipper she had the right of suit in herself. She could bring a suit for declaration that an alienation by the shebait was not valid. No doubt she could not have sued for possession on the ground that the alienation by the shebait was invalid. The circumstances that she was a devotee of the idol and was a worshipper of it were sufficient to entitle

19. ('24) 11 A.I.R. 1924 Cal. 744 : 83 I.C. 233 : 51 Cal. 548 : 39 C.L.J. 418, Najimunnessa Bibi v. Nacharadin Sardar.

her to bring a suit complaining of a breach of trust with reference to the property belonging to the idol. In 5 Cal. 700[20] Sir Richard Garth C. J. and Pontifex J. held that as there was no public officer in this country endowed with the power of enforcing the due administration of charitable or religious trusts by information at the relation of some private individual, as is possessed by the Attorney-General in England, and as it would lead to great abuse in trusts of this nature unless some person was able to bring them under the control of the Court, the representatives of a testator, who had created such a trust, were the persons who would be entitled, if a proper case were made out, to institute proceedings for the purpose of having abuses in the trust rectified. In I.L.R. (1937) 2 Cal. 105[21] (M. C. Ghosh and Mukherjea JJ.) it was observed :

> In India, the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagement or maladministration of the deity's estate and to have a proper scheme of management framed which would end the disputes amongst the guardians and prevent the debutter estate from being wasted or ruined. This principle was reiterated in 53 C. L. J. 621.[22] The Privy Council itself directed the framing of a scheme in the case of a private debutter in 52 I A 245[2] and the case was remanded to the trial Court expressly for that purpose. The same directions were given by this Court in 37 C. W. N. 181[23] which was also a case of private debutter. . . . . *See also* 3 Bom. 27.[24] *See also*, in this connexion, 43 C. W. N. 1056[25] and 55 I. A. 96.[26] Persons having individual rights under such endowments can bring suits to enforce such individual rights by an ordinary suit in their own name without being obliged to bring a suit in the name of the idol. This right reserved to the worshippers sufficiently safeguards the interest of the worshippers or other persons interested in the debutter. At the same time it obviates the risk of jeopardising the interest of the idol by allowing it to be affected by the intermeddling of persons whose fitness has never been inquired into and adjudicated upon. No doubt in the case of the minors the Civil Procedure Code lays down that

> any person who is of sound mind and has attained majority may act as next friend of a minor. . . . . Provided that the interests of such person is not adverse to that of the minor.

Such a next friend, it seems, need not have any interest in the minor's interest. There is however no such statutory provision applicable to the case of an idol and I do not think that this rule involves any such principles of justice, practical experience and common sense as would entitle us to extend it to the case of an idol by analogy. Analogy may indeed often serve a very useful purpose and perhaps helps the stability of the norms for decisions. This stability receives a special respect when the norms are extended not merely to like or similar cases but also to the cases that are only approximately similar. But this projection of norms to new cases on the ground that these are approximately similar is not without its danger. The case of an idol is similar to that of an infant only to this extent that both must act through some agents. But the analogy does not seem to extend beyond this. An idol from its very nature is a perpetual dependent and its incapacity in this respect is perpetual. It would therefore be reasonable to expect that the law which recognised its personality must have made some provision for supplementing this perpetual incapacity. As has been pointed out above, the law recognises the shebaits for this purpose and appoints them, as it were, to be the persons who are to represent the idol for all juridical purposes. In fact, though the idol is recognised as the owner, it is owner only in an ideal sense. The right of suit is really in the shebait.

As has recently been observed by the Judicial Committee in 67 I.A. 251,[27] the procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait. No doubt an idol is recognized as a juridical person capable of having interests demanding legal protection. But this is so only in an ideal sense. Strictly speaking, the law of the present age at least does not concern itself with anything outside human interest and all the recogni-

20. ('80) 5 Cal 700, Brojomohun Das v. Hurrolall Doss.
21. ('37) 24 A. I. R. 1937 Cal. 338 : 172 I. C. 161 : I.L.R. (1937) 2 Cal. 105 : 41 C. W. N. 728, Bimal Krishna v. Iswar Radhaballav Jiu.
22. ('32) 19 A. I. R. 1932 Cal. 117 : 134 I.C. 576 : 53 C.L.J. 621, Rabindra Nath v. Chandi Charan.
23. ('33) 20 A. I. R. 1933 Cal. 519 : 144 I.C. 894 : 60 Cal. 538 : 37 C.W.N. 181, Prasad Das v. Jagannath Pal.
24. ('78) 3 Bom. 27, Radha Bai v. Chimnaji.
25. ('39) 26 A.I.R. 1939 Cal. 699 : 186 I.C. 25 : 70 C.L.J. 88 : 43 C.W.N. 1056, Monindra Mohan v. Shamnagar Jute Factory.
26. ('28) 15 A. I. R. 1928 P. C. 16 : 108 I.C. 361 : 55 Cal. 519 : 55 I. A. 96 (P. C.), Abdur Rahim v. Abu Md. Barkat Ali.
27. ('40) 27 A.I.R. 1940 P.C. 116 : 189 I.C. 1 : I.L.R. (1940) Lah. 493 : I.L.R. (1940) Kar. P.C. 251 : 67 I.A. 251 (P.C.), Masjid Shahidganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar.

a tions and protections accorded to the idol must have been thought necessary because of the existence of some ultimate human interests. In the recent case in 41 C.W.N. 1349[5] my learned brother Mukherjea J. is said to have held that any member of the family in case of a family endowment or any person interested in the endowment may represent the idol in a suit as a next friend. As I read the judgment, he said nothing of the kind and in the particular case had no occasion for saying that. In his own language:

When the shebait himself is negligent or alienates debutter property in breach of trust, not only a prospective shebait under the terms of the grant but any member of the family in case of a family b endowment may maintain the suit on behalf of the deities to recover that property from a trespasser: *vide* 35 C. W. N. 768.[4]

In support of his proposition he refers to a passage in Gour's Hindu Code and says:

"Dr. Gour in his Hindu Code lays down the law as follows: "Any person interested in the endowment may sue to set aside an improper alienation of its property by the manager."

After this he says:

The question, therefore, is as to whether Bhakatram and Panchkari could be said to be persons interested in the debutter.

Now, it appears from the judgment that Bhakatram instituted the suit not as next c friend of the idol, but in his own name and in enforcement of his own right (1) as the rightful shebait, (2) at least as the de facto shebait having the custody of the idol and (3) at any rate, as being interested as a worshipper. It seems abundantly clear that my learned brother Mukherjea J. was considering the question whether such persons could sue in their own name and right and not whether they could represent the deity in a suit. My learned brother cited as an authority in support of the position the decision of the Judicial Committee in 31 I.A. 203,[3] and quoted a passage from the judgment of the Judicial Committee to emphasise this right of suit of d such persons as distinct from the right of suit of the idol itself. The passage from Gour's Hindu Code is also relevant only for this purpose. No doubt he used the expression "on behalf of the deities." As I read the judgment, thereby he was not thinking of the frame of the suit but of the ultimate beneficial result of it. Though not in form, in substance, such a suit will be on behalf of the deity, as the deity will be, as the juristic owner of the property, the person benefited by it. The authority in 35 C.W.N. 768[4] cited in support of the proposition also points to the same thing. That also was a case where the persons interested instituted the suit not on behalf of the idol in form but in their own e name though the interest claimed was the benefit of the idol.

In my judgment there is a very substantial distinction between a suit by certain interested persons as such in their own name, and, at least in form, on their own behalf, and a suit by a person in the name of the idol and as its next friend. In the former case the consequences of the suit will be binding only on the persons suing or on the persons whom they represented in form (O. 1, R. 8, Civil P. C.). In the latter case the idol itself will be affected as a juristic person and it is therefore a question fraught with grave f consequences demanding serious consideration as to who should be allowed to represent the idol in such a suit. No doubt now under O. 32, Civil P. C., very wide scope is afforded in this respect to the case of an infant. Rule 4 of O. 32, Civil P. C., lays down:

Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit: Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

This wide rule makes possible much offi- cious meddling with the infant's interest. In g my judgment such a rule of representation should not be allowed to be extended by analogy to the case of an idol. As yet there is no well defined rule of procedure in this respect. An idol is represented by its shebaits. On the exceptional unfortunate occasion of the shebaits turning hostile to the idol, the other persons interested are given the right of suit in their own name. They may come singly or in a representative group. But let them come in their own name and right. An idol is not an infant in the Hindu conception. It has not been treated as an infant by our Legislature and by the highest judiciary in many respects. I do not see any h necessity for or advantage in allowing it to be treated as an infant for the procedural purposes beyond the extent to which the Judicial Committee has already done so. When in the case of a fight between its shebaits it is necessary that the idol should be brought on the record, let it be brought as represented by a person by the special appointment of the Court. In 58 Cal 619[28] Lort-Williams J. held that in the case of a private religious trust, with regard to the mismanagement of which the members of the public

28. ('31) 18 A. I. R. 1931 Cal. 558 : 133 I.C. 815 : : 58 Cal. 619, Sharat Chandra Shee v. Dwarkanath Shee.

cannot intervene, and it cannot be expected that the shebait will bring a suit against himself, it is necessary and desirable that the idol should file a suit by a disinterested next friend appointed by the Court.

The suit was for the removal of the defendant from the position of the shebait of the deity and it was found in the case that there was nobody left out of the members of the family who under the deed of endowment had any interest in the trust estate. The founder's living relatives other than Dwarka's line were excluded by the terms of the deed itself. In these circumstances Lort-Williams J., held that the idol itself could bring a suit for the purpose and that it was for the Court to appoint a next friend for the idol on such an occasion. In 44 C. L. J. 522,[29] Chotzner J. held that a right of suit is vested in the shebait and not in the idol. In the absence of refusal by the shebait to institute a suit for the protection of the property of an idol, neither a worshipper nor an idol is competent to maintain a suit. The suit in question was for a declaration that a certain deed of revocation of the dedication and mortgage of the dedicated property by the settlor was not binding on the idol. The suit was instituted by a worshipper in her own name as also in the name of the idol represented by herself as its next friend. The dedication in question was made by one Suresh Chandra Chakrabarty in 1922 whereby he appointed himself and his brother Nagendra to be the shebaits of the deity. On 6th June 1923, Suresh and Nagendra executed the deed of revocation in question. Thereafter on 20th June 1923 Suresh executed the mortgage in question.

Nagendra and other members of the founder's family were made defendants in this suit. The mortgagee defendants contested the claim. Their defence inter alia was that the suit was not maintainable at the instance of the present plaintiffs. Nagendra was the only surviving shebait of the deity at the date of this suit. He as also the other members of the family who were made defendants in the suit appeared and supported the case of the plaintiffs by filing a written statement. According to Chotzner J., the proper person to have instituted the suit was the shebait and nobody else. Had the position been that Nagendra in his capacity of shebait had definitely declined to institute the suit, it might perhaps have been open to worshipper as the next friend of the idol to have taken the place of the shebait. In the absence of any such refusal by the shebait neither the worshipper nor the idol was competent to sue. The suit was held to be bad. In 60 Cal. 54[30] at p. 73, Rankin C. J., observed :

> The doctrine that an idol is a perpetual minor is, in my judgment, an extravagant doctrine contrary to the decision of the Judicial Committee in such cases as 37 I. A. 147.[31]

He then pointed out :

> It is open to shebaits or any person interested in an endowment to bring a suit to recover the idol's property for debuttar purposes.

Further on at p. 77 he observed :

> I am not prepared to hold, as a matter of construction of the Limitation Act, that an idol is a perpetual minor as was suggested in 49 Mad 543.[32]

While considering whether the possession of two joint shebaits became adverse to the idol when they openly claimed to divide the property between them, Sir George Rankin observed that "until the shebait was removed or controlled by the Court, he alone could act for the idol." This case is also an authority for saying that at least in the Limitation Act the provisions in the Act as to lunatics and minors were not intended to be extended to idols. In 36 C. W. N. 1108[33] the analogy of minority of deities was declared to be a pure fiction for which no authority was to be found in Hindu law, and it was held that there was no conceivable principle on which on such analogy a contract otherwise good and valid could be taken out of the class of contract of which specific performance might be granted under the law. The position may be summed up as follows : (1) *(a)* The idol is a juristic person and as such it may sue and be sued; *(b)* from its very nature it must act through some human agency—shebait is such agency. Until the shebait is removed or controlled by the Court he alone can act for the idol. (2) Apart from the idol's right of suit, a shebait as such has a right of suit and may be sued. Normally he is the human agency through which the idol holds, enjoys, and manages the property and the right of suit vests in him and not in the idol : 31 I. A. 203.[3] (3) Worshippers and members of the family have interest in the

29. ('27) 14 A.I.R. 1927 Cal 244 : 99 I. C. 917 : 44 C L J 522, Kalimata Devi v. Nagendranath.

30. ('33) 20 A.I.R. 1933 Cal 295 : 144 I. C. 792 : 60 Cal 54, Surendra Krishna v. Iswar Bhubaneswari.

31. ('10) 37 Cal 885 : 7 I. C. 240 : 37 I. A. 147 : 12 C L J 110 : 14 C. W. N. 889 (P.C.), Damodar Das v. Lakhan Das.

32. ('26) 13 A.I.R. 1926 Mad. 769 : 96 I. C. 371 : 49 Mad. 543 : 50 M. L. J. 589, Rama Reddy v. Rangadasan.

33. ('33) 20 A.I.R. 1933 Cal 109 : 142 I. C. 465 : 60 Cal 111 : 36 C. W. N. 1108, Gopal Sridhar Mahadev v. Sasibhusan Sarkar.

a debuttar and a right of suit is given to them also to protect the interest of the debutter. (a) This does not mean that these persons can as of right represent the deity in a legal proceeding. (b) They can sue in their own name and on their own behalf for the benefit of the debutter. (4) In exceptional circumstances, a deity can be represented in a legal proceeding by a person other than a shebait only by the special appointment of the Court: 52 I. A. 245;[2] 60 I. A. 263.[34] (a) In such a case such person may be under the control of the Court in the manner in which and to the extent to which a next friend or a guardian of a minor is under such control
b under the provisions of O. 32, Civil P. C. In my judgment the suit No. 196 of 1933 was not a suit of the idol. The person who purported to represent the idol as its next friend was not the person entitled in law so to represent the idol, and she was never appointed by the Court so to represent the idol. At best it was a suit by Anupama in her own right as a worshipper and as such its result would not in the least affect the present suit.

Assuming that the previous suit was the suit of the same plaintiff and was founded on the same cause of action, O. 9, R. 9, Civil P. C., would prima facie preclude the plain-
c tiff from bringing this present suit. The contention of the plaintiff respondent is: (i) that the position of an idol is analogous to that of an infant for the present purposes; (ii) that the position of an infant in this respect is: *(a)* that gross negligence on the part of a next friend in the conduct of a suit brought on behalf of the infant prevents the effect of the bar contained in S. 103 (now O. 9, R. 9), Civil P. C.: 22 Cal. 8;[16] *(b)* that in the absence of any statutory provision the English rule of law in this respect applies here as principles of equity, justice and good conscience, English rule of law as
d enunciated by Malins V. C. in (1874) 18 Eq. 573[35] at p. 576; (c) that as soon as the next friend becomes negligent in the conduct of the suit, he becomes removable by the Court as such next friend and that he ceases to be the next friend though not removed by the Court by any express order, the minor is thus unrepresented from that moment: 54 ALL. 646[10] at p. 664. There is no direct authority in this respect so far as the position of an idol is concerned.

34. ('33) 20 A.I.R. 1933 P.C. 198 : 146 I.C. 1044 : 8 Luck. 351 : 60 I.A. 263 (P.C.), Kanhaya Lal v. Hamid Ali.

35. (1874) 18 Eq. 573 : 43 L. J. Ch. 758 : 22 W.R. 854, In re Hoghton; Hoghton v. Fiddey.

As regards infants the authorities are to e a certain extent conflicting. The points that will require consideration are: 1. What is the exact position of an infant in this respect? 2. Whether the rule of law applicable to an infant should be extended to the case of an idol by analogy. As regards infants an examination of the various decisions of the several High Courts in India will disclose a clear conflict of opinion. The views of the Calcutta High Court will appear from the following cases: 3 W.R. 43[36] (Jackson and Glover JJ.); 10 Cal. 357[37] (Sir Richard Garth, C. J., and Cunningham, J.); 12 Cal. 69[38] (Field and O'Kinley, JJ.); 22 Cal. 8[16] (Trevelyan and Ameer Ali, JJ.); 29 Cal. 735[39] (Pratt f and Mitra, JJ.); 55 Cal. 1241[40] (Rankin C. J. and C. C. Ghosh J.); 45 C.W.N. 508[41] (Mukherjea J). The following opinions showing a certain amount of conflict can be gathered from these cases:

1. The bar imposed by S. 7 of Act 8 of 1859 (corresponding to S. 43 of Act 14 of 1882 and O. 2 R. 2 of the present Civil Procedure Code) was not available against a minor when the omission in the previous suit was due to the negligence of his next friend.

There is no law which prevents a minor, when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. (3 W.R. g 43[36] at p. 46).

2. Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, the result of that suit would have precisely the same effect as that of the suit by a person of full age: 10 Cal. 357;[37] 12 Cal. 69.[38] (a) Where a decree has been made against an infant duly represented by his guardian and the infant on attaining majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. 12 Cal. 69.[38] If the infant desires to have h the decree set aside because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an

36. ('65) 3 W.R. 43, Kylash Chunder Sirkar v. Gooroo Churn Sirkar.

37. ('84) 10 Cal. 357, Eshan Chunder Safooi v. Nundamoni Dasi.

38. ('86) 12 Cal. 69, Raghubar Dyal v. Bhikya Lal.

39. ('02) 29 Cal. 735, Ram Sarup Lal v. Shah Latafat Hossein.

40. ('28) 15 A.I.R. 1928 Cal. 844 : 113 I.C. 843:55 Cal. 1241:32 C.W.N. 665, Abdul Karim v. Thakur Das.

41. ('41) 28 A.I.R. 1941 Cal. 401 : 196 I.C. 779 : I.L.R. (1941) 1 Cal. 477 : 45 C.W.N. 508, Mahesh Chandra v. Manindra Nath.

ex parte one, the procedure adopted should be that given in the Civil Procedure Code for setting aside ex parte decrees: 12 Cal. 69;[38] 29 Cal. 735.[39]

3. Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of an infant prevents the effect of the bar contained in S. 103, Civil P. C., 1882, (O. 9, R. 9 of the present Civil P. C.), to the institution of a fresh suit in respect of the same cause of action by the minor on attaining majority. Fraud and negligence are on the same footing in this respect: 22 Cal. 8[16] and 45 C.W.N. 508.[41] The Calcutta High Court in 22 Cal. 8[16] took the view that according to the law as administered in England the gross negligence of his next friend would entitle an infant (1) to obtain avoidance of proceedings taken on behalf, as also, (2) to institute a fresh suit in respect of the same cause of action. The rule of English law was applied here as principles of justice and equity. The Bombay High Court has recently taken a contrary view in I.L.R. (1939) Bom. 340.[11] The Full Bench now holds that gross negligence apart from fraud or collusion on the part of the next friend or guardian ad litem cannot be made the basis of a suit to set aside a decree obtained against him. In this case Beaumont C. J., doubted if the English rule of law in this respect was correctly appreciated by the Calcutta High Court in 22 Cal 8.[16] The views of the Madras High Court will appear from the following cases : A.I.R. 1915 Mad. 384[42] (Sankaran Nair and Spencer JJ.), 45 Mad. 425,[43] A.I.R. 1923 Mad. 718,[44] A.I.R. 1925 Mad. 258[45] and A.I.R. 1940 Mad. 810.[46] The Madras High Court has taken the same view as in 22 Cal. 8.[16] The Allahabad High Court also has taken the same view as in 22 Cal. 8[16] in 54 ALL. 646.[10] In an earlier case in 1894 A.W.N. 141[47] the Court observed:

> But short of fraud being established and fraud not only on one side but on both, i. e., on the part of the then plaintiff and on the part of the present plaintiff's then guardian, we know of no right which the present plaintiff can now have to dispute the validity of the decree which became final . . . Even if that guardian was negligent and through her negligence did not properly protect the interests of the minor in the previous suit, the minor is still bound by the decree, so long as the guardian did not act fraudulently and in collusion with the minor's then opponent. If the law was otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a plaintiff or defendant in the suit.

The Patna High Court also has taken the same view as in 22 Cal. 8[16] and has further extended the rule to the case of a ward of Court in 14 Pat. 824.[48] The Lahore High Court also has taken the same view and has refused to follow the Full Bench decision of the Bombay High Court : *see* A. I. R. 1940 Lah. 205.[49] Keeping ourselves confined to the bar imposed by O. 9, R. 9, Civil P. C., we may proceed to examine the legal position of the infant with reference to the following cases. (1) When the minor institutes a fresh suit in respect of the same cause of action; (2) when the minor institutes a suit for setting aside the adverse decision in the previous suit; (3) when the minor makes an application in the previous suit (a) for a review of the adverse decision, (b) for otherwise setting aside the adverse decision. So far as the first case is concerned, it must now be taken to be the settled law that the provisions of S. 44, Evidence Act, cannot be extended to cases of gross negligence: 64 I.A. 17.[17] Assuming therefore that in the previous suit the minor was properly represented and that that suit was dismissed for default under O. 9 R. 8, Civil P. C., it seems difficult to maintain the position that a fresh suit in respect of the same cause of action would be maintainable by the minor on the ground that the previous order under O. 9, R. 8 was due to the negligence of the next friend. The bar is a statutory one and it does not make any exception in favour of an infant.

The only way in which such a fresh suit can be urged to be maintainable in spite of the barring provision contained in O. 9, R. 9, Civil P. C., is by holding (1) that as soon as the next friend or guardian ad litem of a minor in a suit becomes negligent, or, in the language of the statute, "does not do his duty" (O. 32, R. 9 and R. 11, Civil P. C.,) and thus becomes removable by the Court under O. 32, R. 9 or R. 11, Civil P. C., he ceases to represent the minor in that suit, though an order removing him is not actually made;

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42. ('15) 2 A.I.R. 1915 Mad. 384 : 26 I.C. 16 : 27 M.L.J. 486, Subbanna v. Narasamma.

43. ('22) 9 A.I.R. 1922 Mad. 273 : 70 I.C. 668 : 45 Mad. 425 : 42 M.L.J. 429, Chunduru Punnayyah v. Rajam Viranna.

44. ('23) 10 A.I.R. 1923 Mad. 718 : 74 I.C. 218 : 45 M.L.J. 324, Kari Bapanna v. Yerramma.

45. ('25) 12 A.I.R. 1925 Mad. 258 : 85 I.C. 812 : 47 M.L.J. 700, Anada Rao v. Venkatadri Appa Rao.

46. ('40) 27 A.I.R. 1940 Mad 810 : 193 I.C. 353 : (1940) 2 M.L.J. 433, Mahammad Shadak v. Venkata Komaraju.

47. ('94) 1894 A.W.N. 141, Daulat Singh v. Raghubir Singh.

48. ('36) 23 A.I.R. 1936 Pat. 231 : 162 I.C. 235 : 14 Pat. 824 : 16 P.L.T. 484, Mathura Singh v. Rama Rudra Prashad.

49. ('40) 27 A.I.R. 1940 Lah. 205 : 190 I. C. 648, Punnun Mal v. Bishambar Dayal.

(2) that, at any rate, as soon as by failing to do his duty a next friend or a guardian ad litem renders himself liable to be removed it becomes the duty of the Court to proceed in a particular manner in that suit and the Court is not competent to proceed in any other way in that suit and therefore any order made thereafter without removing the next friend or guardian ad litem is an order "delivered by a Court not competent to deliver it" within the meaning of S. 44, Evidence Act.

Sulaiman J. in 54 ALL 646[10] seems to have taken the view that the next friend or the guardian ad litem ceases to represent the minor as soon as he renders himself removable by his negligence or failure to do his duty. In my opinion, this is taking an extreme view of the case and, if introduced is likely to create an appalling confusion. This may be a very good ground for reopening any decision or order consequent upon the negligence of the guardian or next friend by an application in that very suit. But I am not prepared to say that when a minor is once properly represented he will cease to be represented thus without an order from the Court. The case, 55 Cal. 1241,[40] is rather an authority in support of the view I am taking. There a minor and his mother were sued and they were described as Sudhamayee Debi, widow of late Ramlal Thakur, and Thakurdas Thakur, a minor by his mother and certificated guardian, the said defendant 1. No one was formally appointed by the Court as guardian ad litem for the minor. A pleader appeared on behalf of the defendants for taking adjournments for filing written statements. There was a substantial defence to the suit, but that defence was never raised. The suit was ultimately decreed ex parte. It was held that the minor was not properly represented and the decree was a nullity. In this case Sir George Rankin laid stress on the fact that the lady was not at all appointed by the Court as a guardian ad litem as was required by O. 32, R. 3, Civil P. C.

The decision of the Judicial Committee in 36 I.A. 168[12] is not authority for the extreme view taken by Sulaiman J. in 54 ALL. 646.[10] There in one case, the guardian-ad-litem, being a married woman, was disqualified by S. 457, Civil P. C. of 1882 from being appointed a guardian ad litem and in another case the proposed guardian was disqualified, having an interest adverse to that of the minor. I am also not prepared to accept the contention that the Court becomes incompetent to make the order of dismissal as soon as the next friend ceases to do his duty. As regards the second case, namely when the minor seeks to assail the previous order or decision and brings a suit for the purpose of setting aside that order, obviously O. 9, R. 9, Civil P. C., is no bar to such a suit. It is not a suit in respect of the same cause of action. It is the previous order itself which supplies the cause of action for the present suit. In my opinion the law that has developed in India in allowing a minor to assail by a suit the order or decision in bar on the ground of the negligence of the next friend should not be disturbed. Even if it be held that the remedy in this respect is not by a suit but by an application in the previous suit, the suit may be treated as such an application. As regards the third case, namely when the infant applies in the previous suit itself for a review of the adverse decision, I am inclined to the view that negligence of the next friend should afford a good ground for the purpose.

A reading of the relevant Indian decisions above referred to will show that they are ultimately based on the pronouncement of Sir R. Malins, V. C. in (1867) 18 Eq. 573.[35] In that very case it was observed that an infant can be guilty of no negligence and cannot be answerable for the negligence of his next friend. No negligence can be imputed to an infant. It might very well be said that when a suit by a minor by his next friend is dismissed for default of the next friend due to the negligence of such next friend, the minor will always have a sufficient cause for non-appearance and will thus be entitled to have the order of dismissal set aside. The next question is to what extent this should be extended to the case of an idol which as a juristic person is from its very nature under perpetual incapacity to look after its own interests, if any. It is now well settled that an idol is recognized as a juristic person capable of being the subject of legal right and duty. But this is only in an ideal sense. In 52 I.A. 245,[2] Lord Shaw in delivering the judgment of the Judicial Committee observed that :

> A Hindu idol is according to long established authority, founded upon the religious customs of the Hindus and the recognition thereof by Courts of law, a juristic entity. It has a juridical status with the power of suing and being sued. Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir.

His Lordship characterized this doctrine as firmly established. In this case their Lordships likened the deity to a human being. Their Lordships observed that :

> The duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolizing the divinity, has in the eye of the law a status as a separate persona. The position and the rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the shebait custodian of the idol and manager of its estate.

Their Lordships quoted with approval what their Lordships termed "a useful narrative of the concrete realities of the position" from the judgment of Sir Asutosh Mookerjee J., in 36 C.L.J. 478,[1] which in short shows that the deity is conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. Though the deity is likened to a human being, it is not clear whether the idol gets recognition as a possible subject of rights in its own interest or whether it is recognized because of the existence of some ultimate human interest of those benefited directly or indirectly by the debutter. The idol is recognized as a juridical entity, but its juridical personality is only the technical means of developing the juristic relations between the several human beings differently interested in the institution. The idol is the owner only in an ideal sense. Its enjoyment is an ideal enjoyment. The real material enjoyment and interest must ultimately be with some human being; otherwise it is difficult to see why law should concern itself with the matter. In 31 I. A. 203,[3] their Lordships observed :

> There is no doubt that an idol may be regarded as a juridical person capable as such of holding property though it is only in an ideal sense that property is so held . . . . . The possession and management of the dedicated properties belong to the shebait and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol.

It may be noticed that in this case the suit was not by the idol represented by its shebait but by the shebait himself as shebait in enforcement of his right as shebait. The right to sue accrued to the plaintiff when he was under age and this saved the limitation. In 67 I. A. 251[27] their Lordships of the Judicial Committee observed that the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognises certain doctrines of Hindu law as essential thereto, e. g., that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait : 31 I. A. 203.[3] In 2 I. A. 145[50] it was observed:

> It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them.

Though an idol is thus recognised as a juristic person capable of suing and being sued, strictly speaking, it has no material interest of its own. The efficient subject of the rights ascribed to an idol must ultimately be some human beings. It must be they who enjoy such rights and if law protects such rights it is because of the existence of such ultimate human concern. The idol as the juridical person only affords the technical means of developing the juristic relations between those ultimately interested in the endowed property and the strangers. The so-called interest of the idol is merely an ideal interest very different from the interest which an infant has in his property. The introduction of the idol and its recognition as a juristic person are more a matter for the procedure and the procedure in India recognises the idol as having a locus standi in judicio: 67 I. A. 251.[27] The real material interest and enjoyment lie with some human beings. It is the concern of these interested persons to see how best they will protect and preserve their interests and in this respect when the properly represented idol is brought before a Court of law that proceeding is more analogous to the one brought by a few persons representing a multitude under O. 1, R. 8, Civil P. C., than the suit by a next friend in the name of an infant, for the protection of that infant's own interest. Negligence of the person or persons representing the idol (or more correctly, the interest of the ultimate multitude having interest in the endowment) should not be available for the purpose of avoiding the result of that litigation: 64 I. A. 17.[17]

As I have held that the present suit is not in respect of the same cause of action as the

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50. ('74) 2 I. A. 145: 14 Beng. L. R. 450: 3 Sar. 449: 3 Suther 102: 23 W. R. 253 (P.C.), Prosunno Kumari Debya v. Golap Chand Babu.

a Title Suit No. 196 of 1933 and that the idol was not properly represented in that suit, O. 9, R. 9, Civil P. C. is no bar to the present suit. The appeals, therefore, fail on this ground and I agree that they should be dismissed.

K.S./R.K. *Appeals dismissed.*

A. I. R. (29) 1942 Calcutta 120

B. K. MUKHERJEA AND SEN JJ.

Anath Nath Sarkar — Judgment-debtor — Petitioner

v.

Rajendra Nath Bhattacharjee — Decree-holder — Opposite Party.

b Civil Rule No. 257 of 1941, Decided on 18th June 1941, for setting aside order of the Sub-Judge, 1st Court, Howrah, D/- 23rd November 1940.

Bengal Money-lenders Act (10 of 1940), S. 36 (1) and (2) — Under S. 36 Court can reopen decree only if it is necessary for exercising powers under S. 36 (1) — Claim to instalments does not come under S. 36 (1) and hence by itself is no ground for reopening decree—Decree reopened — Court must pass new decree under S. 36 (2).

The Court can reopen a decree under S. 36 only if it is necessary to do so for the purpose of exercising any of the powers which are conferred by S. 36 (1). Consequently, where the Court grants a relief under S. 36 (1) (c) the Court has got to reopen the decree. The reduction of the decretal dues c under S. 36 (1) (c) as well as revision of the order for costs amounts to reopening of the decree. When the Court has reopened the decree, it is bound to pass a new decree as contemplated by S. 36 (2). When the decree reopened is a mortgage decree the new decree has got to be made in accordance with S. 34 of the Act and the judgment-debtor is entitled to such instalments as the Court thinks proper. [P 120*e*, *f*, *g*]

A claim for instalments is not one of the reliefs which comes under the purview of S. 36 (1) and cannot by itself afford a ground for reopening a decree. [P 120*e*]

Ranjit Kumar Banerjee — for Petitioner.

J. N. Roy and Provash Ch. Basu — for Opposite Party.

Order. — This rule is directed against an d order dated 23rd November 1940 of the Subordinate Judge first Court, Howrah, made in an application under S. 36, Bengal Money-lenders Act. The Subordinate Judge came to the finding that the mortgage decree did allow the decree-holder interest in excess of what is permitted under S. 30, Bengal Money-lenders Act. By the order mentioned aforesaid he reduced the decretal dues by a sum of Rs. 127 which, according to him, was the excess amount allowed in contravention of S. 30, Bengal Money-lenders Act, and he has made proportionate alteration in the order for costs also. He has, however, refused to pass a new decree and has rejected the prayer for the instalments on the ground that such e prayer could be made only before the decree was passed.

In our opinion, the view taken by the Court below is not right. The Court can re-open a decree under S. 36 only if it is necessary to do so for the purpose of exercising any of the powers which are conferred by sub-s. (1) of S. 36. A claim for instalments is not one of the reliefs which comes under the purview of that sub-section and cannot by itself afford a ground for re-opening a decree. In the present case the Court has found that the judgment-debtor is entitled to relief under sub-cl. (c) of sub-s. (1) of S. 36, f as he was made liable for interest exceeding the limits prescribed by S. 30 of the Act. As the decree has already been passed by which the excess interest was given, the Court has got to re-open the decree for the purpose of exercising its powers under sub-cl. (c), sub-s. (1) of S. 36. The Court below, therefore, was not justified in saying that the decree should not be re-opened in this case. The reduction of the decretal dues as well as revision of the order for costs did, in our opinion, amount to a re-opening of the decree. As the Court in reality has re-opened the decree, it is bound to make a new decree as contemplated by S. 36, cl. (2), Bengal g Money-lenders Act. As it is a mortgage suit, the new decree has got to be made in accordance with S. 34 of the Act and the judgment-debtor is entitled to such instalments as the Court thinks proper.

In our opinion it will be quite proper in the circumstances of the case if the judgment-debtor is allowed to pay the decretal dues in four equal annual instalments. Pendente lite interest at the rate of six per cent. per annum should be allowed from the date of the institution of the suit till the date of the new decree. No post decree interest will be allowed. We accordingly set aside the h order of the Subordinate Judge and send the case back in order that a new decree might be made in accordance with the directions made above. The petitioner undertakes to withdraw the appeal which he has filed against the same order in the Court of the District Judge of Howrah. There will be no order as to costs in this rule.

G.N./R.K. *Case remanded.*

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a **A. I. R. (29) 1942 Calcutta 121**

EDGLEY J.

Suresh Chandra Mukherjee

v.

Lal Mohun Chatterjee and another.

Application in Suit No. 1146 of 1936, Decided on 4th April 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 2 (22)—Mortgage suit filed before 1st January 1939 — Final decree remaining unsatisfied on 1st January 1939 — Suit must be regarded as pending within S. 2 (22).

Where a final mortgage decree remains unsatisfied on 1st January 1939, the suit in which the decree was passed must be regarded as pending within the meaning S. 2 (22) even if no execution application was pending on that date. [P 122*g*]

b **(b) Bengal Money-lenders Act (10 of 1940), S. 36 (6) (a) (ii) — Application under S. 36 (6) (a) (ii) — Copies of judgment and decree need not be filed — Ch. 31, Calcutta High Court Original Side Rules, does not apply.**

Chapter 31, Calcutta High Court Original Side Rules, does not contemplate applications filed for review of decrees under the Bengal Money-lenders Act. Hence, it is not necessary to file copies of the judgment and decree with an application under S. 36 (6) (a) (ii). [P 123*d*]

(c) Bengal Money-lenders Act (10 of 1940), S. 36—Application for review of decree—Power to grant relief is not limited only by reopening decree—Court can under S. 36 (1) treat unsatisfied decree as satisfied—Case held fit for exercise of power under S. 36 (1) (c) — Relief under

c **S. 36 (1) (c) held did not entitle debtor to benefit of S. 36 (2)—Effect of exercise of power under S. 36 (1) (c) stated.**

The Court's power to grant relief on an application for review is not confined to reopening the decree. The powers conferred upon the Court by S. 36 (1) are sufficiently wide to enable it to treat an unsatisfied decree as satisfied in certain circumstances. [P 123*b*,*c*]

The sale in execution of the mortgage decree had actually been confirmed, a considerable portion of the debt due to the decree-holder had been set off against the purchase-money and the price realised at the sale of the mortgaged properties was insufficient to satisfy the dues of the decree-holder even if interest were calculated at the rate prescribed in S. 30 of the Act :

d ***Held* that in the particular case it was not necessary to reopen the entire decree and that the ends of justice would be served by releasing the borrower of all liability as regards interest in excess of the limits specified in S. 30 (1) (ii) of the Act as contemplated by S. 36 (1) (c).** [P 123*e*]

***Held further* that the exercise of the powers under S. 36 (1) (c) in the particular case did not entitle the debtor to the benefits of S. 36 (2). (Effect of exercise of powers under S. 36 (1) (c) in the particular case stated.)** [P 123*f*]

(d) Bengal Money-lenders Act (10 of 1940), S. 36 (1) and (2) (a) — Relief granted without reopening decree—Costs—Principle of S. 36 (2) (a) should be applied.

Where the Court grants relief under S. 36 (1) (c) without reopening the decree it is reasonable that the principle of S. 36 (2) (a) should apply as regards costs. [P 123*g*]

S. R. Das — for Plaintiff.

S. R. Das Gupta — for Defendant. e

Order. — In this case the petitioner, Lal Mohun Chatterjee, has applied for certain relief under the provisions of Bengal Money-lenders Act, 1940. It appears from his petition that a preliminary decree was passed against him and certain other persons on 19th February 1937. An account was then taken by the learned Registrar who found that the sum of Rs. 26,076-11-9 was due to the mortgagee. The decree was made final for that amount on 14th November 1938 and the mortgaged properties were sold respectively on 30th August 1939 and 6th December 1939. The price realized for the first property f was Rs. 6400 and, as regards the second property, the price realized was Rs. 17,000 or in all Rs. 23,400. The sale was confirmed on 16th August 1940. This application originally came before me in Chambers on 6th March 1941, on which occasion Mr. Das on behalf of the opposite party contended that it was not maintainable on the grounds (1) that no application for execution of the decree was pending and (2) that the application could not be treated as an application for review. At that time I was inclined to accept his contentions, but, as the matter raised some important points of law, I thought it desir- g able that it should be further considered. The decision with regard to this application involves the construction of certain sections of the Bengal Money-lenders Act and the considerations which arise with reference thereto have now been placed fully before me by learned counsel on both sides and by Mr. B. C. Ghose as *amicus curiæ*.

The first point which arises for consideration is whether or not this application relates to a "suit to which this Act applies" within the meaning of S. 2 (22) of the Act. The relevant portion of this sub-section is in the following terms : h

'Suit to which this Act applies' means any suit or proceeding instituted or filed on or after the 1st day of January 1939, or pending on that date and includes a proceeding in execution :

(a) for the recovery of a loan advanced before or after the commencement of this Act.

Admittedly, the suit with regard to which this application is made was filed before 1st January 1939 and no application for execution is pending with reference thereto. Learned counsel for the petitioner contends however that an application for relief under the provisions of the Bengal Money-lenders Act is nevertheless maintainable because the final decree passed in the mortgage suit has not yet been satisfied and, from that point of

view, the suit must be regarded as 'pending' on 1st January 1939. With this contention I must agree and in fact it is not seriously disputed by Mr. Das on behalf of the opposite party that the application has been made with reference to a "suit to which this Act applies." It might, of course, be argued that a suit cannot be regarded as pending after a final decree has been passed therein and that, in view of the language which has been used in S. 2 (22), the Act could not apply in the case of a suit which had been filed and in which a final decree had been obtained before 1st January 1939. At the same time it is clear from the provisions of S. 30, Bengal Money-lenders Act, that the petitioner in the present case is not liable to pay interest in respect of his loan in excess of the amount of 8 per cent. simple. The relevant portion of this section is in the following terms :

Notwithstanding anything contained in any law for the time being in force, or in any agreement,

(1) No borrower shall be liable to pay after the commencement of this Act.

* * * *

(c) interest at a rate per annum exceeding in the case of

* * * *

(2) Secured loans, eight per cent. simple, whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act;

In the present case the interest stipulated under the mortgage bond was ten per cent. compound and it follows from the provisions of S. 30, which have been quoted, that this represents a liability from which the applicant is entitled to be released. The Court is empowered to grant relief to a debtor in cases such as this under the provisions of S. 36 of the Act. Sub-section (1) of S. 36 states that, if the Court has reason to believe that the exercise of one or more powers under the section will give relief to the borrower, it shall exercise certain powers which include the release of the borrower from all liability in excess of the limits specified in cls. (1) and (2) of S. 30. There is a proviso to this part of the section which is of importance with regard to the question now under discussion. It is in the following terms :

Provided that in the exercise of these powers the Court shall not

* * * *

(ii) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the first day of January 1939 or anything which affects an award made under the Bengal Agricultural Debtors Act, 1935.

Sub-section (6) of S. 36 provides :

Notwithstanding anything contained in any law for the time being in force, (a) the Court which, in a suit to which this Act applies, passed a decree which was not fully satisfied by the first day of January 1939 may exercise the powers conferred by sub-ss. (1) and (2)

(i) in any proceedings in execution of such decree, or

(ii) on an application for review of such decree made within one year of the date of commencement of this Act, and the provisions of Rr. 2 and 5 of O. 47, Sch. 1, Civil P. C., 1908, shall not apply to any such application.

It could hardly have been the intention of the Legislature to absolve debtors generally after the commencement of the Act from liability to pay interest in excess of the rates specified in S. 30 and at the same time to place a serious impediment in the way of obtaining such relief in the case of unsatisfied decrees which had been obtained before 1st January 1939 by excluding the suits in which such decrees had been obtained from the category of any suit to which the Act applies which is the expression used in S. 36 (1) of the Act. In fact, it is clear from proviso 2 to S. 36 and sub-s. (6) of that section, that the Legislature intended that the powers conferred upon the Court by sub-ss. (1) and (2) should be exercised in suitable cases in the case of decrees obtained before 1st January 1939 but not fully satisfied on that date. These provisions therefore contain clear indications that in S. 2 (22) the Legislature used the expression "pending" in a technical sense wide enough to include suits in which unsatisfied decrees were outstanding on 1st January 1939.

From a consideration of those portions of the Act which have been quoted above it is clear that the intention of the Legislature was that by observing the appropriate procedure a debtor should be entitled to be released from liability to pay interest in excess of the rates mentioned in S. 30 even in a case in which a decree was passed before 1st January 1939 provided that decree was not fully satisfied on that date and, this being the case, I am of opinion that the present application must be regarded as maintainable as relating to a suit to which this Act applies.

As regards the procedure which should be adopted in applying for relief under the provisions of the Bengal Money-lenders Act in cases such as that with which we are now dealing the provisions of S. 36 allow the borrower to obtain relief either by filing a suit or by making an application. In the case of applications, it appears from the provisions of S. 36 (6) of the Act that as far as Courts of original jurisdiction are concerned, it was the intention of the Legislature that such applications should be made either in the

proceedings in execution of a decree or, if no such proceedings have been taken or are pending, the debtor should be at liberty to file what is described in the Act as an application for review. It does not appear that any question of limitation can arise provided the application for relief is filed during the pendency of the execution proceedings, but, as regards application for the review of a decree, a special period of limitation has been provided, namely one year from the commencement of the Act. It may have been intended in suitable cases to treat decrees which violate the provisions of S. 30 of the Act as being open to review on account of some mistake or error apparent on the face of the record, but, owing to the length of the period during which such application may be made, it was considered that the provisions of Rr. 2 and 5 of O. 47, Civil P. C., would not be suitable and it is therefore provided that they should not apply to any such applications. Although in the present case the appropriate procedure for the borrower to adopt was to file an application for review it does not follow that the Court is only empowered to grant relief on such an application by re-opening the decree. As will be seen later, the powers conferred upon the Court by Sec. 36 (1) are sufficiently wide to enable it to treat an unsatisfied decree as satisfied in certain circumstances.

In the present case it is argued by Mr. Das that, as his client did not wish to put the decree into execution, it was incumbent upon the applicant to file his application for relief in strict conformity with the relevant provisions of Chap. 31 of the Original Side Rules, which apply in the case of applications for review. In that case it would have been necessary for the applicant to observe certain formalities such as the filing of copies of the judgment and the decree which he seeks to have reviewed. Admittedly, however, it would be useless in the present case to file such copies and clearly the rules contained in Chap. 31 of the Original Side Rules could not have contemplated applications for the review of decrees filed under the provisions of the Bengal Money-lenders Act. I therefore propose to treat the present application as an application for review within the meaning of S. 36 (6) (a) (ii) of the Act and to dispense with the filing of copies of the judgment and decree. The question remains as to which of the powers mentioned in S. 36 (1) and (2) of the Act it will be appropriate to exercise. In the present case the sale has actually been confirmed, a considerable portion of the debt due to the decree-holder has been set off against the purchase-money and the price realised at the sale of the mortgaged properties was insufficient to satisfy the dues of the decree-holder even if interest be calculated at the rate prescribed in S. 30 of the Act. In such a case I do not think it necessary to reopen the entire decree, but I consider that the ends of justice will be served by releasing the borrower of all liability as regards interest in excess of the limits specified in S. 30 (1) (ii) of the Act as contemplated by section 36 (1) (c).

It was faintly argued by learned counsel for the applicant that the exercise of this power necessarily involves the reopening of the decree in such a way as to entitle his client to the privileges enumerated in S. 36 (2) of the Act. I am not prepared to accept this argument. In my view the effect of the exercise of the power conferred on the Court by S. 36 (1) (c) in this particular case will be to leave the decree intact, but at the same time the exercise of this power will result in the decree being treated as fully satisfied by writing of the amount by which the decree-holders' dues under the decree exceed the amount calculated at the rates of interest prescribed in S. 30. Admittedly, if interest be calculated at the rate of 8 per cent. simple to this date, the total sum of Rs. 24,855-12-8 would be due to the decree-holder today. The debtor is therefore released from all liability to the decree-holder in excess of this amount in regard to principal and interest. Although I am not reopening the decree it is only reasonable that the principle of Sec. 36 (2) (a) should apply as regards costs. The decree-holder will therefore be entitled to the costs of this application which will be treated as a motion.

G.N./R.K. *Order accordingly.*

A. I. R. (29) 1942 Calcutta 123

SEN J.

Mritunjoy Roy and another

v.

Netai Chand Dutt and others.

Applns. in Suit No. 1680 of 1938, Decided on 14th July 1941.

Bengal Money-lenders Act (10 of 1940), S. 36 (1) (c) and (2)—Relief under S. 36 (1) (c) can be granted only after reopening decree.

The relief under S. 36 (1) (c) can be granted only after reopening the decree. Once the decree is reopened the Court must under S. 36 (2) pass a new decree in accordance with the provisions of the Act. Consequently the sale held in execution of the

decree reopened must be set aside : ('42) 29 A.I.R. 1942 Cal. 120, *Foll.*; ('42) 29 A.I.R. 1942 Cal. 121 and ('41) 28 A.I.R 1941 Cal 681, *Dissent*. [P 125*d*,*e*,*f*]

Sankar Banerjee — for Plaintiffs.

H. N. Sanyal — for Defendants.

Order.—These are two applications under the Bengal Money-lenders Act. The first is by the decree-holders under S. 35 of the Act, while the second is by the judgment-debtors under S. 36 of the aforesaid Act. The applications have been heard together and this order will govern both of them. The plaintiffs obtained a final decree upon two mortgages on 2nd July 1940. This decree affects certain puisne mortgagees as well, but they have not appeared on these applications. The interest specified in the mortgage bonds were 7½ per cent. and 12 per cent. per annum respectively with quarterly rests. A final decree was passed granting the mortgagees interest at those rates, and interest on judgment at 6 per cent. Thereafter the decree-holders brought the mortgaged premises to sale. The price specified in the sale proclamation of the property was Rs. 44,000. The mortgagee decree-holders obtained leave to bid and bid up to Rs. 38,000 for the property. This was the highest bid. They apply now for confirmation of the sale in accordance with the provisions of S. 35, Bengal Money-lenders Act. The section runs as follows :

> Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation.
>
> Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified.

The decree-holders point out that the difference between the price specified and their bid is Rs. 6000 and they consent to deduct this amount from the decretal amount which was then Rs. 42,889-15-6. If the amount of Rs. 6000 is so deducted, the balance is Rs. 36,889-15-6. The decree-holders pray that the sale be confirmed and they be allowed to pay into Court the difference between this sum of Rs. 36,889-15-6 and the highest bid of Rs. 38,000, viz., Rs. 1110-0-6 and take the property in full satisfaction of their claim. This they claim they are entitled to do under S. 35 of the Act. The judgment-debtors oppose this application. They point out that there is no provision in the section which would permit the decree-holders to pay in this sum of Rs. 1110-0-6 into Court and contend that S. 35 can have no application unless the decretal amount is equal to or more than the price specified in the sale proclamation. I do not propose to investigate this matter or give any opinion on it as my decision on the application of the judgment-debtors will result in the sale being set aside.

The judgment-debtors apply, as I have said before, under S. 36, Bengal Money-lenders Act. They point out, inter alia, that they are entitled to be released from all liability for interest in excess of the limits specified in S. 30 of the aforesaid Act. They contend further that if they are to be released of such liability the decree will have to be re-opened, and once the decree is re-opened, by virtue of the provisions of S. 36 (2) a new decree will have to be passed in terms of S. 34. There can be no doubt that the judgment-debtors are entitled to relief under the Bengal Money-lenders Act inasmuch as the interest charged in the mortgage is in excess of that which is allowed under the Act. This claim is not contested. But the decree-holders relying on the case in 45 C.W.N. 859[1] and the case in 45 C.W.N. 863[2] contend that it is not necessary for the Court to re-open the decree in order to grant the relief claimed by the judgment-debtors.

There can be no doubt that the two decisions support the contention urged on behalf of the decree-holders, but with great respect I must express my disagreement with the view taken there and decline to follow those decisions. My reasons for holding a different view are these: Section 36 (1) states that when the Court is of opinion that the exercise of its powers under the section will grant relief to the borrower, it shall exercise all or any of such powers. Sub-section (2) says that when the Court in exercising these powers re-opens a decree already passed, the Court shall pass a new decree in accordance with the provisions of the Act. It is clear from the section that if in granting relief the decree is re-opened, a new decree will have to be passed and the new decree will have to be in accordance with the provisions of the Act. It is also clear that the section envisages the granting of relief under two sets of circumstances: (1) when no decree is

1. ('42) 29 A.I.R. 1942 Cal. 121 : I. L. R. (1941) 2 Cal. 184 : 45 C.W.N. 859, Suresh Chandra v. Lal Mohun.
2. ('41) 28 A.I.R. 1941 Cal. 681 : 45 C. W. N. 863, Manmatha Nath Bose v. Renula Bose.

re-opened and (2) when a decree is re-opened. I shall restrict myself to the particular relief which is sought for in this case, viz., the relief from the liability to pay interest on a mortgage in excess of the limits specified in S. 30. The power to grant this relief is referred to in S. 36 (1) (c). When no decree has yet been passed no complexity arises; the liabilities of the parties will be determined by the decree and, in spite of the terms of the contract between the parties, the borrower will be relieved of the liability to pay interest in excess of the limits specified in S. 30. No question of re-opening any decree then arises. When, however, the relief is sought after a decree has already been passed making the defendant liable to pay interest at a rate in excess of the limits specified in S. 30, can the Court grant this relief without re-opening the decree? I entirely fail to see how it can. So long as a decree is in force the decree-holder is entitled to enforce it as it stands and the judgment-debtor is bound to obey it as it stands. The rights and liabilities under the decree cannot be whittled down without interference with the decree.

When a suit on a mortgage proceeds to a decree the liability of the mortgagor, which so long was under the contract is crystallised or merged into the liability under the decree. The only liability that remains is the decretal liability. If thereafter the judgment-debtor seeks relief on the footing that he is not bound to pay a portion of the interest awarded by the decree, the relief that is sought is relief from the operation of the decree and if it is granted it must be carved out, as it were, from the decree.

In order to exercise my powers under S. 36 (1) (c) of the Act, i. e., in order to relieve the borrowers from all liability to pay interest in excess of the limits specified in S. 30, I must first take hold of the decree, examine it and then relieve the borrowers from the performance of so much of it as the Act allows. In other words I must first re-open the decree. I find it impossible to appreciate how a decree can remain intact when a portion of it is truncated and nullified. The relief claimed can be granted only after re-opening the decree. This view was taken by Mookherjee J. and myself in the case in Civil Revision Case No. 257 of 1941[3] decided by us on 18th June 1941. Once the decree is re-opened, the Court must under the provisions of S. 36 (2), pass a new decree in accordance with the provisions of the Act. In the present case the Court must pass a new decree in accordance with the provisions of S. 34 (1) (a).

I, therefore, set aside the decree which has been passed in this suit and pass a new decree in accordance with the terms of section 34 (1) (a). The decretal amount shall be paid in three annual instalments, the first instalment shall be paid within one month of the confirmation of the Registrar's report. In default of payment of any such instalment, the decree-holders may proceed under S. 34 (1) (a) (ii) after giving one month's notice to the defendant. The sale is set aside and the commission paid to the Registrar shall be refunded to the decree-holders. The judgment-debtors shall pay all the costs incurred up to date including the costs of these applications. Certified for counsel as regards the Chamber application.

G.N./R.K. *Order accordingly.*

3. *Reported in* ('42) 29 A. I. R. 1942 Cal. 120, Anath Nath Sarkar v. Rajendra Nath Bhattacharjee.

A. I. R. (29) 1942 Calcutta 125

SEN J.

Juggannath Roy and another — *Plaintiffs*

v.

Madan Mohan Burman and another — *Defendants.*

Application in Suit No. 1908 of 1929, Decided on 29th July 1941.

(a) Interpretation of statutes —Retrospective effect — Intention must be clear from words of Act.

In construing an Act, the Court should not give it a retrospective effect unless such an intention is clear from the words of the Act. [P 126*h*]

(b) Bengal Money-lenders Act (10 of 1940), S. 33 — S. 33 is not retrospective — Sum paid before Act as capitalist commission cannot be got back by borrower.

Section 33 does not operate retrospectively, and as the rights between the parties so far as they relate to the payment by way of capitalist commission cannot be altered by S. 33 unless it had retrospective effect and hence the debtor will not be entitled to get back any sum paid before the Act by way of capitalist commission or to get credit for any such sum : (1911) 2 Ch.D. 1, *Expl., and Rel. on.* [P 127*f*,*g*]

S. N. Banerjee (Sr.) — for Plaintiffs.

B. N. Ghosh — for Defendants.

Order. — This is an application for relief under the Bengal Money-lenders Act in respect of a mortgage loan taken on 25th September 1926. The loan was for Rs. 3,00,000. There was the usual preliminary decree passed on 12th December 1930, and a final decree on 8th December 1931. Thereafter, various adjustments were recorded between the parties.

The last adjustment was on 31st March 1938, *a* whereby it was provided that the interest would be calculated at the rate of 6¼ per cent. per annum if the amount fixed was paid in terms of certain orders previously passed. The plaintiffs agreed not to proceed in execution for six years from 1st April 1938. I may mention that the interest payable according to the terms of the mortgage was 9½ per cent. per annum with quarterly rests. The defendants have now applied for relief under the Bengal Money-lenders Act on the grounds, firstly, that they have paid interest beyond the limits specified in S. 30 of the Act; secondly, that they are entitled to re- *b* cover Rs. 5750 paid by them by way of capitalist commission; and thirdly, that they are not bound to pay more than twice the principal of the original loan. They claim that the decree should be reopened and a new decree passed in accordance with the provisions of the aforesaid Act.

Mr. Ghose, on behalf of the plaintiffs, agrees that the defendants are entitled to relief on the first and third grounds, that he contends that the defendants are not entitled to get back any sum which they may have paid by way of capitalist commission. He admits that some amount was so paid, but *c* he does not admit that it would amount to Rs. 5750. Next, he says that although the defendants may get relief under the Bengal Money-lenders Act, it will not be necessary for the Court to re-open the decree and pass a new one. I shall take up for consideration, the second point raised by Mr. Ghose. There can be no doubt that the defendants are entitled to get relief with respect to the interest which they have paid in excess of the limits set out in S. 30, Bengal Money-lenders Act. They are also entitled to claim that they shall not be liable to pay more than twice the amount of the principal of the original loan. Now, in order to give *d* them these reliefs, I am of opinion that the decree passed in the suit must be re-opened. I am unable to appreciate how these reliefs can be granted without altering or affecting the decree passed; and if the decree passed has to be altered, then it must first be re-opened. I have expressed my view on this question in two previous decisions: Suit No. 1680 of 1938[1] and Civil Revision Case No. 257 of 1941.[2] And I do not propose to deal in greater detail with this point. I hold that the decree must be re-opened. The next *e* point for consideration is whether the defendants are entitled to claim the return of Rs. 5750 or any sum which they may have paid by way of capitalist commission. This claim is based on section 33, Bengal Money-lenders Act, which is in the following terms:

> Any agreement between a lender and a borrower or intending borrower for the payment to the lender of any sum on account of costs, charges or expenses incidental or relating to the negotiations for, or the granting of, the loan or proposed loan, shall be illegal, and if any sum is paid to a lender by the borrower or intending borrower as, for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set *f* off against the amount actually lent and that amount shall be deemed to be reduced accordingly.

Mr. Ghose argues that retrospective effect to the section should not be given inasmuch as there is nothing in the section which indicates that such effect was intended. He points out that there are words in the section which indicate that only such agreements were contemplated in the section as were entered into between a borrower and a lender after the Act came into force. Mr. Banerji, on the other hand, contends, that there are no words in the section which would justify the Court in holding that it *g* applied only to the agreements entered into after the Act came into force and he suggests that the section applies to agreements whether entered into before or after the Act came into force. In support of this contention he refers me to the case in (1911) 2 Ch.D. 1[3] at pp. 11, 12 and 13. I need hardly state that in construing an Act the Court should not give it a retrospective effect unless such an intention is clear from the words of the Act. An agreement between a lender and a borrower, pursuant to which a sum is to be paid to the lender on account of costs, charges, or expenses incidental to the negotiations for the loan was a perfectly valid *h* agreement before the Act came into force. If the Legislature wished to reopen a prior agreement which has already been performed then it should have clearly said so. I can see no reason why I should hold that an agreement already performed which was perfectly valid and legal before the Act came into operation should after the Act be considered as having been illegal.

The words used in the section are "shall be illegal." This indicates that the taint of illegality was to be attached to agreements

1. *Reported in* ('42) 29 A.I.R. 1942 Cal 123, Mritunjoy Roy v. Netai Chand Dutt.
2. *Reported in* ('42) 29 A.I.R. 1942 Cal 120, Anath Nath Sarkar v. Rajendra Nath Bhattacharjee.
3. (1911) 2 Ch.D. 1: 80 L.J.Ch. 578: 104 L.T. 759: 55 S.J. 519: 27 T.L.R. 444, West v. Gwynne.

entered into or subsisting as an agreement after the Act came into force. The words do not indicate that the intention was to convert agreements which have been performed before the Act and which were perfectly valid at the time of their being entered into into illegal agreements. Again, the words used are "if any sum is paid to a lender." The section does not say 'if any sum has been paid to a lender.' This again shows that the section was not intended to affect agreements which had been performed prior to its enactment. To interpret the section in the way suggested by Mr. Banerjee would be to give it retrospective effect but I can discern nothing in the section which would indicate that such an effect was intended. The case relied upon by Mr. Banerji, in my opinion, supports my interpretation of the section. The case related to the interpretation of S. 3, Conveyancing and Law of Property Act, 1892, and it was held that the section affected all leases whether they were executed before or after the Act. The reason given for this interpretation was that the Act was intended to interfere with the existing rights and that although the Act was not retrospective, it affected rights under existing leases. Where a lease is in existence, certain rights are continuing, and these rights would be affected by an Act like the Conveyancing Act, as the Act was intended to affect existing rights although it was not retrospective. But here we are not concerned with any existing agreement or continuing right. The agreement between the lender and the borrower has long been performed and discharged, no further rights or liabilities are outstanding which could be affected by an Act which is not retrospective. In distinguishing between what is meant by the retrospective operation of an Act, and an interference with existing rights, Buckley L. J., made the following observations :

> To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.
>
> Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between *A* and *B* there is in an event to arise a debt from *B* to *A*, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration, take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation, a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in (1848) 2 Ex. 22[4] and in (1893) 1 Q.B. 41.[5] But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation but is an interference with existing rights in that it destroys *A's* right in an event to become a creditor of *B*. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future, but there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act, in which it is contained, to say what is its fair meaning.

Applying the principles underlying that decision, I am of opinion that the rights between the parties so far as they relate to the payment by way of capitalist commission cannot be altered by S. 33, Bengal Money-lenders Act, unless it were retrospective and I have already held that it is not. In these circumstances, I hold that the defendants will not be entitled to get back any sum paid by way of capitalist commission or to get credit for any such sum. The defendants alleged that in order to obtain the consent of the plaintiffs to one of the adjustments, they paid the sum of Rs. 8500 to the plaintiff on or about 1st February 1934 and they contend that they are entitled to get credit for this amount at the time when accounts are taken. Mr. Ghose on behalf of the plaintiffs says that he does not admit that Rs. 8500 was paid, but he agrees that if any sum was paid, the defendants would be entitled to get credit for that sum and that the amount payable by the defendants should be reduced by that amount. It will be for the Registrar to ascertain when taking accounts what sum if any was paid by the mortgagors on or about 1st February 1934.

The decree passed will have to be reopened and a new decree will have to be passed in accordance with the provisions of S. 34, Money-lenders Act. I direct that an account be taken by the Registrar in the

4. (1848) 2 Ex. 22 : 12 Jur. 138 : 76 R. R. 479, Moon v. Durden.
5. (1893) 1 Q.B. 41 : 62 L.J.Q.B, 28 : 5 R. 54 : 67 L.T. 688 : 41 W.R. 125, Knight v. Lee.

light of the observations made above and in accordance with the provisions of S. 34, Bengal Money-lenders Act. Interest shall be calculated @ 8% per annum simple up to the date of this decree. The amount found due by the Registrar shall be payable in four equal annual instalments. The first instalment shall be paid within one month of the confirmation of the Registrar's report. In default of payment of any such instalment, the plaintiffs after giving the defendants one month's notice in the form prescribed may apply for a final decree in accordance with the provisions of S. 34 (1) (a) (ii). I have considered the circumstances of the plaintiffs and the defendants, and I am of opinion that the defendants should be given four instalments. The defendants shall pay all costs incurred with respect to both the preliminary and final decrees which have been set aside and the costs of this application.

R.K. *Decree re-opened.*

A. I. R. (29) 1942 Calcutta 128

R. C. MITTER AND MOHAMAD AKRAM JJ.

Promode Nath Sinha Roy and others — Judgment-debtors — Appellants

v.

Smt. Raseshwari Dassi w/o Deb Narayan Pain and another — Decree-holders — Respondents.

Appeal No. 132 of 1941, Decided on 18th and 27th August 1941, from original decree of Sub-Judge, First Court, Hooghly, D/- 22nd December 1939.

(a) Bengal Money-lenders Act (10 of 1940), Ss. 36 (2) (a) and 30 (1) (c)—Preliminary mortgage decree — Court cannot grant relief under S. 30 (1) (c) without reopening decree — Court must pass new decree in supersession of preliminary decree : I.L.R. (1941) 2 Cal. 184=('42) 29 A.I.R. 1942 Cal. 121 and 45 C. W. N. 863=('41) 28 A.I.R 1941 Cal. 681, *OVERRULED.*

Court cannot grant relief under S. 30 (1) (c) without reopening the preliminary mortgage decree. When the decree is reopened the Court must pass a new decree in supersession of the preliminary mortgage decree in accordance with the provisions of the Act. With the supersession of the preliminary mortgage decree the final decree passed on the basis thereof must also go : ('42) 29 A.I.R. 1942 Cal. 120 and ('42) 29 A. I. R. 1942 Cal. 123, *Foll.*; I. L. R. (1941) 2 Cal. 184=('42) 29 A. I. R. 1942 Cal. 121 and 45 C. W. N. 863=('41) 28 A.I.R. 1941 Cal. 681, *OVERRULED.* [P 129*g*, *h*]

(b) Bengal Money-lenders Act (10 of 1940), Ss. 34 (1) (a) (i) and 30—Preliminary mortgage decree—Application for relief under Act accompanied with prayer for instalments — Decree reopened — Court while passing new decree must grant instalments.

Where the application for relief under the Act in respect of a preliminary mortgage decree contains a prayer for instalments and the Court grants relief under S. 30 by reopening the decree, the Court is bound to grant instalments while passing a new decree in accordance with S. 34 (1) (a) (i): 45 C.W.N. 11, *Disting.* [P 130*a*]

(c) Bengal Money-lenders Act (10 of 1940), Ss. 34 (1) (a) and 31 — Preliminary mortgage decree — Interest — Three limitations imposed by Act on provisions of O. 34, Rr. 2, 4 and 11, Civil P. C., stated—Court can grant interest at 8 per cent. on principal of loan from date of mortgage suit to passing of new decree under Act and thereafter at same rate up to date of default in payment of instalments.

The Act does not totally abrogate the provisions of O. 34, Rr. 2, 4 or 11, Civil P. C., but imposes only three limitations on those provisions in respect of the award of interest, namely: (1) that the pendente lite interest and interest allowable under O. 34, R. 11 (a) (i), Civil P. C., up to the period of grace, which must be determined in terms of S. 34 (1) (a) (ii) of the Act would not be according to the contract rate, where there is such a rate, but would be according to the rate scaled down by S. 30 (1) (c) of the Act; (2) that the amount of that interest should not exceed the principal of the loan in accordance with the method of calculation to be made in accordance with S. 30 (1) (a) and (b) of the Act, and (3) O. 34, R. 11 (b), Civil P. C., is not to apply where the loan was advanced before the Act. Consequently, the Court has power under the Act to grant simple interest at the rate of 8 per cent. per annum on the principal of the loan from the date of the institution of the mortgage suit upto the date of the passing of the new preliminary decree and thereafter at the same rate up to the date of default in payment of instalments. [P 130 *e*, *f*, *g*]

(d) Bengal Money-lenders Act (10 of 1940), S. 34 — Court while granting instalments can impose any suitable conditions on judgment-debtor — Money decree — Court can require judgment-debtor to furnish security when granting instalments—Mortgage decree—Court can require additional security before granting instalments.

Under S. 34 the Court has the power to impose any suitable condition when directing the payment of the decretal amount by instalments. It is incorrect to say that S. 34 (1) (a) (i) of the Act authorises the Court to fix the dates and number of annual instalments and to do nothing more. Consequently, in the case of a money decree the Court can require the judgment-debtor to furnish security for the decretal amount to be paid by instalments, and in the case of a loan on a mortgage in a fit case require additional security from the judgment-debtor as a condition of giving him instalments. It may also impose other conditions with a view to see that the decree-holder does not lose the full benefit of his security during the period that the instalments may be spread over by reason of any act or default on the part of the judgment-debtor.

[P 130*h*; P 131*a*, *b*, *c*, *d*]

(e) Bengal Money-lenders Act (10 of 1940), S. 34 (a) (ii) and proviso 2—Preliminary mortgage decree — Court imposing terms before granting instalments — Court can give decree-holder right to apply for final decree in case of non-compliance of terms by judgment-debtor.

Where before granting the application of the judgment-debtor to pay the amount due under the preliminary mortgage decree by instalments the Court imposes certain terms, the Court can give the

decree-holder the right to apply for a final decree in case of non-compliance of the terms by the judgment-debtor. Such a right does not militate against the provisions of S. 34 (1) (a) (ii) and Proviso 2 thereto. [P 131*g*]

G. N. Das and Lala Hemanta Kumar — for Appellants.

R. P. Mookerjee, Bhola Nath Roy and Bhudhari Mohan Chatterjee — for Respondents.

Judgment.—On 16th April 1934, the appellants took a loan of Rs. 12,000 from the respondents on a mortgage by which they hypothecated their zemindary interest in some properties and patni interest in others. The interest payable was 12 per cent. per annum with half yearly rests. Before suit they paid a sum of Rs. 300 only. In 1938 the respondents sued to recover the loan. On 22nd December 1939, an ex parte preliminary decree was passed in their favour. The Court reduced the rate of interest to 10 per cent. per annum (simple), allowed pendente lite interest at that rate on the principal of the loan up to the date of the decree and fixed the period of grace at three months from that date. No payment having been made by the judgment-debtors within the period of grace the final decree for sale was passed on 17th May 1940. Shortly thereafter the decree-holders applied for execution of their decree in the Court which had passed the final decree. While the application for execution was pending the Bengal Money-lenders Act (10 of 1940, hereinafter called the Act) came into force. On 11th November 1940 the judgment-debtors filed an application under S. 36 (6) of the Act, in which they claimed relief on the ground that the Court had in its decree awarded interest higher than what was payable under S. 30 (1) (c) of the Act. They prayed for re-opening the decree, for instalments and for other reliefs.

The learned Subordinate Judge held that the interest allowed by that decree was Rs. 1363-15-2 in excess of what was allowable under the Act. He did not however reopen the decree that had been passed but simply reduced the decretal sum by that amount. He did not grant the prayer for payment in instalments. The reason that he gave in refusing that prayer was that the Court had power to grant instalments in the case of a loan secured by a mortgage only at the time of the passing of the preliminary decree and not thereafter in view of the provisions of S. 34 (1) (a) of the Act. In support of this view he relied upon 45 C. W. N. 11.[1] He also refused the prayer of the judgment-debtors for revoking the order for payment of post decretal interest as made in that preliminary decree. In support of his decision on the last mentioned point he relied upon 45 C. W. N. 13.[2] The judgment-debtors have preferred this appeal wherein they contend that (a) the decree ought to have been re-opened and a new decree passed giving them instalments; (b) that in the circumstances of the case the instalments ought to be spread over 20 years, and (c) in the new decree to be passed no post decretal interest ought to be awarded. The respondents do not seriously contest the first point urged by the appellants. Mr. Rama Prosad Mukherjee appearing for them however urges the following additional points: (a) that we should impose conditions with a view to preserve the security during the period which the instalments would cover; (b) that simple interest at the rate of 8 per cent. per annum ought to be allowed up to the date of the new decree that we are to pass; and (c) the annual instalments ought not to be more than four in number.

In this case the learned Subordinate Judge has held that the appellants are entitled to relief under the Act and has in fact exercised the power contained in S. 36 (1) (c) of the Act. We do not see how that power can be exercised without reopening the preliminary decree that had already been passed. The suit in which that decree was passed is a suit to which the Act applied, for it was pending on 1st January 1939. The exercise of that power would affect that preliminary decree, for by that preliminary decree interest was allowed in excess of what is allowable under S. 30 (1) (c). The Act requires the passing of a new decree as soon as the former decree is reopened. That is the import of S. 36 (2) (a), and the new decree must be a decree in accordance with the provisions of the Act. The view we are taking is the view which has been taken by a Division Bench in 45 C. W. N. 975[3] and by Sen J. in 45 C. W. N. 976.[4] We follow this view in preference to the view expressed by Edgley J. in 45 C. W. N. 859[5] and 45 C. W. N. 863[6] which

1. ('40) 45 C. W. N. 11, Sailendra Mohan De v. Accowrie Mukherjee.

2. ('40) 45 C. W. N. 13, Ratan Chunder Gupta v. Nirmal Chunder Neogy.

3. ('42) 29 A.I.R. 1942 Cal. 120 : 45 C. W. N. 975, Anath Nath Sarkar v. Rajendra Nath.

4. ('42) 29 A. I. R. 1942 Cal. 123 : 45 C. W. N. 976, Mritunjoy Roy v. Netai Chand Dutt.

5. ('42) 29 A. I. R. 1942 Cal. 121 : 45 C. W. N. 859 : I. L. R. (1941) 2 Cal. 184, Suresh Chandra v. Lal Mohan.

6. ('41) 28 A. I. R. 1941 Cal 681 : 45 C. W. N. 863, Manmatha Nath Bose v. Renula Bose.

has since been reversed by the appeal Court on another point. The learned Subordinate Judge was therefore wrong in not passing a new decree in supersession of the preliminary decree that had been passed on 22nd December 1939. With the supersession of that decree the final decree passed on the basis thereof must also go. The new preliminary decree which has to be passed must be in accordance with the provisions of the Act. That brings into operation S. 34 (1) (a) (i) of the Act and as there is an application for instalments by the mortgagors instalments will have to be given. That is a statutory duty imposed on the Court. This aspect of the case distinguishes the case in 45 C.W.N. 11[1] on which the learned Subordinate Judge has placed reliance. In that case the preliminary decree which had been passed was not re-opened, no grounds for exercising the powers contained in S. 36 (1) having been established by the judgment-debtor, and so there was no question of passing a new preliminary decree after the Act had come into force. In the case before us, we must pass a new preliminary decree in accordance with S. 34(1)(a) (i) of the Act and must therefore give instalments.

The next question is what and how many instalments we should give. The amount of the new decree would come up to about Rs. 18,000 or so on a loan of Rs. 12,000. Rupees 300 only had been paid before suit although the loan was taken in 1934. Since the appeal to this Court Rs. 900 only has been paid. The affidavit of the judgment-debtors is that the net income from the mortgaged properties is Rs. 5215 per year. Making an allowance for bad years, the net profits would according to their own statement be more than Rs. 4000 a year. We have not the statement of the decree-holders but we must proceed on the statement of the judgment-debtors in considering the question of instalments and we take the said amount as the annual profits only for the purpose of considering what must be the number of instalments. If any question as to the value of the properties arises in future for the consideration of the Court for the purposes of S. 35 of the Act or for other purposes that question must be determined without reference to what we have taken as the annual net profits. Taking all the facts into consideration, especially the amount of the net income as stated in the affidavit filed on behalf of the mortgagors we think they ought to be given the chance of paying up in five equal annual instalments, the first instalment to be paid on or before 16th February 1942.

We will now consider whether the mortgagees are entitled to claim interest up to the date of the new preliminary decree which we are passing after re-opening the preliminary decree passed on 22nd December 1939. That decree directed the scaled down interest (at 10 per cent. per annum) to be paid up to the date of that decree and interest thereafter in accordance with O. 34, R. 11, Civil P. C. As under the Act (10 of 1940) simple interest at the rate not more than 8 per cent. per annum can only be allowed, the calculation of interest must be at that rate. The contract rate is thus interfered with by the Act but the Act does not totally abrogate the provisions of O. 34, Rr. 2, 4 or 11, Civil P. C. Those provisions of O. 34 are only modified to the extent indicated in S. 34 (1) (a) and S. 31 of the Act. The power to award pendente lite interest in a mortgage suit is not thus taken away by the Act. Three limitations only have in our judgment been imposed by the Act on those provisions of O. 34 in respect of the award of interest. Namely, (1) that the pendente lite interest and interest allowable under O. 34, R. 11, sub-r. (a) (i) up to the period of grace, which must be determined in terms of S. 34 (1) (a) (ii) of the Act would not be according to the contract rate, where there is such a rate, but would be according to the rate scaled down by S. 30 (1) (c) of the Act; (2) that the amount of that interest should not exceed the principal of the loan in accordance with the method of calculation to be made in accordance with S. 30 (1) (a) & (b) of the Act, and (3) O. 34, R. 11, sub-r. (b) is not to apply where the loan was advanced before the Act. We accordingly hold that we have the power and should grant simple interest at the rate of 8 per cent. per annum on the principal of the loan (Rs. 12,000) from the date of the institution of the mortgage suit up to this date when we are passing the new preliminary decree and thereafter at the same rate up to the date of default, should the judgment-debtors fail to pay the instalments which we have given them. The amount of interest up to this date does not exceed the principal of the loan. The interest which we have directed to be paid thereafter up to the date of default, if default be made, would however be subject to this proviso, that together with the interest allowed up to this date and the sum of Rs. 300 paid before the suit and Rs. 900 paid while this appeal was pending it is not to exceed the principal of the loan, namely Rs. 12,000. No interest is to run on the total decretal amount.

The last question is whether we have any power to impose further conditions on the judgment-debtors and if we have the power whether we should impose any and what conditions. On the construction of S. 34 of the Act, we have come to the conclusion that the Court has the power to impose any suitable condition when directing the payment of the decretal amount by instalments. We cannot accept the contention of the judgment-debtors' advocate that S. 34 (1) (a) (i) of the Act authorises the Court to fix the dates and number of annual instalments and to do nothing more. This contention would render redundant the phrase "subject to such conditions as the Court may impose" employed in that clause. The same phrase occurs in S. 34 (1) (b) (ii) of the Act which deals with loans other than those secured by mortgage. There the only limitation that is put is that the condition to be imposed must not be one which would make the whole or the balance of the decretal amount payable in default of payment of an instalment. That provision modifies the provisions of O. 20, R. 11, sub-r. (2), Civil P. C., only to the extent of not requiring the consent of the decree-holder for an order for payment of the decretal amount by instalments, but leaves the other parts of that sub-rule untouched. That is indicated by the Legislature in S. 34 (1) (b) (ii) of the Act by leaving it open to the Court to impose conditions. In the case therefore of a money decree it would be open to the Court to impose any term with a view to ensure the rights of the decree-holder as a condition to the granting of instalments to the judgment-debtors. It can in such a case require the judgment-debtor to furnish security for the decretal amount to be paid by instalments. We do not see why the same phrase "subject to such conditions as the Court may impose," used in sub-s. (1) (a) (i) of S. 34 of the Act should have a different or a more restricted scope. We accordingly hold that in the case of a loan on a mortgage the Court would have the power in a fit case to require additional security from the judgment-debtor as a condition of giving him instalments. It may also impose other conditions with a view to see that the decree-holder does not lose the full benefit of his security during the period that the instalments may be spread over by reason of any act or default on the part of the judgment-debtor.

In the case before us, the loan is secured on revenue paying properties and patni taluks. They can be summarily sold for paramount charges, e. g., if the default is made by the judgment-debtors in the payment of reveune or patni rent. In that case the security of the decree-holders no doubt would not completely disappear but would assume a different form. It would fasten on the surplus sale proceeds. But in that eventuality, e. g., on a sale for paramount charges, the transformed security would be less valuable. It would be on the surplus. Moreover it is common experience that in such sales property does not fetch anything like its proper price. We do think that in this case we should impose the further condition that the judgment-debtors must pay up all past arrears of revenue, cess and patni rent by September next and pay the revenue and cess as they fall due and file the receipts of payment in the Court below at least a week before the last kist date. They must also pay the patni rent and cesses as they fall due and file the receipts thereof in the Court below within the first week of Kartik (and if the Court is closed at that time then on the date of reopening of the Court) and within the first week of Bysack of every year. In default then the decree-holders will be entitled to apply for a final decree on giving notice to the judgment-debtors through Court.

This is an additional condition which we impose. We do not consider that this additional right which we are giving to the decree-holders to apply for a final decree militates against the provisions of S. 34 (1) (a) (ii) of the Act or proviso 2 thereto. In those provisions the Legislature had only in view the payment of instalments and had consequently set out the consequences of default in the payment of instalments, and has not done anything more. It has not dealt with and has not fettered in any way the power or discretion of the Court to impose terms and to say what would be the consequences if those terms are not complied with by the judgment-debtor who is given the privilege of paying in instalments.

In the exercise of discretion given to us by S. 36 (2) (a) of the Act we direct that the same amount which had been decreed as costs to the respondents in the preliminary decree dated 22nd December 1939, which we have reopened, should be allowed as costs to the decree-holders respondents. That would be included in the new preliminary decree which we are now passing. The result is that this appeal is allowed in part. Let a preliminary decree be drawn up in this Court in terms of this judgment. The parties

are to bear their respective costs of the lower Court and of this appeal.

27th August 1941. — The learned advocate appearing for the decree-holder says that a sum of Rs. 428-4-3 was paid by his client, namely, the mortgagee, towards arrears of revenue on behalf of the mortgagors. That fact is admitted by the learned advocate appearing on behalf of the mortgagors. Let this sum be added to the decree that is to be drawn up in this Court. This sum will not carry any interest.

G.N./R.K. *Appeal partly allowed.*

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BISWAS AND ROXBURGH JJ.

Sk. Budhan Mia — Judgment-debtor — Appellant

v.

Jotindra Mohun Dutt — Decree-holder Respondent.

Appeal No. 113 of 1941, Decided on 28th August 1941, from original order of Sub-Judge, 1st Court, Howrah, D/- 22nd February 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 2 (22) — Purchaser of equity of redemption is borrower.

A purchaser from the mortgagor of the equity of redemption in the mortgaged property is deemed to be a "borrower" within the meaning of the Act as defined in S. 2 (22) : ('41) 28 A.I.R. 1941 Cal. 484, *Foll.* [P 132*e*]

(b) Bengal Money-lenders Act (10 of 1940), S. 36 (2) — Order refusing to re-open decree is not appeable.

An order refusing to re-open the decree under S. 36 (2) is not appealable : ('41) 28 A.I.R. 1941 Cal. 530, *Foll.* [P 132*h*]

(c) Bengal Money-lenders Act (10 of 1940), S. 36 (2) (a)—Interest in excess of limits specified in S. 30 allowed in decree — Judge cannot only bring it down within limits allowed but also grant relief under S. 36 (2) (a) by passing new decree.

The interest allowed by a decree was in excess of the limits specified in S. 30 and on application by the judgment-debtor, the Court wrote down the amount payable under the decree, so as to bring it within those limits, but refused to "re-open" the decree under S. 36 (2) and grant any further reliefs :

Held that the Court was bound to pass a "new decree" in accordance with the provisions of the Act under the terms of cl. (a) of sub-s. (2) especially in view of the fact that the application was made for review of the decree under S. 36 (6) (a) (ii).

[P 132*g* ; P 133*g*]

Hiralal Chakravarti and Syamadas Bhuttacharji — for Appellant.

Gour Mohan Dutt and Satya Charan Pain — for Respondent.

Biswas J. — This case arises out of an application made by a judgment-debtor under cl. (a) (ii) of S. 36 (6), Bengal Money-lenders Act, in respect of a preliminary mortgage-decree. The petitioner before us is not the original borrower, but a purchaser from him of the equity of redemption in the mortgaged property, and it is sufficient to state that on the authority of the decision in 45 C.W.N. 530,[1] he will be deemed to be a "borrower" within the meaning of the Act as defined in S. 2 (22). The loan here was for a sum of Rs. 9000 which one Rahim Bux had borrowed from the opposite party on mortgage, agreeing to pay interest at the rate of 15 per cent. per annum. On 6th September 1938, the opposite party instituted a suit to enforce the mortgage, making the petitioner as well as Rahim Bux party defendant, and on 30th March 1940, he recovered against them both a preliminary mortgage decree for a total sum of Rupees 19,951-15-0, which included a sum of Rs. 9000 on account of principal, Rs. 9454-8-0 on account of interest and the balance as costs. On the Bengal Money-lenders Act then coming into force, the petitioner made the present application to the learned Subordinate Judge of Howrah who had passed the decree, asking for relief under various sections of the Act, namely, Ss. 30, 31, 34 and 36. It was not disputed that the interest allowed by the decree was in excess of the limits specified in S. 30. What the learned Subordinate Judge did accordingly was to write down the amount payable under the decree, so as to bring it within those limits, but he refused to "re-open" the decree under S. 36 (2) and grant any further reliefs, such as the grant of instalments in respect of the amount to which the decree was so written down. It is the propriety of this decision that is challenged before us.

The petitioner filed an appeal as well as an application under S. 115, Civil P. C., against the order of the learned Subordinate Judge which was passed on 22nd February 1941. In view of the decision in 45 C.W.N. 776,[2] the appeal has not been pressed, and in our opinion, it must be dismissed as incompetent. It was held in that case that where on an application under S. 36 (6) the Court refuses to re-open a decree, the order is non-appealable, whether it is made under sub-cl. (i) or sub-cl. (ii). The Bengal Money-lenders Act certainly confers no right of appeal against such an order, and in so far as the order is made under sub-cl. (ii), an

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1. ('41) 28 A.I.R. 1941 Cal. 484 : I.L.R. (1941) 1 Cal. 514 : 73 C.L.J. 435 : 45 C.W.N. 530, Sailendra Nath v. Amarendra Nath.
2. ('41) 28 A.I.R. 1941 Cal. 530 : 196 I.C. 683 : 45 C.W.N. 776, Promode Nath v. Raseshwari.

appeal would be expressly barred by the provisions of R. 7 (1) of O. 47, Civil P. C., treating the application as one for review under the Code. That being so, we can deal with the matter only in our revisional jurisdiction. Coming to the question which was actually canvassed in this case, it should be perhaps sufficient to state that the point is now covered by authority. The learned Subordinate Judge here seems to have followed the decision of Edgley J., in 45 C.W.N. 859[3] and 45 C.W.N. 863,[4] though he does not mention any of these cases in his order. The view expressed by Edgley J., has, however, been expressly dissented from by Sen J., in 45 C.W.N. 976,[5] and 45 C.W.N. 1042,[6] and there is also a decision of a Division Bench which in effect overrules Edgley J.: 45 C.W.N. 975.[7] For ourselves, we are inclined to agree with the view expressed in these later cases.

The question is, what did the Legislature mean by the words in sub-s. (2) of S. 36: "If in exercise of the powers conferred by sub-s. (1), the Court re-opens a decree?" Sub-s. (1) itself says nothing about "re-opening a decree:" it refers to the re-opening of transactions and the re-opening of accounts, and in proviso (2), it forbids the doing of anything which "affects" any decree of a Court other than a decree of the kind indicated therein. That would seem to suggest that the Legislature intended that in giving relief in exercise of the powers under sub-s. (1), it should be possible in some cases to "affect" a decree, and that in such cases only sub-s. (2) should apply. The interpretation would perhaps have been easier, if, therefore, instead of the expression "re-opens a decree," sub-s. (2) had used the words of proviso (2) to sub-s. (1) and said, "does anything which affects a decree." We are not unmindful that such an interpretation might lead to the unnecessary and somewhat anomalous result that in some cases the Court shall be required to pass a new decree under cl. (a) of sub-s. (2) where it will be futile to do so. For example, if a borrower is sued on a bond given in satisfaction of a liability arising out of a decree of the kind which may be "affected" under the terms of proviso (2) to sub-s. (1), it should be possible to give him all the relief he can conceivably ask for under the Act, in connexion with the decree passed in the very suit which is brought on the bond, and there ought not to be any question of passing a new decree in the place of the prior decree which ex hypothesi was satisfied by the execution of the bond. And still on the interpretation we have suggested above, it should be necessary for the Court to pass a new decree in respect of such satisfied liability, because the old decree was being "affected."

On the other hand, it seems to us that if we were to hold that the words "re-opens a decree" in sub-s. (2) only mean re-opening a decree in the sense in which, for example, a decree is re-opened in review, that would involve a tautology, and merely amount to saying that if the Court "re-opens" or re-makes a decree, it shall re-open or re-make the decree in a certain way, but in that case the sub-section will have given no indication as to when it should apply and when it should not. It is not necessary, however, for the purposes of the present case to pursue the matter further, for, the application here was made for review of the decree in question under sub-clause (ii) of cl. (a) of S. 36 (6), and if relief is given by way of review, then that procedure itself must ipso facto involve a "re-opening" of the decree in any sense of the term. That being so, the learned Subordinate Judge was, in our opinion, bound to pass a "new decree" in accordance with the provisions of the Act under the terms of cl. (a) of sub-s. (2). The order of the Court below must, therefore, be set aside, and the case remitted to him in order that he may dispose of it in accordance with law. The result is that the appeal is dismissed, but the application under S. 115, Civil P. C., is allowed. We make no order as to costs in either the appeal or the application. The stay Rule 779M of 1941 is discharged.

Roxburgh J. — I agree.

K.S./R.K. *Order accordingly.*

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3. ('42) 29 A.I.R. 1942 Cal. 121 : I.L.R. (1941) 2 Cal. 184 : 45 C.W.N. 859, Suresh Chandra v. Lal Mohan.
4. ('41) 28 A.I.R. 1941 Cal. 681 : 45 C.W.N. 863, Manmatha Nath v. Renula.
5. ('42) 29 A.I.R. 1942 Cal. 123 : 45 C.W.N. 976, Mritunjoy v. Netai Chand.
6. ('42) 29 A.I.R 1942 Cal. 125 : 45 C.W.N. 1042, Juggannath v. Madan Mohan.
7. ('42) 29 A.I.R. 1942 Cal. 120 : 45 C.W.N. 975, Anath Nath v. Rajendra Nath.

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B. K. MUKHERJEA J.

Srikanta Mridha and others — *Defendants — Appellants*

v.

Prafullya Chandra Ghosh and others — *Plaintiffs — Respondents.*

Appeal No. 266 of 1939, Decided on 17th January 1941, from appellate decree of Dist. Judge, Khulna, D/- 13th September 1938.

(a) Bengal Tenancy Act (8 of 1885), Ss. 178 (1) (i) and 67 — Interest under contract made before or after Act contravening S. 67 cannot be recovered.

Under S. 178 (1) (i) the landlord is incapable of recovering interest on the basis of any contract entered into either before or after the Bengal Tenancy Act beyond what is laid down in S. 67. [P 134*h*; P 135*a*]

(b) Bengal Tenancy Act (8 of 1885), Ss. 178, Proviso 1, 97 and 191—S. 178, Proviso 1 governs entire S. 178 and not merely S. 178 (3)—Reclamation lease—Test — Stipulation as to interest (at 37½ per cent.) even though contravening S. 67 of Act is enforcible—Fresh lease by Government in favour of lessor held did not affect stipulation.

Proviso 1 to S. 178 is a limitation upon the entire section and not upon sub-s. (3) only. Consequently, proviso 1 to S. 178 applies to a lease granted bona fide for reclamation of waste lands and any stipulation for payment of interest, even though it contravenes S. 67 of the Act, will be valid and operative : 63 C.L.J. 283, *Rel. on.* [P 135*b*]

The kabuliat in respect of a lease of jungle lands executed after the Act came into force provided for progressive rents for successive years and mentioned a maximum which could never be increased, and it further provided that in case of default in the payment of any instalment of rent, the tenants would have to pay interest at the rate of 37½ per cent. per annum. In the year 1932 there was a resettlement of revenue and rent under Part II, Chap. 10, Bengal Tenancy Act, and the annual rent payable by the tenants was increased to Rs. 388 :

Held that (1) the lease was a reclamation lease and a provision in the kabuliat that the lessee will forfeit his rights if the reclamation was not made within a particular period was not essential. The lease came within the purview of S. 178, proviso (1) and the stipulation as to payment of interest at 37½ per cent. was not hit by S. 178 (1) (i) ; [P 135*c*]

(2) the fact that the lessor obtained a fresh lease from the Government and a fresh settlement of rent was made under Part II, Chap. 10 of the Act did not abrogate the stipulation as to payment of interest : 30 Cal. 811 (P.C.), *Rel. on.* [P 135*d*, *e*]

(c) Bengal Tenancy Act (8 of 1885), S. 191 — Applicability — S. 191 applies to lease created after and not before Act — Rent enhanced — Other covenants in lease remain intact.

Where the kabuliat creating a lease was executed prior to the Bengal Tenancy Act, the rent cannot be enhanced by the settlement authorities in the resettlement proceedings under Part II, Chap 10 of the Act : ('22) 9 A.I.R. 1922 Cal 248, *Rel. on.* [P 135*e*]

But where the lease was created after the passing of the Bengal Tenancy Act, the provisions of S. 191 are applicable and the settlement authorities have jurisdiction to enhance the rent ; the other covenants in the lease however remain intact and binding between the parties. [P 135*e*]

(d) Bengal Tenancy Act (8 of 1885), S. 178 Proviso 1—Reclamation lease—Stipulation for payment of interest at 37½ per cent. on arrears of rent is not unusual.

A reclamation lease has been placed in the Bengal Tenancy Act itself on a somewhat different footing than ordinary tenancies as is clear from proviso 1 to S. 178 and a stipulation in a reclamation lease for payment of interest at the rate of 37½ per cent. on arrears of rent cannot by itself be regarded as an unusual covenant. [P 136*d*]

(e) Practice — New plea—Appeal—Plea that party was purchaser at rent sale cannot be raised for first time in appeal.

No fresh opportunity can be given to a party in appeal for proving his case that he was a purchaser at a rent sale with no notice of an unusual covenant governing the holding sold when no foundation was made for such a case either in the pleadings or in the evidence in the trial Court. [P 136*e*]

Sitaram Banerjee and Biswa Nath Naskar — for Appellants.

Anilendra Nath Roy Choudhury — for Respondents.

Judgment. — This appeal is on behalf of the defendants and it arises out of a suit commenced by the plaintiffs for recovery of arrears of rent in respect of a Darganti for the years 1341 to 1343 B. S. together with cesses and interest on the basis of a kabuliat executed by the defendants' predecessors in the year 1294 B. S. The lands are situated within a temporary settled estate and were originally jungle lands. The plaintiffs based their claim upon a kabuliat which was executed in 1294 and by which two persons, Chandra Mandal and Kamal Mandal, took lease of the disputed lands which were stated to cover an area of two hundred bighas. The kabuliat provided for progressive rents for successive years and mentioned a maximum which could never be increased, and it further provided that in case of default in the payment of any instalment of rent, the tenants would have to pay interest at the rate of 37½ per cent. per annum. It appears that in the year 1932 there was a resettlement of revenue and rent under Part II, Chap. 10, Ben. Ten. Act, and the annual rent payable by the defendants was increased to Rs. 388. The whole controversy now centres round the point as to whether the plaintiffs are entitled to recover interest on arrears of rent at the rate of 37½ per cent. per annum. The trial Court decided this point against the plaintiffs and was of opinion that under S. 178, sub-s. (1), clause (i), Ben. Ten. Act, the landlord cannot get interest at a rate higher than that provided for in S. 67, Ben. Ten. Act. The lower appellate Court, on the other hand, has come to the conclusion that the case comes under proviso 1 to S. 178 and the plaintiffs are entitled to get interest at the contract rate. It is the propriety of this decision that has been assailed before me in this second appeal.

It is not disputed that under S. 178, sub-s. (1), cl. (i) the landlord is incapable of recovering interest on the basis of any contract entered into either before or after the Bengal

Tenancy Act beyond what is laid down in S. 67, Ben. Ten. Act. The question is whether the plaintiffs can, in the present circumstances of the case, invoke the assistance of proviso 1 to S. 178, as has been held by the lower appellate Court. Mr. Sitaram Bannerjee, who appears for the appellants, has argued in the first place that this proviso is really engrafted upon and controls sub-s. (3) of S. 178 and not sub-s. (1) which makes unenforceable any contract between the landlord and tenant affecting the provisions of S. 67, Ben. Ten. Act. It is argued also, though somewhat faintly, that the lease is not a reclamation lease and hence does not attract the operation of the proviso. I do not think that I can accept this contention as sound. The opening words of the proviso indicate beyond doubt that it is a limitation upon the entire section and not upon sub-s. (3) only. The words are "nothing in this section which affects etc. etc." If therefore the lease was granted bona fide for reclamation of waste lands, proviso 1 will apply and any stipulation for payment of interest, even though it contravened S. 67, Ben. Ten. Act, will be valid and operative: *vide* 63 C. L. J. 283.[1] On the question as to whether the lease was a reclamation lease or not, the only thing that has been pointed out by Mr. Bannerjee is that there is no provision in the kabuliat that the lessee will forfeit his rights if the reclamation was not made within a particular period. I do not think that a stipulation is essential. The lands are admittedly jungle lands and the fact that no rent was to be paid for the first years and then also it was payable at a progressive rate from year to year till the maximum was reached show beyond doubt that it was a reclamation lease. I agree therefore with the lower appellate Court in holding that the stipulation regarding the payment of interest at the rate of 37½ per cent. per annum is not hit by S. 178, sub-s. (1), cl. (i), Ben. Ten. Act.

It is next contended by Mr. Bannerjee that the stipulation in the kabuliat ceased to be operative as soon as the plaintiffs themselves got a fresh lease from the Government in the year 1931 and a fresh settlement of rent was made under Part II, Chap. 10 Ben. Ten. Act. In my opinion, this contention also cannot prevail. As was laid down by the Judicial Committee in 30 Cal. 811,[2] a fresh settlement would not abrogate the rights of the tenant if the landlord got a lease from the Government and was in a position to fulfil his obligations to the tenant. If the kabuliat in this case had been created prior to the Bengal Tenancy Act, the defendants could have argued on the authority of the case in 35 C.L.J. 14,[3] that the rent could not be enhanced by the settlement authorities in the resettlement proceedings. But as the lease here was after the passing of the Bengal Tenancy Act, the provisions of S. 191, Ben. Ten. Act, are applicable and the settlement authorities have jurisdiction to enhance the rent; the other covenants in the lease however remain intact and binding between the parties.

The last point taken by Mr. Bannerjee is, that his clients being the purchasers of the tenancy at a rent sale, are not bound by this unusual covenant to pay interest at an exorbitant rate, this being not an ordinary incident of a tenancy governed by the Bengal Tenancy Act and the landlords, when they put up this property to sale, did not disclose anything about this unusual stipulation in the sale proclamation. In support of this contention, reliance has been placed upon the decision in 27 C.W.N. 502.[4] The learned Judges who decided that case following an earlier decision in 26 Cal. 315[5] held that a stipulation for the payment of interest at an unusual or exorbitant rate cannot be an ordinary incident of a tenancy which would attach to it even after a sale for arrears of rent. In both these cases, the tenancy in dispute was a raiyati holding and the reason for making a distinction between a private purchase and a purchase at a rent sale was thus stated by Chatterjea J. in the former case:

> In the case of a private transfer the transferee can and should call for the title deeds of the vendor; and if there is a lease providing for interest at a high rate, the purchaser becomes aware of such a contract before his purchase. He therefore purchases with full knowledge of the terms of the lease and he cannot in these circumstances complain that the rate of interest is an exorbitant one. In the case of a rent sale, on the other hand, the purchaser ordinarily cannot have any knowledge of the terms of the contract between the landlord and the tenant unless the landlord chooses to specify, in the sale proclamation any incident of the ten-

1. ('35) 63 C.L.J. 283, Upendra Nath v. Surendra Nath Roy Sircar.
2. ('03) 30 Cal. 811 : 30 I.A. 159 : 7 C.W.N. 601 : 8 Sar. 497 (P. C.), Pria Nath Das v. Ramtaran Chatterjee.
3. ('22) 9 A. I. R. 1922 Cal. 248 : 65 I. C. 234 : 35 C. L. J. 14, Prafulla Nath v. T. C. Tweedie (Receiver).
4. ('23) 10 A.I.R. 1923 Cal. 559 : 72 I.C. 719 : 37 C.L. J. 333 : 27 C.W.N. 502, Ananda Moyee Debi v. Saudamini Debya.
5. ('99) 26 Cal. 315 : 3 C.W.N. 194, Kali Nath Sen v. Trailokya Nath.

ancy or refer to the contract under which the tenancy is held.

The propriety of this decision was doubted by Suhrawardy, and Garlick JJ. in a later decision, *vide* order of reference in 33 C.W.N. 126,[6] and the learned Judges referred to an earlier Full Bench decision in 9 C.W.N. 175,[7] where a contrary view was taken. It was further observed that no distinction could be made between a holding and a tenure and it was against established principles to give the purchaser at a rent sale a better title than the judgment-debtor whose property is sold, or a different tenure. There was however no pronouncement on this point by the Full Bench and the divergence in judicial opinion still remains.

So far as the present case is concerned, I think that the decisions are of no assistance to the defendants. In the first place it was nowhere alleged in the written statement that the defendants were the purchasers at a rent sale with no notice of this covenant. After the case was closed on both sides, they made an application to the learned Munsif praying for time to enable them to file the sale certificate and other documents and this application the trial Court rejected. I have no materials therefore to hold that the defendants were purchasers at a rent sale and that the plaintiffs had themselves put up the property to sale without mentioning anything about the kabuliat or the stipulation relating to interest. In the next place I think that the stipulation itself can hardly be said to be an unusual stipulation having regard to the fact that the lease was a reclamation lease. In an ordinary agricultural tenancy which is not governed by any lease, the purchaser could very well assume that the interest was payable at the rate provided for in S. 67, Ben. Ten. Act, unless there was something to the contrary specified in the sale proclamation. Here it was a case of a tenure covering an area more than two hundred bighas of land and the lease was in writing and registered. A reclamation lease has been placed in the Bengal Tenancy Act itself on a somewhat different footing than ordinary tenancies and that I think furnishes an explanation for the proviso that is engrafted upon S. 178. Ben. Ten. Act. I do not think myself that a stipulation to pay a high rate of interest by itself can be regarded as an unusual covenant in a reclamation lease of this character. But whatever that may be, and I am not going to express any final opinion on this point, I am unable to give the defendants a fresh opportunity of proving a case for which there was no foundation made either in the pleadings or in the evidence. The result is that this appeal is dismissed, but having regard to the facts and circumstances of the case I make no order as to costs in this appeal.

G.N./R.K. *Appeal dismissed.*

6. ('28) 15 A.I.R. 1928 Cal. 777 : 115 I.C. 593 : 56 Cal 723 : 48 C.L.J. 327 : 33 C.W.N. 126 (F.B.), Tarini Charan v. Kedar Nath.

7. ('05) 32 Cal. 258 : 9 C.W.N. 175 (F.B.), Lal Gopal Dutt v. Monmotha Lal.

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HENDERSON J.

Ram Charit Bhakat and others

v.

Tetari Kumari Kuor of Nithpur.

Civil Rule No. 458 of 1941, Decided on 17th June 1941, for setting aside order of Sub-Judge, Dinajpur, D/- 20th March 1941.

(a) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Words "suit" or "proceeding" in S. 3 do not include appeal.

The words "suit" or a "proceeding" in S. 3 do not include an appeal:('41) 28 A.I.R. 1941 Cal. 452 (Biswas J.'s judgment), *Foll.* [P 137*b*]

(b) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3 — Provisions of S. 3 in no way depend on application by parties — Court is bound to stay appeal if S. 3 applies.

The provisions of S. 3 in no way depend upon any application made by the parties and if it applies, the Court is bound to stay the appeal even though both sides are anxious that it should be heard. [P 137*f*]

(c) Specific Relief Act (1877), S. 42—Plaintiff settling ferry with defendant—Suit for declaration that defendant had no right to carry on ferry—Proper consequential relief is injunction and not ejectment.

In a suit for declaration by the plaintiff that the defendant had no right to carry on the ferry settled with him by the plaintiff, the appropriate consequential relief is an injunction rather than decree for ejectment. [P 137*g*]

(d) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 2— Non-agricultural tenant.

The ferry man holding a settlement of a ferry is not a non-agricultural tenant within the meaning of Section 2. [P 137*g*; P 138*a*]

(e) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Suit to eject tenant in arrears cannot be stayed under Section 3.

A suit to eject a tenant who is in arrears is a suit on account of non-payment of rent within the meaning of S. 3 and cannot be stayed under S. 3 : ('41) 28 A.I.R. 1941 Cal. 302, *Rel. on.* [P 138*b*]

Hiralal Chakravarty and Nirmal Kumar Sen — for Petitioners.

Sailendra Nath Majumdar and Gunendra Krishna Ghose — for Opposite Party.

Order. — This is a rule calling upon the opposite party to show cause why an order of the Subordinate Judge refusing to hear an appeal in view of S. 3, Bengal Non-Agricultural Tenancy Act, should not be set aside. The rule was argued on grounds Nos. 2 and 3 attached to the petition. The former raises the question whether the Act applies to appeals and the latter whether the case comes within S. 3 at all. I will deal with the former point first. This question will only arise in the case of appeals which were pending at the time when the Act came into force or filed subsequently; that is to say, in all such cases the actual decree must have been made in the first Court before the Act came into force. It will therefore only affect a comparatively small number of cases. The point has already been considered by a Division Bench of this Court in 45 C. W. N. 603.[1] Unfortunately, the learned Judges differed. Biswas J. discussed the point at length and came to the conclusion that the words "suit" or a "proceeding" in S. 3 do not include an appeal. Mukherjea J. said that he was not prepared to go so far as to say that the expression "proceeding" is not sufficiently wide to include an appeal.

I would agree with the view expressed by Biswas J. With all due respect I cannot see how an appeal by a defendant could possibly be called a proceeding for ejectment. As Biswas J. pointed out, it is quite the opposite. In my judgment, if the section applies to appeals, it could only do so on the footing that an appeal is a continuation of and part of the suit. Various authorities bearing on the subject have been discussed by Biswas J. in his judgment and I do not desire to repeat what he has said. I do not think that the respondent could succeed on this point unless it could be said that the word "suit" must automatically in every case include an appeal. That however is putting the case far too high. At present no attempt has been made by the petitioner to put the decree into execution. As soon as he does so, that proceeding will automatically be stayed. It was therefore not necessary to include an appeal in the section in order to give protection to a defendant. On the other hand, while the staying of an appeal by the plaintiff might help to carry out the purpose of the Act, the staying of an appeal by the defendant could not possibly have such an effect. On the contrary, the defendant would be debarred from getting rid of a hostile decree and from showing that he was perfectly entitled to remain on the land. It may be that the difference between an appeal by the plaintiff and an appeal by the defendant is the reason why appeals were not specifically brought within the scope of the section. Whatever the reason may be, I accept the reasoning of Biswas J., and respectfully agree with his conclusion.

In course of the argument there was some discussion on the point whether it was necessary for the defendant to apply for a stay of further proceedings. Biswas J. pointed out the absurdity of a defendant applying for the stay of his own appeal. The provisions of S. 3, however, in no way depend upon any application made by the parties and if it applies, the Court is bound to stay the appeal even though both sides are anxious that it should be heard. That may be an additional reason why appeals have been excluded from the scope of the section.

The other ground raises the question whether the Act applies to the case at all. The petitioner settled a ferry with the defendant's husband. For the settlement Rupees 108-12-0 per annum was payable and the settlement-holder was entitled to land passengers at certain places on the bank. The main prayer was for a declaration that the defendant has no right to carry on the ferry. Mr. Chakravarty conceded that the plaint was clumsily drafted and that the appropriate consequential relief would be an injunction rather than a decree for ejectment. Be that as it may, there is no doubt as to the real nature of the suit and the question is whether it can be said that the defendant is a non-agricultural tenant within the meaning of S. 2. The learned Subordinate Judge concluded his decision on this point which was extremely short by saying: "A tenancy of land inseparable from the ferry was therefore contemplated." The plaintiff's case is that he settled the ferry with the defendant's husband. Of course a ferry is absolutely useless unless passengers are able to embark on and disembark from the boats. There must therefore be landing ghats. But these are merely ancillary to the use of the boats and the water of the river. No question of settling them with the ferry-man really arises. The plaintiff allows the public and the servants of the defendant to use the ghats for the purpose of getting on and off the boats. Now, in order to bring herself within the section, the defendant must show that she holds and is liable to pay rent to the plaintiff for non-agricultural land which

1. ('41) 28 A.I.R. 1941 Cal. 452 : 196 I.C. 346 : 45 C.W.N. 603, Jahur Mia v. Abdul Gaffur.

she is entitled to use for the conduct thereon of any commercial or industrial enterprise. None of these conditions are present in the present case. It appears, as it must almost inevitably be the case, that the ghats shift from place to place in accordance with the season of the year and height of the water in the river. No rent is paid for any particular ghat. Even if it can be said that a ferry is a commercial or industrial enterprise, it is certainly not carried on on the landing ghats. The Act was certainly not intended to apply to a case of this kind.

Finally, even if the petitioner is a non-agricultural tenant and even if the appeal is a part of the suit, the suit cannot be stayed under the provisions of S. 3. The difficulty of interpreting that section was pointed out and its meaning explained by Mitter J. in 45 C.W.N. 22.[2] If the defendant is a non-agricultural tenant then she was in arrears with her rent at the time when the suit was brought. The rule is accordingly made absolute. The order of the lower appellate Court is set aside and he is directed to hear and dispose of the appeal in accordance with law. The opposite party will pay the petitioner's costs, hearing fee being assessed at three gold mohurs.

G.N./R.K. *Rule made absolute.*

2. ('41) 28 A.I.R. 1941 Cal 302: 194 I.C. 581: 45 C.W.N. 22, Purnendu Nath v. Narendra Nath.

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B. K. MUKHERJEA AND BISWAS JJ.

Kaiser Khan and others — Plaintiffs — Appellants

v.

Khaja Abdul Ghani and others — Defendants — Respondents.

Second Appeal No. 1326 of 1937, Decided on 14th March 1941, from decree of Addl. Dist. Judge, Third Court, 24-Parganas, D/- 14th June 1937.

(a) Mortgage — Prior and puisne mortgagees — Prior mortgagee, not aware of puisne mortgagee's rights, obtaining decree without impleading puisne mortgagee — Sale in execution — Purchaser acquires title subject to puisne mortgagee's right of redemption — Terms on which puisne mortgagee can redeem, stated.

Where a prior mortgagee obtains a decree on his mortgage without impleading the puisne mortgagee, and puts the property to sale in execution of his decree, the purchaser of the mortgaged property in such cases acquires the property as it existed at the date of the sale, discharged of the mortgage lien, but subject to the rights of the parties who were omitted from the suit : 11 C. W. N. 403; 6 C. L. J. 612 and ('33) 20 A. I. R. 1933 Cal. 728, *Rel. on.* [P 140*d*]

It is also essential that the mortgagee must have no notice of the rights of the parties who were left out of the suit at the time when the mortgage suit was instituted: ('23) 10 A. I. R. 1923 Cal. 274 and ('29) 16 A.I.R. 1929 Cal. 233, *Rel. on.* [P 140*d*]

The purchaser consequently in such cases acquires title on the basis of his purchase subject to puisne mortgagee's right of redemption. The puisne mortgagee however cannot be compelled to pay the purchase money which the purchaser himself had to pay and may be allowed to redeem on the basis of the mortgage decree obtained by the prior mortgagee. [P 140*e*]

(b) Civil P. C. (1908), O. 34, R. 12—Construction — *A* mortgaging property *X* to *B* and subsequently *X* and *Y* to *C*—*A* obtaining mortgage decree without impleading *C* and putting to sale property *X* which was purchased by *D*—*C* suing on his mortgage and impleading *D* — Court directing sale of property *Y* first and then of *X* if necessary — No question of marshalling held arose—Facts held did not warrant inference of *D* being consenting party to order of sale free of his previous charge — *D's* omission to plead his prior rights in *C's* mortgage suit held did not bar *D* from raising that question by suit against *C* — Constructive res judicata — *D* held could use first mortgage as shield against *C*.

Under O. 34, R. 12 the Court can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any prior mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold. [P 140*h*]

A mortgaged property *X* to *B* and subsequently mortgaged the same along with property *Y* to *C*. *B* the prior mortgagee, who was not aware of the rights of *C* as puisne mortgagee, obtained a decree without impleading *C* and in execution of his decree put up the property *X* to sale which was purchased by *D*. Subsequently, *C* brought a suit to enforce his mortgage making *D* also a party. The mortgage decree in *C's* suit directed that *C* should proceed in the first place against property *Y* and if the sale proceeds proved insufficient to wipe off his dues he could then proceed to sell the property *X*. It was not mentioned that the sale of the property *X* would be held free of the rights of *D* but the lower Court held that that must be effect of the order which was made in the presence of *D*. It was also contended that the omission on *D's* part to plead his rights in *C's* mortgage suit barred him from raising that question again in a subsequent suit against *C* :

Held that no question of marshalling arose on the facts of the case and *D* could not be said to be a consenting party to the order of sale in *C's* suit merely because it was at his instance that a direction was given to sell the property *Y* first; even if the order for sale of property *Y* was made at the instance of *D* that fact alone did not justify the inference that he consented to have property *X* sold by the second mortgagee free and clear of his previous charge even though no order was made giving him a prior charge of the sale proceeds. [P 141*a*]

Held further that the omission on *D's* part to plead his prior rights in the mortgage suit and to invite the Court to pass an order in his favour could not operate as a bar to his raising that question again by suit against *C* on the principle of constructive res judicata inasmuch as in order to attract the doctrine of constructive res judicata it must be shown that there were allegations made

by *C* in his plaint in the mortgage suit which impugned or sought to displace the prior title of *D*. Far from containing any allegation in derogation of *D*'s title, *C* expressly admitted his prior interest and claimed only a right to redeem and, therefore, the subsequent suit by *D* to establish his prior rights was not barred on the principle of constructive res judicata: ('20) 7 A.I.R. 1920 P.C. 81, *Rel. on.* [P 141*b*,*c*]

Held also that though *D* was a purchaser at the mortgage sale held at the instance of the first mortgagee, he could use the first mortgage as a shield against the puisne encumbrancer. [P 141*d*]

(c) Mortgage—Redemption — Sale in execution of prior mortgagee's decree—Purchaser in possession for long time — Terms on which puisne mortgagee should be allowed to redeem stated—Interest.

The purchaser *D* at the sale in execution of the prior mortgagee's decree to which the puisne mortgagee was not made a party obtained possession of the property on 30th May 1917. Subsequently the puisne mortgagee obtained a decree and at the sale in execution thereof purchased the property himself on 25th May 1935. The puisne mortgagee was allowed to redeem the property purchased by him subject to *D*'s prior rights on the basis of the mortgage decree obtained by the prior mortgagee. It was contended that the puisne mortgagee was entitled to get credit for all sums realized by *D* as profits out of the disputed premises ever since he got possession in 1917:

Held that the puisne mortgagee was not entitled to get credit as prayed for since *D* purchased not only the interest of the first mortgagee but of the mortgagor as well and the puisne mortgagee himself being a simple mortgagee was not entitled to get possession till the date of his purchase. [P 141*f*]

Held further that it would be fair and equitable not to allow any interest on the decretal amount in consideration of the fact that *D* had been in possession of the property for a very considerable period of time. [P 141*g*]

Sarat Chandra Jannah and Paresh Chandra Mukherjee (Jr.) — for Appellants.

N. C. Sen Gupta and Amiruddin Ahmed — for Respondents.

B. K. Mukherjea J. — This is an appeal on behalf of the plaintiff and arises out of a suit commenced by him for declaration of his title to the properties in suit on the basis of a purchase at a mortgage sale and for confirmation of possession in respect of the same. The material facts are not in controversy and may be shortly stated as follows : The property in suit is premises No. 6 Middle Road, Entally, situated in the suburbs of Calcutta and it belonged admittedly to one Asraf Serang. Asraf Serang mortgaged it to one Girish Das by an indenture of mortgage dated 14th May 1903 to secure an advance of Rs. 1000 only. On 20th September 1906, Asraf sold the property to one Abdul Aziz who in his turn mortgaged these premises along with certain other properties known as 'Harinbari' properties to one Abdul Gani, the defendant in this suit, as security for a loan of Rs. 2000. On 17th February 1914 Girish Das, the first mortgagee instituted a suit on the basis of his mortgage bond, and both Asraf and Abdul Aziz were made parties to the suit. Abdul Gani, the second mortgagee, was however left out and was not impleaded as a party defendant. Girish Das obtained a decree in execution of which the mortgaged premises were sold and were purchased by the present plaintiff on 14th September 1916. The plaintiff got possession on 30th May 1917.

In April 1918, Abdul Gani instituted a suit (being Suit No. 510 of 1918) in the original side of this Court for enforcement of the mortgage bond executed in his favour by Abdul Aziz. The present plaintiff was made a party defendant to that suit, and in para. 8 of the plaint, Abdul Gani asserted his right to redeem the prior interest of the plaintiff Kauser Khan acquired by his previous purchase, in premises No. 6. Middle Road, Entally. There was a decree passed in that suit on 5th May 1922, which directed inter alia that the Harinbari properties should be sold first, and if the sale proceeds were not sufficient to satisfy the mortgage money, then premises No. 6, Middle Road, would be sold. This decree was made final on 23rd January 1929. The Harinbari property having been sold already at the instance of another creditor, Abdul Gani got permission of this Court to sell the Middle Road property and that was put up to sale on 25th May 1935, and purchased by Abdul Gani himself. The plaintiff has now brought this suit against Abdul Gani and he seeks a declaration that Abdul Gani did not acquire any rights against him on the strength of his subsequent purchase and that the title which the plaintiff acquired on the basis of his purchase remains unaffected. The defendant Abdul Gani raised a number of defences, and contended inter alia that he had no knowledge of the mortgage suit instituted by Girish Das, whereas Girish Das and the plaintiff were both aware of the defendant's mortgage. It was urged that by virtue of the sale in execution of the decree of that Court to which the plaintiff was a party, the defendant had acquired a title which would prevail over the rights of the plaintiff, if any, and as he was not impleaded as a party in the mortgage suit of Girish Das, he had a right to obtain possession of the disputed premises.

The trial Court decreed the suit in part. a It held that the plaintiff acquired a title to the property by his purchase but that the defendant was entitled to redeem him. The plaintiff therefore could retain possession of the property only so long as the defendant did not pay the purchase money with interest at the rate of 6 per cent. per annum upon the same. The defendant was given two months time, within which he was to make the payment. Against this decision, the defendant took an appeal to the Court of the District Judge of 24-Parganas. The Additional District Judge who heard the appeal, reversed the decision of the trial Court and b dismissed the plaintiff's suit. The learned Judge was of opinion that as the plaintiff was made a party to the mortgage suit instituted by the defendant in the original side of this Court, and an order for sale of the property was made in his presence, he was bound by the decree and order made in that suit, and if he wanted to establish his own title to the property, he should have done so in the High Court suit. It is the propriety of that decision that has been challenged before us in this second appeal.

The plaintiff, as has been said above, seeks to establish his title as a purchaser at a c sale held at the instance of Girish Das who obtained a mortgage decree against Asraf and Abdul Aziz, and his case is that the subsequent purchase by the defendant at the sale held in execution of his own mortgage decree could not affect his title. The case of the plaintiff put forward in this extreme form is manifestly untenable. It is not disputed that the defendant who was a puisne mortgagee was not made a party to the mortgage suit of Girish Das. As has been held in a series of cases of this Court, of which the cases in 11 C. W. N. 403,[1] 6 C. L. J. 612[2] and 37 C. W. N. 897[3] can be taken as d types, the purchaser of the mortgaged property in such cases acquires the property as it existed at the date of the sale, discharged of the mortgage lien, but subject to the rights of the parties who were omitted from the suit. It is also essential that the mortgagee must have no notice of the rights of the parties who were left out of the suit at the time when the mortgage suit was instituted: *vide* 49 Cal. 1048;[4] 33 C.W.N. 100.[5] In this case, we have a definite finding by the trial Judge, that Girish was not aware of the rights of the defendant as a puisne mortgagee, and consequently, it may be said that at the date of the purchase the plaintiff acquired a title to the property subject to the rights of redemption which could be exercised by the defendant.

In the mortgage suit that was instituted by the defendant in the original side of this Court, he definitely accepted this position, and there was an express prayer in the plaint for allowing him to redeem the interest which the plaintiff acquired at the e previous mortgage sale. The plaintiff, for f reasons best known to his legal advisers, put forward a defence that as he was a bona fide purchaser for value without notice of the defendant's right, the defendant could not assert any right of redemption against him. This defence was obviously unsupportable, but it is quite clear from the pleadings of the parties that the plaintiff was made a party to the mortgage suit of the defendant in the capacity of a person having a prior right and the relief which the defendant claimed against him, was entirely on that footing. The decree that was passed in the mortgage suit is rather peculiar. It directed g that the mortgagee, Abdul Gani, should proceed in the first place against the Harinbari properties with which the present plaintiff was not concerned and if the sale proceeds proved insufficient to wipe off his dues, he could then proceed to sell No. 6 Middle Road, Entally. It was not said that the sale would be held free of the rights of the plaintiffs, but the Additional District Judge says that that must be the effect of the order which was made in the presence of the plaintiff. I am unable to accept the view that has been taken by the learned Judge.

Under O. 34, R. 12, Civil P. C., the Court h can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any prior mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold. I cannot agree with Dr. Sen Gupta that the plaintiff was a consenting party to this order as it was at his instance that a direction

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1. ('07) 11 C.W.N. 403 : 5 C.L.J. 315, Gangadas Bhattar v. Jogendra Nath.
2. ('07) 6 C.L.J. 612 : 12 C.W.N. 107, Jugdeo Singh v. Habibullah Khan.
3. ('33) 20 A.I.R. 1933 Cal. 728 : 148 I.C. 42 : 60 Cal. 948 : 37 C.W.N. 897, Nihar Mala Debi v. Saroj Bhandu.
4. ('23) 10 A.I.R. 1923 Cal. 274 : 69 I.C. 530 : 49 Cal. 1048 : 28 C.W.N. 92, Krishtopada Roy v. Chaitanya Charan Mandal.
5. ('29) 16 A.I.R. 1929 Cal. 233 : 120 I.C. 97 : 33 C.W.N. 100, Digambar Suthar v. Suajan.

was given to sell the Harinbari property first. We do not know why the plaintiff was advised to plead in the written statement in the mortgage suit that the Harinbari properties should be sold first. No question of marshalling arises on the facts of the present case; but even if the order for sale of the Harinbari properties was made at the instance of the plaintiff, we cannot from that fact alone infer that the plaintiff consented to have premises No. 6 Middle Road, Entally, sold by the second mortgagee free and clear of his previous charge even though no order was made giving him a prior charge on the sale proceeds. I am also not impressed by the argument of Dr. Sen Gupta that the plaintiff ought to have set up his prior rights in the mortgage suit itself and invited the Court to pass an order in his favour and that the omission to plead his rights in the mortgage suit would operate as a bar to his raising this question again on the principle of constructive res judicata. To attract the doctrine of constructive res judicata, it must be shown that there were allegations made by the defendant in his plaint in the mortgage suit which impugned or sought to displace the prior title of the plaintiff: *vide*, 47 I. A. 11.[6] Far from containing any allegation in derogation of the plaintiff's title, the defendant expressly admitted his prior interest and claimed only a right to redeem.

It is true as Dr. Sen Gupta points out that the present plaintiff in his written statement in the mortgage suit resisted Abdul Gani's claim for redemption and set up an indefeasible title to the property on the basis of his prior purchase. But simply because he claimed certain rights which were not and could not be allowed by the Court, it cannot be suggested that he lost or waived his right to be redeemed by Abdul Gani. It is not disputed before us that though the plaintiff was a purchaser at the mortgage sale held at the instance of the first mortgagee, he could use the first mortgage as a shield against the puisne encumbrancer. It seems to me that the plaintiff has been misadvised all through and at every step he took up such positions as can never be supported in law. The decree in the mortgage suit is no doubt obscure, but we think it should be interpreted in such a way as to make it conformable to law. In my opinion the order passed for sale in the original side of this Court must be taken to be a direction to sell the property subject to and not free of the plaintiff's prior rights.

The result, therefore, is that the plaintiff can have a declaration of his title on the basis of his purchase with respect to the properties, subject to the defendant's right of redemption and the question now is on what terms the defendant should be allowed to redeem. Dr. Sen Gupta is right in saying that the defendant cannot be compelled to pay the purchase money which the plaintiff himself had to pay. Both sides admit that the defendant should be allowed to redeem on the basis of the mortgage decree obtained by Girish Das. Dr. Sen Gupta says further that though his client is willing to pay interest on the decretal amount at the Court rate of 6 per cent. per annum from the date of the decree, yet he is entitled to get credit for all sums that the plaintiff realized as profits out of the disputed premises ever since he obtained possession in 1917. We do not think that this position is quite sound. The plaintiff purchased not only the interest of the first mortgagee but of the mortgagor Asraf Serang as well and the defendant himself being a simple mortgagee is not entitled to get possession till the date of his purchase. We think, on the whole, that it would be fair and equitable if we do not allow any interest on the decretal amount in consideration of the fact that the plaintiff has been in possession of the property for a very considerable period of time.

It is, therefore, ordered that the defendant or his heirs would be entitled to redeem the interest of the plaintiff in premises No. 6 Middle Road, Entally, on depositing the actual amount that was allowed to Girish in the final decree passed in the mortgage Suit No. 31 of 1914 of the second Court of the Subordinate Judge, Alipur, within six months from this date. On payment being made within this time the plaintiff or his heirs would be bound to deliver over possession of the properties to the defendant or to his heirs. In default of payment, the title of the plaintiff or his heirs to the disputed properties will be declared and their possession confirmed. We direct that the parties do bear their own costs in all the Courts. Let a decree be drawn up accordingly.

Biswas J. — I agree.

G.N./R.K. *Order accordingly.*

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6. ('20) 7 A. I. R. 1920 P. C. 81 : 55 I. C. 959 : 47 Cal 662 : 47 I. A. 11 (P. C.), Radha Kishun v. Khurshed Hossein.

A. I. R. (29) 1942 Calcutta 142 (1)

HENDERSON J.

Nagendra Chandra Lahiri and others — Petitioners

v.

Moulvi Muhammad Abdus Sobhan Saheb and others — Opposite Party.

Civil Rule No. 1747 of 1939, Decided on 10th July 1941, issued from judgment and decree of Sub-Judge, Rangpur, D/- 22nd August 1939.

Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), Ss. 75A (2) and 105—S. 75A (2) applies to decree for enhancement made under S. 105 — S. 75A (2) is not concerned with landlord's rights — It merely restrains him from enforcing them for certain period.

Section 75A (2) applies to a decree for enhancement made by a revenue officer under S. 105. Section 75A (2) has nothing to do with the rights of the landlord; it merely restrains him from enforcing them for a certain period. The fact that S. 105 directs the revenue officer to settle a fair and equitable rent is quite irrelevant. In carrying out his duties under that section he may enhance it, maintain the existing rent or reduce it. If he enhances it, the provisions of S. 75A (2) are attracted at once. [P 142*d*,*e*]

Surajit Chandra Lahiri — for Petitioners.

Order.—This rule has arisen in connexion with proceedings under S. 88, Bengal Tenancy Act. The question for consideration is whether S. 75A, sub-s. (2) has any application to a decree for enhancement made by a revenue officer under S. 105, Ben. Ten. Act. In the present case the actual enhancement was decreed before this section came into force but the decree of the appellate Court was made after it. The only way in which the question can be brought within the range of S. 115 is to contend that by misunderstanding the law the Munsif has apportioned a rent which does not exist. I will therefore proceed upon that point of view. The relevant words of the sub-section are as follows:

All decrees and orders enhancing rent passed under any of the provisions of this Act are hereby declared to be inoperative from the date of such decree or order until the expiry of the ten years referred to in sub-section (1).

The sub-section therefore has nothing to do with the rights of the landlord; it merely restrains him from enforcing them for a certain period. There can be no question that in this case the rent was actually enhanced by a decree made under the provisions of this Act. The case therefore appears to be within the terms of the section. Mr. Lahiri relies upon the fact that S. 105 directs the revenue officer to settle a fair and equitable rent. That appears to me to be quite irrelevant. In carrying out his duties under that section he may enhance it, maintain the existing rent or reduce it. If he enhances it, the provisions of the new section are attracted at once. To differ from the learned Subordinate Judge would lead to most extraordinary results. The landlords in districts where settlement operations were going on would be able to enforce enhancements while landlords in other districts would not be able to do so. Even in the former case of districts where settlement operations are going on a landlord's right to enforce enhancements would depend upon the mere accident whether he filed an application under S. 105 or whether he instituted an ordinary suit. I cannot believe that such could have been the intention of the Legislature. I have no doubt that the learned Subordinate Judge was correct. The rule is accordingly discharged. As the opposite party did not appear, I make no order as to costs.

G.N./R.K. *Rule discharged.*

A. I. R. (29) 1942 Calcutta 142 (2)

HENDERSON J.

Atul Chandra Bhandary — Accused — Petitioner

v.

Corporation of Calcutta—Opposite Party.

Criminal Revn. No. 367 of 1941, Decided on 14th May 1941.

(a) Calcutta Municipal Act (3 of 1923), Ss. 386 (1) (b) and 488 — Charge under S. 386 (1) (b)—Essentials to be proved by prosecution stated.

For the purpose of S. 386 (1) (b) the Corporation means the Chief Executive Officer. The first thing, therefore, in a charge under S. 386 (1) (b), the prosecution must prove is that the Chief Executive Officer had formed the opinion that the use of the premises without a license was dangerous to life, health or property or likely to create nuisance. It is not the duty of the prosecution to convince the Magistrate by evidence that the use of the premises was dangerous to life, health or property or a nuisance to the neighbours. [P 143*a*,*b*]

(b) Calcutta Municipal Act (3 of 1923), Ss. 534 (1) and (2) and 386 (1) (b) — Offence under Sec. 386 (1) (b) is continuing within S. 534 (1).

The offence under S. 386 (1) (b) is not a solitary one but a continuing offence. But under the specific provision of S. 534 (2) the offence comes to an end on the expiry of the year for which the license is required to be taken out. Consequently under S. 534 (1) the complaint in respect of the offence under S. 386 (1) (b) must be made within 3 months of the date on which the existence of the offence is first brought to the notice of the Chief Executive Officer. [P 143*d*,*e*]

Dinesh Ch. Roy — for Petitioner.

S. K. Basu and Pashupati Ghose — for Opposite Party.

Order. — This is a rule calling upon the Municipal Magistrate and the Chief Execu-

tive Officer of the Calcutta Corporation to show cause why the conviction of the petitioner under section 386 (1) (b)/488, Calcutta Municipal Act, should not be set aside on grounds Nos. 2 and 4 attached to the petition. The petitioner keeps a motor repairing workshop and the noise, which is said to be almost continuous day and night, is undoubtedly a nuisance to the neighbours. The essence of the offence charged is that he is using the premises without a license for a purpose, which is, in the opinion of the Corporation, dangerous to health or likely to create a nuisance. For the purpose of this provision the Corporation means the Chief Executive Officer. The first thing, therefore, the prosecution had to prove was that the Chief Executive Officer had formed this opinion. Now there was a complete muddle at the trial. Both sides apparently thought that it was the duty of the prosecution to convince the Magistrate that this business was dangerous to health and a nuisance to the neighbours. They called evidence on the point and the learned Magistrate discussed it at enormous length. It appears, however, from the explanation of the Magistrate that in their attempt to convince him of the existence of a nuisance the prosecution did actually introduce evidence to show that the Chief Executive Officer had formed the necessary opinion. The evidence of course is extremely scanty but it is actually there on the record and its truth is demonstrated by the letters B and C, which were written by the petitioner himself. The first ground upon which this rule was issued must therefore fail.

The other ground raises a question of limitation. The learned Municipal Magistrate appears to have misunderstood the law on this point. The offence charged is using the premises without a license during the year 1939-1940. The learned Magistrate seems to have thought that the only question was whether the petitioner committed a solitary offence on 5th January 1940. The offence, however, is a continuing offence but under the specific provision of S. 534 (2), Calcutta Municipal Act, the offence will come to an end on the expiry of the year for which the license is required to be taken out.

Under S. 534 (1) the complaint must be made within three months of the date on which the existence of the offence is first brought to the notice of the Chief Executive Officer. The learned Magistrate points out that no question of limitation was raised at the trial. It was, however, his duty to examine the question and he ought to have satisfied himself that the prosecution was within time. The question therefore is whether 11th January 1940 is within three months of the date when the existence of the offence was first brought to the notice of the Chief Executive Officer. As it turns out there is no difficulty in the present case. It appears that the Chief Executive Officer first formed the opinion referred to in S. 386 (1) (b) on 30th October 1939. The offence therefore began subsequent to that date and the complaint was within three months thereof. The rule is accordingly discharged.

G.N./R.K. *Rule discharged.*

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* A. I. R. (29) 1942 Calcutta 143

EDGLEY J.

Kissinlal Kankaria

v.

Purshottamdas Halwasiya and another.

Application in Suit No. 1739 of 1940, Decided on 25th March 1941.

***Civil P. C. (1908), S. 132 and O. 26, R. 1 — "Personal appearance" in S. 132 mean "personal attendance"—Woman found to be pardanashin lady observing strict parda should not be compelled to attend Court but should be examined on commission.**

The words "personal appearance" in S. 132 mean "personal attendance." [P 144*g*]

Therefore a woman who is a pardanashin lady and observes strict parda, should not be compelled to attend the Court but should be examined on commission if she so desires : ('33) 20 A.I.R. 1933 All 551, *Rel. on;* ('29) 16 A.I.R. 1929 Cal. 528, *Dissent.; Case law referred.* [P 144*h*]

J. A. Clough — for Applicant.

P. C. Ghose — for Respondents.

Order. — In this case the petitioner, Sm. Madan Mohini Debi, who is a defendant in Suit No. 1739 of 1940 has asked that she may be examined on commission in view of the fact that she is a pardanashin lady. The petitioner bases her application on S. 132 (1), Civil P. C., which is in the following terms :

Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

She also relies on O. 26, R. 1 of the Code which is to this effect :

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

On behalf of the opposite party it is urged that O. 26, R. 1 of the Code merely confers a discretion on the Court as regards the issue of a commission in a case such as this, and that this discretion should not be exer-

cised in view of the fact that the applicant does not observe strict pardah that she often goes out in public and even attends Court. In her affidavit in reply the petitioner has stated that it is not correct to say that she does not observe pardah or that she goes out in public. Further she maintains that, when it is necessary for her to go to the Court premises for the purpose of signing documents and transacting similar business, she does not leave her private car. On the affidavits, I am of opinion that it must be held that the petitioner is in fact a pardanashin lady, and the only question which arises for consideration is whether, in these circumstances, she should be regarded as exempt from attendance in Courts and should be examined on commission.

There can, in my opinion, be no doubt, in a case of this nature that it is certainly desirable that the petitioner should give her evidence in Court and that she should be subjected to cross-examination as an ordinary witness. It is however argued on her behalf by Mr. Clough that S. 132 of the Code confers a right upon her to be exempted from personal attendance in Court and that it follows that it is necessary in the ends of justice that she should be examined on commission in order that her evidence may come on the record. Learned counsel for the opposite party places considerable reliance upon the decision of this Court in the case in 18 W. R. 230.[1] In that case it was pointed out that the appellant should have been examined in Court. On this point the learned Judges stated :

> A pardanashin lady is frequently examined in Court in a palkee or otherwise on a proper identification, and there in the presence of the parties and the pleaders and with all the advantages attending the examination of the witness in open Court, she, at whose command was the best knowledge of the facts, could have been examined in a full and satisfactory manner. There should have been no examination by commission in such a case as this.

It is curious that the learned Judges who decided 18 W.R. 230[1] did not refer to the relevant provisions of the Code of Civil Procedure, which was in force at the time, namely, Act 8 of 1859. The language used in S. 21 of the Code of 1859 was precisely similar to that which has been employed in S. 132 (1) of the present Code, and if S. 21 has been compared with Ss. 22 and 175 of the Code, it would, I think, have been difficult to escape from the view which was adopted in several later cases in this Court to the effect that a purdanashin lady should not be compelled either to appear in Court personally or attend Court even although she may have failed to observe the restraints of the pardah system on previous occasions. This was the view which was followed by Stanley J. in 26 Cal. 650[2] and also by Greaves J. in 45 Cal. 492.[3] The leading cases on this point were reviewed by Mookerjee and Walmsley JJ. in 45 Cal. 697.[4] In that case the learned Judges observed that

> a pardanashin lady may completely alter her mode of life, and cease to be included in the statutory description of 'women who according to the customs and manners of the country, ought not to be compelled to appear in public.' When this transformation has taken place, she can no longer claim, as of right; the statutory exemption formulated in S. 132. But if she is in fact a pardanashin lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public.

In a later case, *Serowgee's case*,[5] Lort-Williams J. stated :

> I am of opinion that the correct meaning of S. 132 (1), Civil P.C., is that a lady, who according to the customs and manners of this country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court, that is, from being exposed to the public gaze—such a person is exempt not from attendance in Court but from appearance in Court. I think 'appearance' means that she shall not be compelled to come forth into view or become visible to the public gaze.

It will be seen from *Serowgee's case*[5] that Lort-Williams J. draws a distinction between "appearance in Court" and "attendance in Court" but in my view the expressions really mean the same thing. In O. 26, R. 1 of the Code reference is made to a person "who is exempted under this Code from attending the Court." This portion of the rule can only refer to the exemption granted by Secs. 132 and 133 of the Code. It appears from the language which has been used by the Legislature that women who according to the customs and manners of the country, ought not to be compelled to appear in public have as regards personal appearance, been placed in the same category as persons who are exempted from personal appearance by reason of their rank under S. 133. It cannot be contended that persons who fall within the latter category, although they need not appear in Court, may be compelled to attend Court,

1. ('72) 18 W. R. 230, Nusrut Banoo v. Mahamed Sayem.
2. ('99) 26 Cal. 650: 3 C.W.N. 751, Mohesh Chunder v. Manik Lall.
3. ('18) 5 A.I.R. 1918 Cal. 111 : 44 I.C. 157 : 45 Cal. 492: 22 C.W.N. 147, E.J. Soloman v. Jyotsna Ghoshal.
4. ('18) 5 A.I.R. 1918 Cal 743: 41 I.C. 610: 45 Cal. 697: 26 C.L.J. 319: 22 C.W.N. 197, Balakeshwari Debi v. Jnananda Banerjee.
5. ('29) 16 A.I.R. 1929 Cal. 528 : 121 I.C. 635 : 56 Cal. 865: 33 C.W.N. 681, In re Bilasroy Serowgee.

and in my opinion the correct view with regard to this matter has been adopted by the Allahabad High Court in 55 ALL. 666.[6] In that case Rachhpal Singh J. disagreed with the view expressed by Lort-Williams J. in 56 Cal. 865[5] and he pointed out that :

If a pardanashin lady observing strict parda is ordered to attend the Court, it means that she is 'compelled to appear in public.' Her face may be covered or she may be wearing a burka, but all the same she is compelled to appear in public if she is ordered to attend the Court. This is against the spirit of S. 132, Civil P. C. In families in which ladies observe strict parda it is considered most objectionable for them to appear in public even with their faces covered. I am of opinion that the words 'personal appearance' used in Sec. 132 mean 'personal attendance.'

Having regard to the considerations stated above this application must be allowed and it is directed that Mr. B. K. Ghose be appointed Commissioner for the examination of Sm. Madan Mohini Debi. The costs of the commission and costs of this application will be costs in the cause. The commission will issue as expeditiously as possible and is returnable one month from the date of issue.

K.S./R.K. *Application allowed.*

6. ('33) 20 A.I.R. 1933 All. 551 : 146 I.C. 885 : 55 All. 666: 1933 A.L.J. 1384, Sunder Debi v. Dattatraya Narhar.

A. I. R. (29) 1942 Calcutta 145

B. K. MUKHERJEA AND BISWAS JJ.

Rai Saheb Kumudnath Das, on death his legal representatives, Provabati Debi, and others — Plaintiffs — Petitioners

v.

Protap Chandra Mazumdar and others — Defendants — Opposite Party.

Civil Rules No. 1521 to 1524 of 1940, Decided on 3rd July 1941, for setting aside orders of Sub-Judge, Dinajpur, D/- 30th August 1940.

(a) Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3 — Applicability—Word "tenant" in S. 3 means ex-tenant.

In order to attract the operation of S. 3, it is necessary that the suit must be one for ejectment of a non-agricultural tenant, and ejectment must be sought for on a ground other than non-payment of rent. Strictly speaking, the right of a landlord to recover immovable property from his tenant arises when the relationship of landlord and tenant has ceased between themselves, and the tenant has lost his right to remain in possession of the property. The word 'tenant' in S. 3, therefore means an ex-tenant whose tenancy has been determined in one of the ways recognised by law, and it is the determination of the tenancy that constitutes the cause of action of the suit. The section places one restriction in this respect namely that the claim for eviction should not be based upon mere non-payment of rent. [P 147*e*,*f*]

(b) Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Words "suit or proceeding for ejectment on account of non-payment of rent" in S. 3—Meaning of *(Obiter)*.

The words "suit or proceeding for ejectment on account of non-payment of rent by such tenant" in S. 3 refer to that class of cases where under the terms of the lease itself the lessee forfeits his tenancy by reason of non-payment of rent. As a relief against forfeiture in such cases is provided in S. 114, T. P. Act, the Legislature probably thought it proper to exempt this class of cases from the operation of S. 3, Non-Agricultural Tenancy Act : ('41) 28 A.I.R. 1941 Cal. 302, *Ref.* [P 147*g*,*h*]

(c) Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—Suit to eject defendant on ground that he was tenant under plaintiff and his tenancy has subsequently ceased—Suit to eject trespasser on establishment of plaintiff's title—Procedure in matter of stay to be followed under S. 3 stated—Plaintiff patnidar in execution of rent decree putting lands held by darpatnidar to sale and purchasing them himself—Suit by plaintiff to eject tenants of darpatnidar as trespassers pure and simple—Suit held must be dismissed if plaintiff failed to prove his case of defendants being trespassers — Assuming finding that defendants were tenants under plaintiff by operation of law was correct suit held could not even after that finding come within S. 3.

The plaintiffs patnidars in execution of a rent decree brought the lands held by the darpatnidars under them to sale and purchased them themselves. The plaintiffs then sued to eject the tenants holding under the darpatnidars as trespassers pure and simple. The leases under which the defendants purported to hold the lands from the darpatnidars were challenged as not binding upon the plaintiffs, and the plaintiffs were alleged further to have annulled the incumbrances under the provisions of S. 167, Ben. Ten. Act :

Held that if the plaintiffs failed to establish the allegation, on which they had taken their stand exclusively, that the defendants were trespassers, the suit could not but be dismissed. [P 148*d*,*e*]

Held further that assuming the finding recorded by the Court that the defendants were tenants under the plaintiffs by operation of law, i. e., by reason of the plaintiffs' purchase at the sale in execution of their rent decree was correct, the suit could not even after that finding be treated as suit for eviction of tenants on a ground other than non-payment of rent as contemplated by S. 3. (Proper procedure to be followed under S. 3 in dealing with suits to eject a tenant on the ground that the defendant was a tenant under the plaintiff and his tenancy has subsequently ceased to exist and with suits to eject trespasser on establishment of plaintiff's title, indicated.) [P 148*g*]

(d) Bengal Tenancy Act (8 of 1885), S. 167—Rent sale—Sub-tenant under defaulting tenant does not automatically become tenant under purchaser and remain tenant till notice under S. 167—Interest of purchaser and position of sub-tenant, explained.

When a tenure is purchased at a rent sale, a sub-tenant under the defaulting tenant does not automatically become a tenant under the purchaser and remain a tenant till the tenancy is put an end to by a notice under S. 167. The purchaser at a

rent sale acquires the tenure itself subject to all
a protected interests and with right to annul all incumbrances. If he does exercise his powers of annulling encumbrances within the period laid down by law, the position of the encumbrancer will be that of a trespasser from the very moment of the sale. He can be treated as a tenant only if the purchaser does abstain from exercising his powers of annulling encumbrances or in fact the time for exercising the power has expired. [P 148*h*;P 149*a*]

Dr. Sen Gupta, Jyotirindra Nath Das and Gopal Chandra Shome — for Petitioners.

Gunada Charan Sen, Jatindra Nath Sanyal, Sibakali Bagchi and Rohini Kanta Ghose (in 1521), Panchanan Pal (in 1522), Nagendra Nath Bose (in 1523) and Gopendra Nath Das (in 1524) — for Opposite Party.

b **B. K. Mukherjea J.** — These four connected rules arise out of as many actions in ejectment commenced by the same plaintiffs against different defendants for recovery of possession of certain plots of land on the allegation that the defendants were trespassers. The Subordinate Judge who heard the suits did not pass any decree or final order in any one of them; but by his order dated 30th August 1940 he has stayed all these suits under the provisions of S. 3, Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940). It is the propriety of this order for stay that has been challenged before us in these rules.

c To appreciate the points in controversy, it is necessary to set out the material facts briefly. The plaintiffs in all the suits who are the petitioners before us, are the patnidars of mahal lot Khupi appertaining to touzi No. 712/1 of the Bogra Collectorate, and they purchased the patni from Maharaj Bahadur Singh by a kobala dated 26th April 1928. There is a darpatni under this patni which was held in all material times by two ladies named Kunja Bala and Sarat Kamini, who are the heirs of one Gadadhar Das to whom the darpatni previously belonged. There being default in the payment of rent
d due by the darpatnidars to the plaintiffs, the latter instituted a rent suit against the two ladies, being rent suit No. 5 of 1931, in the Court of the Subordinate Judge at Bogra and got a decree. In execution of this decree, the darpatni taluk was put up to sale, and it was purchased by the plaintiffs themselves on 20th December 1935. The sale was confirmed on 20th January 1936 and the plaintiffs took delivery of symbolical possession of the mahal through Court on 15th February 1936. It is stated in the plaint that after that purchase the plaintiffs came to know that several persons were in occupation of various plots of land within the darpatni, and purported to hold them as tenants under the darpatnidars. Their interests, if any, constituted according to the plaintiffs, incumbrances within the meaning of S. 159, Ben. Ten. Act, and the plaintiffs had these incumbrances annulled in accordance with the provision of S. 167 of the Act. As these persons refused to vacate the lands in spite of the notice under S. 167, Ben. Ten. Act, the plaintiffs instituted five suits in ejectment against them in the Court of the Subordinate Judge at Dinajpur, and these were suits Nos. 5, 6, 8, 9 and 10 of 1938 of that Court. In all these suits the plaintiffs' allegations were substantially the same. Their case was
f that the leases in favour of the different sets of defendants were created by the darpatnidars in contravention of the express terms of the darpatni lease, which expressly provided that the darpatnidars would not be able to grant settlement of lands without the consent of the patnidar and also at a low rent. These leases consequently were not binding on the patnidars. It was averred, in the second place, that even if the darpatnidars had not acted in excess of their authority in granting these leases to the defendants, the leases being incumbrances within the meaning of S. 159, Ben. Ten. Act, were annulable in law and that the plain-
g tiffs actually annulled them by following the procedure laid down in S. 167 of the Act. The defendants therefore were in the position of trespassers and were bound to vacate their lands.

The defendants in all the five suits appeared and resisted the plaintiffs' claim for eviction. The defence in all the suits was practically the same. It was contended, in the first place, that the plaintiffs were not sixteen annas patnidars, and the decree in execution of which the darpatni was sold was not a proper rent decree, but had the effect of a money decree merely. The defen-
h dants denied that the leases granted to them by the darpatnidars were in contravention of the provisions of the darpatni pottah, and their case was that the interests were protected interests within the meaning of S. 160, Ben. Ten. Act, and were not incumbrances which could be annulled in law. They further denied service of any notice under S. 167, Ben. Ten. Act. On these pleadings, ten issues were framed, and they were common issues in all these five suits which were heard together. So far as suit No. 5 is concerned, the trial Judge decided all these issues, and as a result of the findings arrived at dismissed the plaintiffs' suit. We have been told that an

appeal has been taken against this decision to the Court of the District Judge at Dinajpur, and this appeal is still pending. So far as the other four suits are concerned, a point was taken by the defendants' pleader in course of the hearing that the tenancies held by the defendants in these suits being non-agricultural tenancies within the meaning of Bengal Act, 9 of 1940, the suits could not be further proceeded with and ought to be stayed under the provision of S. 3 of the Act. This contention found favour with the learned Subordinate Judge who decided only one matter in connexion with these four suits, namely, as to whether the tenancies created by the darpatnidars in favour of the defendants were in excess of the powers conferred upon the lessors by the darpatni potta. The answer to this question was given in the negative, and the Subordinate Judge being of opinion that the defendants became, by operation of law, tenants of the plaintiffs as soon as the latter purchased the darpatni in the rent sale, stayed all further proceedings in these four suits under S. 3, Bengal Non-Agricultural Tenancy Act. It is against this order of stay passed in the four suits that these four rules were obtained.

Dr. Sen Gupta, who appears on behalf of the plaintiffs, has contended before us that as on the face of the allegations made in the plaint, it was clear that the plaintiffs wanted to evict the defendants as trespassers and not as tenants, the suits were not suits for ejectment of non-agricultural tenants as contemplated by S. 3 of Bengal Act, 9 of 1940 and could not be stayed under S. 3 of the Act. The argument is, that for the purpose of exercising the powers under S. 3, Non-Agricultural Tenancy Act, the Court should look to the case as made by the plaintiff in his plaint, and if on the plaint, as it stands, the suit is one for evicting a trespasser, the Court is bound to proceed with the suit, and if after hearing the evidence, it comes to the conclusion that the defendant is a tenant and not a trespasser, the suit should be dismissed and not stayed. Mr. Sen who appears for the opposite party contends, on the other hand, that the allegations made in the plaint are not at all conclusive, and even though the suit purports to be one for ejecting a trespasser, if the Court on hearing the evidence comes to the conclusion that the defendant is a tenant and an agricultural tenant within the meaning of the Act, it has got to stay further proceedings. As the question is likely to arise in many cases, we think it necessary to examine the relevant provisions of the Act carefully and indicate the procedure which is to be followed in cases of this description. Section 2, Non-Agricultural Tenancy Act, gives the definition of a non-agricultural tenant. Section 3 then lays down that:

> Notwithstanding anything contained in any other law for the time being in force, every suit and proceeding in any Court for ejectment of a non-agricultural tenant other than a suit or proceeding for ejectment on account of non-payment of rent by such tenant shall be stayed for the period during which this Act continues in force.

In order to attract the operation of this section, it is necessary that the suit must be one for ejectment of a non-agricultural tenant, and ejectment must be sought for on a ground other than non-payment of rent. Strictly speaking the right of a landlord to recover immovable property from his tenant arises when the relationship of landlord and tenant has ceased between themselves, and the tenant has lost his right to remain in possession of the property. The word 'tenant', therefore, means here an ex-tenant whose tenancy has been determined in one of the ways recognized by law, and it is the determination of the tenancy that constitutes the cause of action of the suit. The section places one restriction in this respect, namely, that the claim for eviction should not be based upon mere non-payment of rent. These words are somewhat ambiguous, and my learned brother Mitter J. was constrained to interpret this expression as referring to a suit for ejectment of a tenant whose rent was in arrears, though the right to sue was based on other grounds and not upon non-payment of rent: 45 C. W. N. 22.[1] The interpretation seems to us to be somewhat far-fetched. The words undoubtedly are unhappy, but if they have got any meaning, in our opinion they cannot but refer to that class of cases where under the terms of the lease itself the lessee forfeits his tenancy by reason of non-payment of rent. As a relief against forfeiture in such cases is provided in S. 114, T. P. Act, the Legislature probably thought it proper to exempt this class of cases from the operation of S. 3, Non-Agricultural Tenancy Act. It is not, however, necessary for us to express any final opinion on this point in the present case.

Now, a suit for ejectment may be one to eject a tenant on the ground that the defendant was a tenant under the plaintiff and his tenancy has subsequently ceased to exist, or it may be one to eject a trespasser on

1. ('41) 28 A.I.R. 1941 Cal. 302 : 194 I.C. 581 : 45 C.W.N. 22, Purnendu Nath v. Narendra Nath.

establishment of the plaintiff's title. In the former case, if the plaint itself shows that the defendant is a non-agricultural tenant, and ejectment was not sought on the ground of non-payment of rent, no difficulty arises, and the Court is bound to stay the suit under S. 3 of the Act at its very inception. If any dispute arises as to the character of the tenancy, the Court is bound to take evidence, and if it comes to the conclusion that the defendant in fact is a non-agricultural tenant, then also the suit must be stayed. If on the other hand, the suit purports to be one for ejecting a trespasser, different considerations arise. As the plaintiff does not admit the defendant to be a tenant the suit cannot be stayed in limine. The Court must proceed to hear the suit in the ordinary way and take evidence. Supposing that after taking evidence the Court forms an opinion that the defendant is really a tenant and an agricultural tenant within the meaning of the Act, is he bound to stop the proceedings forthwith, and refuse to proceed any further? The answer to this question would, in our opinion, depend upon the fact as to whether after the Judge arrived at such a finding, the suit could be treated as one for ejectment of a non-agricultural tenant within the meaning of S. 3 of Bengal Act, 9 of 1940. In other words, it is not enough to find that the defendant is a tenant and not a trespasser. It must be further found that the suit as it stands could be regarded as a suit to evict the defendant as a tenant on the ground that the tenancy has been determined in any lawful manner.

Ordinarily, when the plaintiff starts with a specific case in the plaint and fails to establish that case, the suit is bound to fail, but there are exceptional cases where even though the defendant is found to be a tenant and not a trespasser as alleged by the plaintiff, the plaintiff can still ask the Court to pass a decree for ejectment against the defendant, if in fact it is admitted or proved in the case that the defendant's tenancy, if any, had come to an end prior to the institution of the suit. If the Court allows the plaintiff to convert a suit for possession against a trespasser into one for ejectment of a tenant, it is certainly bound to stay it under S. 3 of Bengal Act 9 of 1940. But if, on the other hand, the suit is one which must necessarily fail, if the defendant is found to be a tenant and the plaintiff does not want to treat it as a suit for ejectment of a tenant, the Court should dismiss the suit on the finding that the plaintiff failed to prove his case, and the question of stay will come, if and when the plaintiff institutes a fresh suit against the defendant, seeking to eject him on the ground that the tenancy which was found in his favour in the previous suit had since then been determined. In the present cases, the plaintiffs sought to eject the defendants as trespassers pure and simple. The leases under which the defendants purported to hold the lands were challenged as not binding upon the plaintiffs, and they were alleged further to have annulled the incumbrances under the provisions of S. 167, Ben. Ten. Act. The Court held on evidence that the leases were binding on the plaintiffs inasmuch as the darpatnidars did not exceed their authority in granting such leases to the defendants.

The Court did not consider whether the leases were or were not encumbrances which were annulable in law, and were or were not in fact annulled by the landlords purchasers under S. 167, Ben. Ten. Act; although in deciding Issue 1 in connexion with suit No. 5, the Subordinate Judge did in fact come to the conclusion that the sale was not a rent sale within the meaning of Chap. 14, Ben. Ten. Act. If the sale was not a rent sale, the operation of S. 167, Ben. Ten. Act, would necessarily be excluded. Be that as it may, even after the Court had recorded a finding that the defendants were tenants under the plaintiffs by operation of law, the suits could not in our opinion be treated as suits for eviction of tenants on a ground other than non-payment of rent as contemplated by S. 3, Bengal Non-Agricultural Tenancy Act. The plaintiffs cannot and do not say that even if the defendants are tenants, the tenancies have been determined in any manner recognized by law. They take their stand exclusively on the allegation that the defendants are trespassers, and if they fail on that case, the suits in our opinion cannot but be dismissed. We do not agree with Mr. Sen that when a tenure is purchased at a rent sale, a sub-tenant under the defaulting tenant becomes automatically a tenant under the purchaser and remains a tenant till the tenancy is put an end to by a notice under S. 167, Ben. Ten. Act. The purchaser at a rent sale acquires the tenure itself subject to all protected interests and with right to annul all incumbrances. If he does exercise his powers of annulling encumbrances within the period laid down by law, the position of the encumbrancer will be that of a trespasser from the very moment of the sale. He can be treated as a tenant only if the

purchaser does abstain from exercising his powers of annulling encumbrances or in fact the time for exercising the power has expired.

In our opinion therefore the procedure followed by the Subordinate Judge was not right, and these rules must be made absolute. The order of stay made by the Subordinate Judge is set aside and the cases are remitted to the same officer in order that all the other issues in connexion with the suits may be properly decided. We are told that the officer who tried the suits is now holding the position of an Additional District Judge of the same district, and we direct that all these suits should be heard by him. The Court after recording its findings on all the material issues raised in the suits will dispose of the suits in accordance with the directions given above and in accordance with law. We make no order for costs in these rules. Further costs on remand will abide the result. The findings already recorded by the Subordinate Judge in his judgment must stand. Let the records be sent down as early as possible.

Biswas J. — I agree.

G.N./R.K. *Rules made absolute.*

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B. K. MUKHERJEA AND BISWAS JJ.

Mohini Ranjan Bhattacharjya — Judgment-debtor — Petitioner

v.

Surendra Chandra Ghosal and another, Decree-holders and others, Judgment-debtors 1 and 2—Opposite Party.

Civil Rule No. 536 of 1941, Decided on 10th July 1941; application for setting aside order of Sadar Munsif, Third Court, Chittagong, D/- 1st March 1941.

(a) Bengal Money-lenders Act (10 of 1940), Scope—Decree on pronote—Execution of—Act is not ultra vires.

In the case of execution of a decree on the promissory note, the Courts are concerned with the question of recovery of the amount due under the decree and hence it cannot be said that the Act is ultra vires with respect to the loan : ('41) 28 A.I.R. 1941 Cal. 498 (S. B.), *Rel. on.* [P 149*e*,*f*]

(b) Bengal Money-lenders Act (10 of 1940), Ss. 36 (6) (a) and 2 (22) — Decree prior to 1st January 1939—Execution pending on that date —Suit is one to which Act applies.

Where a decree has been passed before 1st January 1939, but an execution case in connexion therewith is still pending on that date, that will be sufficient to bring the suit within the definition as given in cl. (22) of S. 2 and from the mere fact that sub-s. (6) cl. (a) refers specifically to a decree passed in a suit, it cannot be held that the meaning of that expression in this clause must be restricted on that account. [P 149*g*,*h*; P 150*a*]

Anil Kumar Das Gupta — for Petitioner.

Nalini Ranjan Bhattacharji — for Opposite Party.

Biswas J. — This rule arises out of an application under S. 36, Bengal Money-lenders Act. It was dismissed by the learned Munsif of Chittagong. The application was thrown out on two grounds. In the first place, it was stated that the Bengal Money-lenders Act in so far as it dealt with loans on promissory notes was ultra vires. But in this case there was a decree on the promissory note, and we are concerned with the question of recovery of the amount due under the decree in execution thereof. On the authority of a Special Bench of this Court in 45 C. W. N. 609[1] by which we are bound, it is not possible, therefore, to support the view taken by the learned Munsif. The second ground on which the learned Munsif holds that the application is incompetent is that it does not come within the terms of cl. (a) of sub-s. (6) of S. 36. Clause (a) requires that the decree must be passed in a "suit to which this Act applies." The learned Munsif holds on a reference to the definition of "suit to which the Act applies" as given in cl. (22) of S. 2, that these words in the setting in which they are used in cl. (a) cannot include an execution proceeding, inasmuch as there can be no question of a decree being passed in an execution proceeding. The decree here had been passed before 1st January 1939, but an execution proceeding was pending on that date. The learned Munsif, however, thought that this was not sufficient to make it a "suit to which this Act applies." Speaking for myself, I must say that the point of view put forward by the learned Munsif cannot be summarily dismissed as untenable. All the same, having regard to the very wide terms of the definition and to the interpretation which has been given by this Court to that definition, I am afraid, we are not at liberty to give effect to the narrower meaning suggested by the learned Munsif. It has been held that where a decree has been passed before 1st January 1939, but an execution case in connexion therewith is still pending on that date, that will be sufficient to bring the suit within the definition as given in cl. (22) of S. 2, and from the mere fact that sub-s. (6), cl. (a) refers specifically to a decree

1. ('41) 28 A. I. R. 1941 Cal. 498 : 196 I. C. 161 : I. L. R. (1941) 2 Cal. 107 : 73 C. L. J. 333 : 45 C. W. N. 609 (S. B.), Harsukdas Balkissendas v. Dhirendra Nath Roy.

passed in a suit, we do not think it is possible to hold that the meaning of that expression in this clause must be restricted on that account. In our opinion the application must be held to be competent. The result, therefore, is that the matter is sent back to the learned Munsif to be dealt with in accordance with the provisions of the Act. We make no order as to costs.

B. K. Mukherjea J. — I agree.

R.K. *Case remanded.*

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LORT-WILLIAMS J.

In re Mirja Md. Masrur Ali Khan.

Insolvency Case No. 218 of 1923, Decided on 11th February 1941.

(a) Presidency Towns Insolvency Act (1909), S. 23—Effect of annulment.

The effect of the annulment is to divest the Official Assignee of the debtor's property, which reverts to the debtor unless the Court by order appoints some one in whom it shall vest, not necessarily the Official Assignee. [P 150*h*]

(b) Presidency Towns Insolvency Act (1909), S. 23—Adjudication annulled—By order assets to remain in hands of Official Assignee—Assets not in hands of Official Assignee held not affected.

On annulment of an adjudication, the Court passed the following order : "Annulled. The assets to remain in the hands of the O/A subject to the further order of the Court" :

Held that the expression "remain in the hands" cannot have meant "remain vested in the hands," because on annulment, the assets ceased to be so vested and therefore could no longer 'remain.' Hence, the effect of the order was that the property of the debtor reverted to him, but on condition that the assets already in the hands of the Official Assignee were to remain in his hands subject to the further order of the Court. Property neither in his (Official Assignee's) hands nor vested in him was not affected by the order. [P 151*c*,*d*,*e*]

F. S. R. Surita — for Insolvent.

S. C. H. Myer — for Official Assignee.

Order. — In this petition of the Official Assignee of Calcutta he states that the debtor was adjudicated insolvent on his own petition on 17th September 1923, more than 17 years ago, and filed his schedule of affairs on 18th December 1923 showing Rs. 36,788 as unsecured liabilities. The balance now standing to his credit in the hands of the Official Assignee is Rs. 219-5-3. Not having applied for his discharge, the adjudication was annulled on 23rd July 1928, more than 12 years ago, and an order was made by the Registrar in the following terms, namely, "Annulled. The assets to remain in the hands of the O/A subject to the further order of the Court." This order was not completed and filed by the Official Assignee until 4th December 1940. The Official Assignee has discovered recently that the debtor owns a fractional share amounting to 19/576ths in a property known as the Dhalbhum Mining Estate at Dhalbhum in the District of Singhbhum which he failed to disclose in his schedule. He asks therefore that the debtor be ordered to amend his schedule of affairs accordingly, and that he may be given liberty to sell the debtor's interest and declare and distribute a dividend.

In his affidavit the debtor states that of the creditors shown in his schedule only Allenbery & Co., for Rs. 1170 and Aga Wasik Ali for Rs. 2150 have proved their claims, and one other has submitted a proof for Rs. 258 which is challenged. He says that the Dhalbhum Estate was and is still in the hands of a Receiver appointed in a suit in this Court, protracted litigation is still pending, and there are claims against the estate to the extent of over four lakhs of rupees. In these circumstances the then Official Assignee Mr. Faulkner told him that in view of the litigation and that his share would be worth only Rs. 1000 or Rs. 1500 he did not claim the property, from which the debtor has not received anything up to date. He sold his share for Rupees 1500 to Mr. J. C. Galstaun on 22nd November 1938, and after paying the costs of assignment, etc., received Rs. 1200 in settlement.

Section 17, Presidency Towns Insolvency Act, provides that upon adjudication the property of the insolvent shall vest in the Official Assignee. Section 23 (1) provides that where an adjudication is annulled all sales and dispositions of property and payments duly made, and all acts therefore done by the Official Assignee or other person acting under his authority or by the Court shall be valid, but the property of the debtor who was adjudicated insolvent shall vest in such person as the Court may appoint or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions (if any) as the Court may declare by order. It is clear therefore that the effect of the annulment is to divest the Official Assignee of the debtor's property, which reverts to the debtor unless the Court by order appoints some one in whom it shall vest, not necessarily the Official Assignee. The order made on 23rd July 1928 was not in terms such an order. The Registrar did not appoint any one in whom the property should vest. He merely directed that the assets should remain in the hands of the Official

Assignee subject to the further order of the Court. Subject to this condition they reverted to the debtor on the annulment. Generally speaking the effect of annulment is to put creditors back in their original position. They can again file or proceed with suits, and execute decrees by means of imprisonment of the debtor or otherwise.

For this purpose, the Court may recommit the debtor to his former custody and thereupon all processes which were in force against him shall be deemed to be still in force as if he had never been released—S. 23 (2). Notice of annulment must be published in the Gazettes. Pending the taking of such steps, it may well be that the Court will think it desirable to make an order to keep the assets in the hands of its officer, for the time being. But that is very different both in terms and in intention from an order vesting the assets in the Official Assignee or appointing the Official Assignee as the person in whom they shall vest and so preventing them from reverting to the debtor under the provisions of the section. The effect of annulment in this section is clearly intended to be different from that in S. 18A which provides that upon annulment by the High Court of the order of a Subordinate Court the debtor's property shall vest in the Official Assignee and the Court may give directions for its custody.

Where it is intended, as in the latter section, that the assets shall vest in the Official Assignee, this is stated specifically. Where, as in S. 23 the vesting of the property is intended to be left to the discretion of the Court, the order of the Court should be stated in clear and explicit terms. The expression "remain in the hands" cannot have meant "remain vested in the hands," because on annulment the assets ceased to be so vested and therefore could no longer "remain". For the same reason it is necessary for the section to provide, as it does, that they "shall" vest, if a proper order of appointment is made. If, again, it was intended to appoint the Official Assignee as the person in whom the property should "vest", there was no necessity to add the condition "subject to the further order of the Court." The section provides for terms and conditions to be applied only to the debtor on reversion—otherwise no conditions are necessary. The effect of the order was that the property of the debtor reverted to him, but on condition that the assets already in the hands of the Official Assignee were to remain in his hands subject to the further order of the Court. The share in question was neither in his hands nor vested in him and therefore was not affected by the order. This petition therefore must be dismissed with costs, limited to the assets in the hands of the Official Assignee.

R.K. *Petition dismissed.*

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B. K. MUKHERJEA AND BISWAS JJ.

Dhajadhari Ghosh — Defendant — Appellant

v.

Union Board of Kendragoria — Plaintiff — Respondent.

Appeal No. 1689 of 1937, Decided on 2nd May 1941, from appellate decree of Dist. Judge, Birbhum at Suri, D/- 6th September 1937.

Limitation Act (1908), Arts. 144, 142 and 146A—Applicability — Words "dispossessed" or "discontinued the possession" in Arts. 142 and 146A — Meaning — Suit for possession by Union Board constituted under Bengal Village Self-Government Act in respect of strip of land which it claimed as part of public road—Defendant found in possession from before date of establishment of Board—Suit held governed by Art. 144 and not Art. 146A — S. 23, Limitation Act, held did not apply.

The words "dispossessed" or "discontinued the possession" in Art. 146A must be given the same meaning as in Art. 142 and cannot be deemed wide enough to include a case of being kept out of possession. The absence of the words "while in possession of the property" in Art. 146A cannot be taken to indicate that prior possession was not contemplated. Article 146A applies only where the local authority suing has been dispossessed or has discontinued its possession; in other words, it contemplates prior possession of the land by the local authority which it subsequently loses by reason of any act done by the defendant or otherwise. The article can obviously have no operation in a case where the local authority is found not to have been in possession at all. The only effect of the special provision enacted in Art. 146A in favour of a local authority is that if the local authority was previously in possession, it could claim a longer period of 30 years within which to bring a suit. But where this was not the case, evidently the shorter period of 12 years' limitation would apply. [P 152*c*,*f*,*g*,*h*; P 153*a*]

The plaintiff Union Board, a local authority constituted under the Bengal Village Self-Government Act of 1919 instituted a suit against the defendant in respect of a strip of land which it claimed as part of a public road vested in it. Its case was that the defendant had encroached upon the disputed land by putting up certain sheds over it, and it accordingly asked for removal of the encroachment and also for a permanent injunction to restrain further encroachment by the defendant. The defendant was found to have been in possession from before the date of establishment of the Union Board and the suit was brought more than 12 years after the date of the establishment of the board:

Held that the suit for possession by the Board was governed by Art. 144 and not by Art. 146A and was barred by limitation. [P 152*f*; P 153*b*]

Held further that S. 23, Limitation Act, had a no application to the case. [P 153*b*]

Promotha Nath Mitter and Shyama Pada Majumdar — for Appellant.

Gopendra Nath Das and Dhirendra Nath Sarkar — for Respondent.

Biswas J.—This is an appeal on behalf of the defendant in a suit instituted by the Union Board of Kendragoria in respect of a strip of land which it claimed as part of a public road vested in it. The plaintiff board is a local authority constituted under the Bengal Village Self-Government Act of 1919, and its case was that the defendant had encroached upon the disputed land by putt-b ing up certain sheds over it, and it accordingly asked for removal of the encroachment and also for a permanent injunction to restrain further encroachment by the defendant. The trial Court found in favour of the plaintiff and decreed the suit, and this decision was affirmed on appeal by the District Judge of Birbhum.

The defendant had raised various defences to the suit, but the only one with which we are concerned in this appeal is that of limitation which was negatived by both the Courts below. They concurrently took the view that treating the suit as one for possess-c sion of immovable property, the 12 years' limitation under Art. 142 or Art. 144 did not apply, but that the suit was governed by Art. 146A of Sch. 1, Limitation Act, which provides an extended period of 30 years' limitation for a suit by or on behalf of a local authority for possession of any public street or road from which it has been dispossessed or of which it has discontinued the possession. It is the propriety of this decision which is challenged in this appeal. On the findings arrived at by the Courts below, it is not disputed that if Art. 142 or 144 was held to apply, the suit would be clearly out of time. The question is, how far d these findings are sufficient to attract the operation of Art. 146A, and it is necessary, therefore, to see what they are.

One important fact found is that the plaintiff Union Board came to be established in the Bengali year 1327 or 1328 B. S., that is to say, in or about the year 1921, so that it could not have been in possession of the disputed land at any time prior to this. As regards the alleged encroachment by the defendant, the finding is that it had commenced several years before the Union Board came into existence, and not four years after, as was the case of the plaintiff. The precise date when the defendant came into possession could not be ascertained, but both e Courts found that it was well within 12 years from before the establishment of the Union Board. The suit was instituted on 5th May 1936, that is, more than 12 years, but within 30 years, from the date of the encroachment or of the inception of the Union Board. On these facts, it seems to us that there can be no room for the application of Art. 146A, and it is difficult to support the view taken by the Courts below. In our opinion, Art. 146A applies only where the local authority suing has been dispossessed or has discontinued its possession: in other words, it contemplates prior possession of f the land by the local authority which it subsequently loses by reason of any act done by the defendant or otherwise. The article can obviously have no operation in a case like the present, where, as stated above, the local authority is found not to have been in possession at all. At the date the Union Board was created, possession was with the defendant, and if, therefore, the Union Board wanted to recover the land as part of a public road to which it became entitled upon its creation under the Act of its incorporation, it might and ought to have sued for such recovery within 12 years from the date of its establishment under Art. 144. g

Mr. Das on behalf of the plaintiff-respondent contended that the word "dispossession" in Art. 146A has not the same meaning as in Art. 142, and in support of his argument he pointed out that while Art. 142 expressly contains the words "while in possession of the property," no such words occur in Art. 146A. It was urged that Art. 146A was a special provision enacted for the benefit of local authorities in order to give them a longer period of limitation in respect of all kinds of suits for possession of a public street or road, and not merely of such suits as could be brought within the terms of Art. 142. In h other words, the argument was that suits which would otherwise come under Art. 144 were also intended to be included within the scope of Art. 146A, where the plaintiff was a local authority. This would mean that the words "dispossessed" or "discontinued the possession" in Art. 146A should be deemed wide enough to include a case of being kept out of possession. We find ourselves unable to accept this contention. In our opinion, these words must be given the same meaning as in Art. 142 and we do not think that the absence of the words "while in possession of the property" can be taken to indicate that prior possession was not contemplated.

The suit here was instituted on 5th May 1936, and the defendant had already been in possession of the land for over 12 years in assertion of a claim of ownership. Such possession of the defendant would have been sufficient to bar a suit for recovery of possession by the rightful owner both under Arts. 142 and 144. The only effect of the special provision enacted in Art. 146A in favour of a local authority is that if the local authority was previously in possession, it could claim a longer period of 30 years within which to bring a suit. But where this was not the case, evidently the shorter period of 12 years' limitation would apply. As, in this case, the defendant is found to have been in possession of the land from before the date of establishment of the Union Board, it is obvious that his possession could not be adverse to the plaintiff from before such date, and it follows, therefore, that as no steps were taken by the Union Board to recover the property within 12 years thereafter, its right to recover possession was barred.

Mr. Das raised a further argument that the plaintiff had a continuing cause of action under S. 23, Limitation Act, but we do not think there is any substance in this contention. This is not a suit by or on behalf of the public to assert their right of way over the disputed strip of land and for removal of an encroachment therefrom, in which case no doubt S. 23 might appropriately be held to be applicable. As Mr. Das himself admits this is a suit by the Union Board for possession, and it could, therefore, come only under Art. 146A, or under Art. 142 or 144. On the facts of the case, however, as already pointed out, none of these articles could be invoked by the plaintiff in support of the suit. The result is that in our opinion the suit must be held to be barred by limitation. The appeal is accordingly allowed, and the judgments and decrees of the Courts below are hereby set aside. The defendant is entitled to his costs in all the Courts.

B. K. Mukherjea J. — I agree.

G.N./R.K. *Appeal allowed.*

Lim. Act —
('42) Chitaley, Art. 146A N. 5 Pts. 1, 2.

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EDGLEY AND BISWAS JJ.

Saradindu Mukherjee

v.

Jahar Lall Agarwalla.

Appeal No. 254 of 1935, Decided on 17th June 1941, from original decree of Addl. Sub-Judge, 1st Court, 24-Parganas, D/- 29th July 1935.

(a) Practice—Appeal — Preliminary and final decrees passed—Appeal from preliminary decree —Appellate Court can give necessary and consequential directions regarding final decree.

When no appeal is preferred against the final decree and only the preliminary decree is appealed against but a copy of the final decree has been placed on the record of the appeal it is the duty of the appellate Court in dealing with the appeal to give necessary and consequential directions regarding the final decree : ('29) 16 A. I. R. 1929 Cal. 689 (F. B.), *Foll.* [P 155c]

(b) Transfer of Property Act (1882, as amended by Act 20 of 1929), S. 67 (a) — Suit to enforce English mortgage falls under Art. 132 and not Art. 147, Limitation Act.

A suit to enforce an English mortgage not being a suit "for foreclosure or sale" but being one for sale only is governed by Article 132 and not by Art. 147, Limitation Act : 30 Mad. 426 (P. C.), *Ref.* [P 158f]

(c) Transfer of Property Act (1882, as amended by Act 20 of 1929), S. 67 (a)—English mortgage executed prior to 1st April 1930 is governed by Art. 147, Limitation Act.

The effect of S. 31 (c), read with S. 63 of the Amending Act, is that so far as English mortgages executed prior to 1st April 1930, are concerned, they must be deemed to be outside the scope of the amendment made by substitution of the new cl. (a) in S. 67, T. P. Act, and consequently a suit to enforce such mortgage is governed by Article 147, Limitation Act. [P 159a]

(d) Mortgage—Mortgagee of undivided share of one cosharer — Rights of — Partition among cosharers — Mortgagee's security is limited to divided share of mortgagor—But partition must be fair and proper — Onus.

A mortgagee of an undivided share of one cosharer takes the security subject to the right of the other cosharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. The mortgagee, however, can neither compel a partition, nor claim to be a party to the partition proceedings as of right. All the same, after partition his security will be upon the divided share or separate allotment of his mortgagor and he can have no recourse against the parcels allotted to the other cosharers with whom he has no privity of contract, but must pursue his remedy only against the properties that may be allotted to the mortgagor. In order, however, that the mortgagee may be so bound, it is a fundamental condition that the partition must be a fair and proper one. Merely because the original security was in respect of an undivided share, it does not follow that the mortgagee should be held bound by a partition to which he was not a party, even where it was shown that such share had not received a proper allotment and the partition was the result of a collusive or fraudulent arrangement between the mortgagor and his cosharers to the prejudice of the mortgagee. [P 160a,b,c,d]

In such a case the mortgage is enforceable against the proportionate share of the mortgagor in every item of property specified in the mortgage deed whether such property is in the hands of the mortgagor's transferee or of any transferee from him : 1 I. A. 106 (P. C.), *Rel. on.* [P 163d,e]

The burden to prove that the partition was fair and equal lies upon the person relying upon the partition. [P 160e]

(e) Civil P. C. (1908), O. 6, R. 17—Mere delay in applying for amendment is no ground for refusing it — Mortgage of half undivided share —Transferee from other cosharer getting share defined by partition — Suit by mortgagee — Transferee defendant pleading that mortgage did not affect his share and plaintiff could proceed against properties allotted to other share —Suit decreed against defendant ex parte but restored on agreement—After restoration defendant in additional written statement raising new plea of subrogation by virtue of payment of certain prior mortgages — Plea held involved obvious injustice to other party — At stage and in circumstances in which plea was raised amendment held rightly rejected.

Mere delay in applying for amendment is no ground for refusing the application, in so far as it may be compensated for by the award of costs, which is the one panacea which heals every sore in litigation: (1884) 26 Ch.D. 700, *Rel.on.* [P 164*d*, *e*]

The mortgagor executed a mortgage in respect of his half undivided share in certain properties. Subsequently his cosharer transferred his share to a third person. The transferee got his share defined by a partition suit. In the suit by mortgagee to enforce his mortgage, the transferee defendant pleaded in his written statement which was filed on 2nd November 1933, that he was not bound or affected in any way by the plaintiff's mortgage and accepted the position that the plaintiff could proceed against the properties allotted to the share of the other cosharer mortgagor. The suit was decreed against the defendant ex parte but by consent of parties, the decree was set aside. After restoration the defendant filed an additional written statement on 29th April 1935, in which he tried in effect to raise by way of amendment a new plea of subrogation by virtue of payment of certain prior mortgages (two of which were in his favour) which were within his knowledge throughout and claimed that the plaintiff could not get a decree on his mortgage without redeeming the said prior charges by payment to him. The additional written statement was rejected by the trial Court :

Held that the case was not one of mere delay. The raising of the new plea involved obvious injustice to the other party, as it threw on the plaintiff an additional burden the effect of which would be to defeat the whole of the plaintiff's claim. Consequently, at the stage and in the circumstances the additional written statement was put in, the Court was fully justified in rejecting it: (1880) 16 Ch.D. 440, *Ref.* [P 163*g*, *h*; P 164*c*]

(f) Mortgage—Subrogation—Plea of—Averments in pleading held insufficient to found plea of subrogation.

A transferee from the mortgagor who claims the right of subrogation against the plaintiff mortgagee by virtue of payment of certain prior mortgages must show that the mortgagor in the prior mortgages was the mortgagor of the plaintiff and that the properties mortgaged were the same and that the payment had been made by or on behalf of himself. [P 164*g*, *h*]

[The averments in the pleadings were held not sufficient to found a plea of subrogation.] [P 164*g*]

(g) Government of India Act (1935), S. 205—Counsel challenging certain provisions of Bengal Money-lenders Act, but not arguing point in view of Special Bench decision to contrary —Court can record objection to enable counsel to obtain certificate under S. 205 for appeal to Federal Court.

The counsel in the appeal before the High Court challenged the validity of certain provisions of the Bengal Money-lenders Act but in view of the Special Bench decision of the Calcutta High Court to the contrary did not argue the point but merely desired the Court to put on record his particular objection to entitle him to a certificate under S. 205 for the purpose of an appeal to the Federal Court :

Held that the objection should be put on record as requested by the counsel. [P 165*c*]

(h) Bengal Money-lenders Act (10 of 1940), S. 2 (2)—Word "borrower" in S. 2 (2)—Scope — Purchaser of mortgagor's interest is borrower.

A purchaser of the mortgagor's interest vis a vis the mortgagee comes within the definition of a 'borrower' given in S. 2 (2), which includes a successor-in-interest of his original borrower: ('41) 28 A.I.R. 1941 Cal. 484, *Foll.* [P 165*d*]

(i) Bengal Money-lenders Act (10 of 1940), S. 2 (2) — Transferee of undivided share of mortgagor's cosharer holding properties in severalty after partition liable for mortgage debt is entitled to benefit of Act.

Under the Bengal Money-lenders Act, it is open even to a person who was not a "borrower" to show to what extent a "borrower" was liable, if thereby he could obtain any relief. The transferee of the undivided share of the mortgagor's cosharer who by virtue of partition subsequent to the mortgage holds certain properties in severalty which are found liable to be proceeded with by reason of the partition having been unfair is entitled to the benefits of the Act. [P 165*e*, *f*]

(j) Bengal Money-lenders Act (10 of 1940), S. 36 (6) (a) and (b), S. 36 (1), Proviso 2 and S. 2 (22) and (21) — Suit instituted before 1st January 1939 — Decree in suit not satisfied by 1st January 1939—Act applies.

The scheme of the Act is no doubt primarily to give relief in suits instituted on or after 1st January 1939 but at the same time, suits instituted before 1st January 1939 are definitely not excluded, as the definition itself shows. The latter category of suits comes within the description of suits "pending on that date," the word "pending" being for this purpose given an extended meaning so as not to be limited to suits in which no decrees have been passed, but also to include suits in which decrees have been already obtained, provided that such decrees were not fully satisfied by 1st January 1939: ('42) 29 A.I.R. 1942 Cal. 121, *Rel. on.* [P 166*f*, *g*]

(k) Bengal Money-lenders Act (10 of 1940), S. 2 (21) and (22)—Suit filed before 1st January 1939 — Appeal pending on 1st January 1939 — Act applies.

Since under S. 2 (21) a suit includes an appeal, the Act applies to a suit filed before 1st January 1939, in which a decree was passed but an appeal therefrom was pending on 1st January 1939. [P 166*h*]

(l) Bengal Money-lenders Act (10 of 1940), Ss. 34 and 36 (2) (a)—Appeal from preliminary decree — Appellate Court finally making preliminary decree — S. 34 applies — No question of re-opening decree and passing new decree arises.

Where in an appeal from the preliminary decree the appellate Court is finally making the preliminary decree in the suit, the provisions of S. 34 apply, and the decree must be made in accordance therewith. There can be no question in such case of 're-opening' a decree, and passing a "new decree in accordance with the provisions of this Act," as contemplated by S. 36 (2) (a), but relief can be given under S. 36 (1) (c). [P 167*a*,*b*]

Atul Chandra Gupta, Rajendra Bhusan Bakshi and Amal Kumar Mookerjee — for Appellant.

Amarendra Nath Bose and Pramatha Nath Mitra; Gopendra Nath Das; Jnan Chandra Roy and Anil Chandra Dutt; and Nani Bhusan Mukherjee — for Respondents 1, 5, 4 and 6, respectively.

Biswas J. — This is an appeal on behalf of defendant 3, and arises out of a suit which was commenced by the plaintiff to enforce two English mortgages which had been executed in his favour on 20th May and 29th September 1919. There were five defendants in the suit, and a preliminary decree for foreclosure was made against them all by the First Additional Subordinate Judge of 24-Parganas on 29th July 1935. The present appeal is directed against this decree. Since this appeal was presented, the final decree was passed on 23rd November 1938, whereby the defendants and all persons claiming through them were absolutely debarred of their right to redeem the mortgaged properties. No appeal has been preferred against this final decree, but a copy has been placed on the records of this appeal, and following the procedure laid down by the Full Bench in 57 Cal. 1013,[1] it should be the duty of this Court in dealing with the present appeal to give necessary and consequential directions regarding the final decree.

The facts giving rise to this litigation are as follows : On 30th September 1906, one Mohendra Nath Das, a wealthy Hindu governed by the Dayabhaga school, died leaving a will, executed a few years before his death, whereby he had endowed all his properties, moveable and immovable, for the worship of a family deity called Sri Sri Iswar Mahadeb or Shib Thakur. The will was in due course admitted to probate by the executors. Shortly thereafter, on 27th March 1909, a nephew (brother's son) of the testator, named Charu Chandra Das, commenced a suit (Suit No. 313 of 1909) against the executors on the original side of this Court, in which he claimed that the properties left by Mohendra were joint properties and that he had inherited an eight anna share in the same. He accordingly asked for a declaration of his title and for partition. On 12th June 1912, a preliminary decree was passed in the suit, declaring Charu's title to a half share as claimed, and directing a partition by metes and bounds. No steps, however, were taken by Charu to enforce a partition under the decree. It was while the properties still remained joint that the executors of Mohendra's estate effected the present mortgages in favour of the plaintiff, the first on 20th May 1919 and the second, a deed of further charge, on 29th September following. The security offered was the testator's declared undivided share in the properties left by him, which comprised some lands at Belur and Ultadinghi and two brick-built houses in Calcutta, namely 5, Padma Nath Lane and 88, Beadon Street. The principal amounts secured by the two mortgages were Rs. 3500 and Rs. 2500 respectively, carrying interest at the rate of 12 per cent. per annum compound with quarterly rests, and the due date fixed for the repayment of the loans was 20th May 1920. Meanwhile, Charu had got heavily involved in debts, both secured and unsecured and on 1st September 1919, on the petition of a creditor, he was adjudicated an insolvent by an order of this Court in its insolvency jurisdiction. The result was that his properties, being the undivided eight anna share decreed to him in the partition suit, vested in the Official Assignee. The Official Assignee in due course advertised the said share for sale for payment of the insolvent's debts, and this attracted defendant 3, Saradindu Mookerjee, as an intending purchaser.

It is stated on behalf of Saradindu that he had dealings from before with Charu as well as with the executors of Mohendra's estate, but whether that is a fact or not, it appears that on 4th August 1920, he did enter into an agreement with the Official Assignee, to which both Charu and the executors were made parties. The terms of this agreement, which really constitutes the foundation of Saradindu's claim in this suit, will have to be examined later, but it will be sufficient to state at this stage that Saradindu thereby agreed to purchase Charu's undivided interest in the properties which the Official Assignee had offered for sale, subject to payment of all his debts which had been secured thereon, and Saradindu also undertook to pay off all the secured debts of Mohendra's estate, on condition that Charu and the executors of Mohendra should "carry out" the decree for partition, and upon such partition, allot to Saradindu "sufficient properties" out

1. ('29) 16 A.I.R. 1929 Cal. 689 : 123 I.C. 305 : 57 Cal. 1013 : 50 C. L. J. 566 : 34 C.W.N. 66 (F.B.), Talebali v. Abdul Aziz.

of the joint estate which would enable him by sale thereof to discharge all the secured liabilities in both shares.

Whether by such allotment Saradindu was to acquire any interest in any properties out of Mohendra's share is by no means clear, for the agreement expressly provided that the allotment was to be made to him as assignee of Charu's interest and in lieu thereof : it further provided that out of the properties to be so allotted, if any were not required to be sold, Saradindu was to make over the same, together with any balance of the sale proceeds that might be left in his hands, to Charu and the executors to be held by them in certain shares. This might be supposed to imply that in respect of the properties which were to be allotted to Saradindu on 'carrying out' the partition, he was merely to be the agent of the parties for selling the same, and not to acquire any beneficial interest therein for himself. Such a view would no doubt be difficult to reconcile, so far at any rate as Charu's share was concerned, with the clear provision in the agreement for an out and out assignment of the said share to Saradindu. At the same time, it is not easy to see how under cover of an assignment, and in lieu, merely of Charu's interest, Saradindu could claim to be entitled on partition to any properties in excess of Charu's legitimate share. And yet this must doubtless have been the intention of the provision regarding the allotment of "sufficient properties" to Saradindu out of the joint estate. The "sufficient properties" could only come out of the moiety properly assignable to Mohendra's share.

Be that as it may, the fact remains that an indenture of agreement was executed in these terms on 4th August 1920, and the parties to the transaction as stated were (1) the Official Assignee, first party, (2) the executors of Mohendra's estate, second party, (3) the insolvent Charu, third party, and (4) Saradindu Mookerjee, fourth party. On 31st August following there was a conveyance (EX. 3) executed by and between the same parties in terms of the agreement, which terms in fact were fully recited therein. As between the Official Assignee and Charu on the one hand and Saradindu on the other, it purported to be a conveyance to the latter of all the right, title and interest of Charu in the joint estate, while as between the executors, Charu and Saradindu, it merely contained reciprocal covenants by these parties for the performance of their respective parts of the agreement. The consideration for the conveyance was stated to be Rs. 29,000, which was the total amount of Charu's unsecured debts, and it was presumably the idea that the Official Assignee would pay off these debts with this sum.

It appears that on 5th October 1921, before any steps were taken to effect a separate allotment of the properties as contemplated by the agreement and the conveyance, Saradindu, Charu and the executors jointly executed a mortgage (EX. 1 (b)) in respect of the 16 annas share of these properties in favour of one Suresh Chandra Chowdhury for a sum of Rs. 2,10,000, Saradindu describing himself therein as purchaser of the equity of redemption of Charu from the Official Assignee. It was stated that the purpose of the loan was to clear off the incumbrances on the properties which were offered as security. It was not until 19th November 1925, that Saradindu applied in Charu's partition suit (Suit No. 313 of 1909) to be substituted in his place for the purpose of carrying out the decree passed in that suit, claiming to do so as purchaser of Charu's right, title and interest. In his application he recited the agreement of 4th August 1920, and the conveyance of 31st August following, and also recited the preliminary decree for partition which had expressly directed a division of the properties into two equal parts or shares as between Charu and the executors of Mohendra's estate, and he specifically asked for the appointment of a commissioner for making a partition in terms of the said decree and allotting to him "the share which was of the said Charu Chandra Das in the joint properties." On 26th November 1925 an order for substitution was made and a writ of commission issued as asked for. The direction in the writ was for a division into two equal parts or shares, one to be allotted to Saradindu and the other to the executors.

From the report of the Commissioner which he submitted on 6th July 1928 it appears however that though he had caused the properties to be valued by a competent surveyor and valuer, and the valuations were accepted by the parties, he nevertheless made the division, not into two equal halves, but according to an agreement arrived at between the parties, admittedly an unequal division, the Commissioner himself stating that properties of greater value were being allotted to Saradindu. In fact, only one of the Calcutta properties namely 5 Padma Nath Lane, was assigned to Mohendra's estate, while all the remaining properties including the Belur and Ultadinghi

lands and premises No. 88, Beadon Street were allotted to Saradindu. Suresh Chandra Chowdhury, the mortgagee of the joint properties, was not a party to the partition proceedings: all the same, the Commissioner directed in his report that the properties given to Saradindu would only remain charged with payment of the sum due to Suresh under the mortgage, which the Commissioner put down as Rs. 2,10,000. It was stated that this sum included debts which had been incurred by the executors of Mohendra's estate, amounting to Rs. 90,000 and the executors, apparently for this reason, were declared entitled to hold the properties allotted to them free from all incumbrances. On the application of Saradindu, the Commissioner's report was in due course confirmed by the High Court and the final decree for partition passed in terms thereof on 12th September 1928 (Ex. D). Saradindu thereafter assumed to hold the properties allotted to him in absolute right, subject of course to the mortgage in favour of Suresh Chandra Chowdhury. On 27th June 1930 he purported to sell some of the properties to the Ramkrishna Mission for a sum of rupees 40,000 having by an indenture of the same date (Ex. A) obtained from Suresh a release and re-conveyance of these properties on payment of Rs. 38,000 out of the sale proceeds in part satisfaction of the mortgage debt. A consent order was afterwards made on 19th December 1933, Ex. 8 (a) in Suresh's mortgage suit (Suit No. 588 of 1924), adjusting the decree passed in that suit between him and Saradindu, whereby the whole amount due was settled for the sum of Rs. 2,10,000 out of which Rs. 50,500 was made payable by Saradindu immediately, and the balance in certain instalments extending to 15th April 1941 and Suresh in return re-conveyed and re-transferred to Saradindu all the mortgaged properties which still remained unsold, Saradindu undertaking not to deal with or dispose of these properties before the mortgagee's claim under the settlement was fully satisfied.

In this state of things, on 17th July 1933 the present plaintiff, Jaharlal Agarwalla, commenced the suit out of which this appeal arises, to enforce the two mortgages which, as already stated, had been executed in his favour on 20th May and 29th September 1919 by the executors of Mohendra's estate. The original mortgagors were not parties to the suit, but, in their place, the plaintiff impleaded the idol, Sri Sri Shib Thakur, as the beneficiary under the testator's will, and Charu as shebait of the idol and also as Mohendra's sole surviving natural heir. They are defendants 1 and 2 respectively, and it is not disputed that between them they fully represent the estate of Mohendra. Charu having died since the passing of the decree by the Court below, his heirs who are also the present shebaits have been duly brought on the records of this appeal as respondents. There were three other defendants in the suit, whom the plaintiff joined as parties as "subsequent transferees," namely, Saradindu Mookerjee (defendant 3), Suresh Chandra Chowdhury (defendant 4) and the Ramkrishna Mission (defendant 5), the last named defendant being a society registered under Act 21 of 1860. The mortgages in suit being English mortgages, the plaintiff asked for a decree for foreclosure, and in the alternative, for sale of the mortgaged properties. In his plaint he referred to the agreement of 4th August 1920 as well as to the conveyance of 31st August of that year, but did not seek to enforce any liability against Saradindu on the basis thereof. On the other hand he claimed that notwithstanding the agreement, he was entitled to realise his security in terms of the mortgage deeds, and accordingly asked for a decree against the mortgagors' half share in each of the several items of properties comprised in the deeds. As regards the allotment made in favour of Saradindu in the partition suit, the plaintiff expressly challenged it as "unfair," "inequitable" and "collusive."

The suit was not contested on behalf of the mortgagors, nor on behalf of Suresh Chandra Chowdhury though the latter had entered appearance. The Ramkrishna Mission resisted the claim as regards the properties which they had purchased from Saradindu. The main opposition, however, came from Saradindu, who raised inter alia the bar of limitation, and further pleaded that by virtue of the proceedings in the partition suit the plaintiff's mortgage lien could attach only to the properties which were allotted in severalty to the mortgagors as representing their undivided interest in the joint estate which they had mortgaged. He stoutly denied all liability in respect of any debts incurred by the executors of Mohendra's estate, and even pretended not to have any knowledge of the agreement of 4th August 1920, though he had to admit that the agreement was set out in the conveyance of 31st August 1920, on which he could not but rely in support of his title. By an additional written statement Saradindu sought to set up a claim of priority over the plaintiff by virtue of certain payments alleged to have

been made out of the consideration money for the mortgage in favour of Suresh Chandra Chowdhury, to satisfy four prior mortgages of the executors, three in favour of Saradindu himself for Rs. 3000, Rs. 2000 and Rs. 1000 respectively, and one in favour of Radha Nath Pal and Kanai Pal for Rs. 22,000. On the objection of the plaintiff, the Court below refused to admit the additional written statement. The Ramkrishna Mission generally supported Saradindu, and further raised the plea of being a bona fide purchaser for value without notice.

The learned additional Subordinate Judge of 24-Parganas who heard the suit overruled all the objections of the defendants, and passed a preliminary decree for foreclosure in the usual terms, but in view of what he considered to be "inordinate delay" on the part of the plaintiff in the institution of the suit, he reduced the amount of interest, and in the result, made a decree for Rs. 15,000 only, including interest up to the date of the decree, and costs. The claim, it may be stated, had been laid at Rs. 26,731-3-9. The Ramkrishna Mission have filed an independent appeal against this decree (F. A. 266 of 1935), which will be separately dealt with.

In support of the present appeal by Saradindu Mr. Atul Chandra Gupta urged four points before us on behalf of his client. The first was on the question of limitation, but it was not seriously pressed till the end. In the trial Court, it seems to have been assumed that the 12 years' rule of limitation applied (Art. 132 of Sch. I, Limitation Act). The suit was instituted on 17th July 1933, which was more than 12 years from the due date of payment under the two mortgages, namely, 20th May 1920, but limitation was sought to be saved by setting up payment of a sum of Rs. 500 as interest on each mortgage on 11th October 1921, which the Court below found in favour of the plaintiff. As to this, Mr. Gupta said that the appellant's answer was two-fold; first, that the alleged payment was not a fact, and secondly, that in any case it was not such a payment as would be sufficient in law to save limitation. Fairly and frankly, however, Mr. Gupta himself suggested that in view of the fact that the mortgages sued upon were English mortgages, the article to be considered was Art. 147, which provides a period of 60 years for a suit "by a mortgagee for foreclosure or sale." It was pointed out that in 34 I.A. 186[2] the Judicial Committee of the Privy Council had authoritatively laid down, on a true construction of this article, not only that it was applicable to English mortgages, but that it was limited in its application only to this class of mortgages, in which alone the suit could be, and always was, "for foreclosure or sale."

The only point therefore, said Mr. Gupta, that was left open for argument was whether by reason of the subsequent alteration of the law by Act 20 of 1929 regarding the remedies open to an English mortgagee, this suit could still be held to come under Art. 147. It would appear that by S. 31 (c) of the said Act, a new cl. (a) was substituted in S. 67, T. P. Act, which took away the right of an English mortgagee to sue for foreclosure, and left him only the remedy to sue for sale. In other words, a suit to enforce an English mortgage could no longer be a suit "for foreclosure or sale" within the meaning of Art. 147, as interpreted by the Judicial Committee. There could be no doubt therefore that as a result of the amendment such a suit was to be governed by Art. 132, and not Art. 147. All the same, the question arose how far this would affect the present suit, seeing that the mortgages sued upon had been executed before the date on which the amending Act came into force, namely, 1st April 1930, though the suit was instituted after that date. Mr. Gupta himself drew attention in this connexion to the saving clause enacted in S. 63 of the Act, but contended that it contained no provision regarding limitation, and that consequently the period of limitation would be determined not by Art. 147, but by Art. 132 which was in force at the date the suit was brought. A closer examination of the terms of S. 63, however, revealed to Mr. Gupta the futility of this argument. It could not be questioned that in respect of the mortgages now in suit, a right to sue "for foreclosure or sale" had already accrued before 1st April 1930, under the law as it stood before the amendment made by S. 31 (c) of the Act, and one had only to refer to the terms of cls. (c) and (d) of S. 63 to see that not only was such right expressly saved, notwithstanding the amendment, but that the amendment was not to affect in any way any remedy or proceeding in respect of such right, which might in fact be enforced or instituted as if the amending Act had not been passed. It seems to be wholly immaterial that no specific provision was made to save the operation of any particular article of the Limitation Act.

In our opinion, the effect of S. 31 (c), read

2. ('07) 30 Mad. 426 : 34 I. A. 186 : 17 M.L.J. 444 (P.C.), Vasudeva Mudaliar v. Srinivasa Pillai.

with S. 63 of Act 20 of 1929 is that so far as English mortgages executed prior to 1st April 1930, are concerned, they must be deemed to be outside the scope of the amendment made by substitution of the new cl. (a) in S. 67, T. P. Act. This being so, it would be wrong to hold that though the remedy of a suit "for foreclosure or sale" is still left open, Art. 147, Limitation Act, must nevertheless be deemed to be abrogated in respect of such a mortgage. This article has been neither repealed nor altered, and there is no reason, therefore, why it should not be held to operate in cases to which it might still be in terms applicable. In this connexion Mr. Gupta sought to make a further point by referring to a special saving provision which was enacted by the Legislature in S. 15 (2) of Act 21 of 1929 in connexion with an amendment of Art. 132, Limitation Act, made by S. 9 of that Act. By the amendment a new clause was added in Art. 132 to the effect that a suit on a mortgage by deposit of title deeds should be governed by this article, so that the period of limitation for such a suit should be 12 years only. The Bombay High Court had held previously that such a suit stood on the same footing as an English mortgage, in which case the limitation would necessarily be 60 years under Art. 147. There can be no doubt that the object of the amendment was to override this Bombay ruling. The Legislature apparently thought that this amendment required some express provision to be made in order that suits which had hitherto been believed to be subject to the 60 years' rule might not be suddenly found barred by limitation, and it is said that this led them to enact S. 15 (2), by which it was provided that notwithstanding anything contained in S. 9, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title deeds might be instituted within two years from the date of commencement of the Act, or within 60 years from the due date of payment, whichever period expired first, and provision was also made for the saving of pending suits already instituted under the 60 years' rule.

Mr. Gupta stressed the fact that no such saving provision had been enacted with reference to the amendment introduced by S. 31 (c) of Act 20 of 1929, and as the effect of the amendment undoubtedly was to take away an English mortgage from the scope of Art. 147, Limitation Act, and bring it under Art. 132, the argument was that in the absence of such a saving provision it must be assumed that the Legislature contemplated that Art. 132, and not Art. 147, should apply to such mortgages executed before the commencement of the amending Act. The argument seems to be wholly unconvincing. In the first place, it takes no account of the terms of cls. (c) and (d) of S. 63 of Act 20 of 1929, which, as shown above, unmistakably save the right to sue for foreclosure or sale in respect of such mortgages. Secondly, as regards mortgages by deposit of title deeds, which were dealt with by the amendment under S. 9 of Act 21 of 1929, it will be seen that so far as it was intended to save the operation of Art. 147 in the case of such mortgages executed before 1st April 1930 of course on the interpretation that they stood on the same footing as English mortgages, the saving was effected not by S. 15(2), but by the provisions of S. 15(1), which in fact contained almost exactly similar clauses to cls. (c) and (d) of S. 63 of Act 20 of 1929. As a saving provision, S. 15(2) was both useless and unnecessary: its real effect was to abridge the period of limitation under Art. 147 from 60 years to 2 years from the date of the Act for this class of mortgages, on the basis that this article applied. It was only if the Legislature had intended similarly to cut down the period under Art. 147 in its application to English mortgages that a provision like S. 15 (2) would have been really necessary in regard to such mortgages.

The first point taken by Mr. Gupta on the ground of limitation must consequently fail. The suit must be held to be governed by Art. 147, Limitation Act, and not by Art. 132. In that view of the matter, it becomes unnecessary to consider whether there was any payment of interest as alleged by the plaintiff which prevented time from running. Mr. Gupta's next point on behalf of the appellants was that the plaintiff having taken a mortgage only of an undivided share in certain properties and there having been a subsequent partition between the mortgagors and their cosharer, the mortgage could be enforced only against the properties which fell to the share of the mortgagors as a result of such partition. In other words, it was urged that in the events which had happened, the plaintiff was limited as regards his remedy only to premises No. 5, Padma Nath Lane, that being the property which had been exclusively allotted to the estate of Mohendra Nath Das under the final partition decree (Ex. D) in Charu's partition suit No. 313 of 1909. Mr. Gupta was in fact invoking the principle which had been laid down by the Judicial Committee of the Privy

Council in the well-known case in 1 I.A. 106.[3] That raises the question as to whether the conditions necessary for the application of this principle have been shown to exist in the present case.

It need not be disputed that a mortgagee of an undivided share of one cosharer takes the security subject to the right of the other cosharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. The mortgagee however can neither compel a partition, nor claim to be a party to the partition proceedings as of right. All the same, 1 I.A. 106[3] is certainly authority for holding that after partition, his security will be upon the divided share or separate allotment of his mortgagor. In other words, he can have no recourse against the parcels allotted to the other cosharers with whom he has no privity of contract, but must pursue his remedy only against the properties that may be allotted to the mortgagor. In order however that the mortgagee may be so bound, it is a fundamental condition that the partition must be a fair and proper one, and that in fact is the underlying assumption in the judgment of their Lordships in the Privy Council case. Having taken a mortgage of an undivided share, the mortgagee could not of course complain, if, as a result of the partition which he could not resist, he was required to accept a substituted security in the shape of what was allotted in severalty to his mortgagor, but then the substituted security had to be a fair equivalent of the original fairly obtained. Merely because the original security was in respect of an undivided share, it did not follow that the mortgagee should be held bound by a partition to which he was not a party, even where it was shown that such share had not received a proper allotment and the partition was the result of a collusive or fraudulent arrangement between the mortgagor and his cosharers to the prejudice of the mortgagee. So to hold would be manifestly contrary to all legal principle, and 1 I.A. 106[3] most decidedly did not lend support to any such inequitable doctrine.

In fairness to Mr. Gupta it must be said that he did not contend for any such doctrine either. On the other hand, he conceded that he could succeed only if the partition on which his client relied was a fair and equal one, but he maintained that the only test of fairness or equality was to see whether or not the security of the substituted property allotted to the mortgagor was sufficient or not. He drew attention in this connexion to the terms of the final partition decree (Ex. D) and the award of the Commissioner of partition on the basis of which the decree was passed, and also referred to an entry in the Corporation Assessment Book (Ex. C) which showed the annual valuation of Premises No. 5, Padma Nath Lane as Rs. 779. Mr. Gupta could not deny that the burden of proof in this matter lay entirely on his client. In any case, it was for defendant 3 as appellant to displace the finding of the learned Subordinate Judge on this point, which was to the effect that the partition was such an "iniquitous and irrational adjustment of properties" that by no stretch of imagination could it be held to affect the right, title and interest of a prior mortgagee in the position of the plaintiff. In our opinion, the appellant has wholly failed to establish this part of his case.

Let us see how the matter stands. From the narrative of facts already set out at some length, it will have appeared that by his conveyance (Ex. 3) Saradindu purported to buy only Charu's eight annas interest in the properties, and yet by the terms of the agreement of 4th August 1920, which was incorporated in the conveyance, he had stipulated for an allotment to him of "sufficient properties" out of the joint estate, which in plain language could only mean the annexation of properties from the other moiety. It is said that the consideration for this was Saradindu's undertaking to pay off the secured liabilities in both shares, and Mr. Gupta asked us to hold that this undertaking had been duly implemented by his client, in so far as he made himself liable for the sum of Rs. 2,10,000 which was raised on mortgage from Suresh Chandra Chowdhury. As to this it is perhaps relevant to call attention to a few facts as showing the attitude which Saradindu himself took up in the matter. In his written statement (para. 11), Saradindu indeed took the plea, disingenuous as it was, that he was "not aware of any deed of agreement executed on 4th August 1920," no doubt qualifying the statement by adding "excepting what has been set out in the deed of conveyance itself," and he definitely asserted that he was "not bound by the terms of the said alleged agreement." In his examination-in-chief also he stated explicitly that he "did not undertake to pay up the debts due to the secured creditors of Charu

3. ('74) 1 I. A. 106 : 21 W. R. 233 : 3 Sar 333 : 2 Suther 942 (P. C.), Byjnath Lall v. Ramoodeen Chowdry.

Das and Mohendra Das," though in cross-examination, in trying to explain his conveyance, he could not help contradicting himself by saying that he "took personal responsibility with the executors and Charu" for paying up these debts. In any case, he maintained that the present plaintiff was not entitled to "get any advantages" out of the agreement (para. 12), and further, pleaded complete ignorance of the plaintiff's mortgages (para. 21), making the same case also in his evidence. So far as the present plaintiff was concerned, Saradindu in fact showed little disposition on his part either to admit or to honour any such undertaking as was referred to by his learned advocate.

Even if one was to put aside these denials and evasions in Saradindu's pleading or evidence, and look into the documents which were supposed to create his right to an excess allotment on partition with the executors of Mohendra's estate, it would be seen that though the ostensible consideration for this was stated to be his willingness to accept liability for the secured debts of the executors, neither the agreement nor the conveyance contained any statement of the amount of such debts or any particulars thereof. There was only a statement as regards the total liability in Charu's share. It seems, however, only fair to hold that if there was a real intention on Saradindu's part to make himself answerable for the debts of Mohendra's estate, there should have been a clearer specification of the debts in the documents, and he would not have bound himself to take over an undefined or unascertained liability. It is also reasonable to suppose that in that case Saradindu would not have been content with anything short of a direct assignment of a share of Mohendra's estate from the executors. As it is, there is little reason to doubt that the transactions were not merely of a speculative character, as the learned Judge in the Court below seemed to think, but something more, namely, a device, though ill-conceived, to get hold of the properties in Mohendra's share under a cloak of seeming fairness. The device was clumsy too, in that the properties were to be transferred to Saradindu only as assignee of the other share.

We need not pause to consider the effect of the further recital in the agreement which seemed to suggest that the allotment of "sufficient properties" to Saradindu was only to enable him by the sale of such properties to pay off the secured debts in both shares, besides, it may be added, paying himself back the sum of Rs. 29,000 which he was to advance to the Official Assignee as consideration for the conveyance. This would doubtless mean that Saradindu was not to acquire any beneficial interest in the properties which were to be allotted to him, whether from Mohendra's or from Charu's share, and such a meaning in fact seemed to receive support from the last clause in the deed, which provided that if any balance remained in his hands after the sale or any properties were not required to be sold, he was to make them over to Charu and the executors of Mohendra's estate. If the ostensible was the real meaning, it would of course strike at the very root of Saradindu's title, and for this, if not for any other reason, it is easy to understand why he should have been so anxious to disavow the agreement. All things considered, we have therefore no hesitation in holding that the agreement was not a bona fide transaction at all, in so far at any rate as it intended a transfer of any properties out of Mohendra's share to Saradindu. If then the conveyance was left to operate apart from and without the agreement, as Saradindu himself would seem to have contended for in his written statement, it could be effective only as an assignment of the right, title and interest of Charu, and there could be no question of Saradindu's acquiring any interest in Mohendra's share.

Nothing is gained by referring to the mortgage deed which was afterwards executed in favour of Suresh Chandra Chowdhury. All that was recited in it was that a loan of Rs. 2,10,000 was being raised on the security of the properties mentioned in the document "for the purpose of clearing off incumbrances affecting (the) same," but without any statement as to the extent of such incumbrances or of the respective liabilities of the several parties thereunder. The mortgage on the face of it purported to be free of all incumbrances. Saradindu's statement in his evidence is that at the time of the mortgage he knew the amount of the secured debts in the share of Mohendra's executors, and both he and the mortgagee were satisfied that "sufficient margin" would be left after paying off the dues of all the creditors. Saradindu has shown himself to be such an unreliable witness that no importance can be attached to his statements. In any case, the fact remains that the mortgage was not executed by Saradindu alone, but was a joint mortgage by the executors as well as by Saradindu and Charu, and it was executed by Saradindu on his part as

a purchaser of Charu's interest only. Saradindu could not obviously therefore affect thereby any interest other than Charu's and it would not be reasonable to hold that by executing this mortgage he was accepting an obligation to repay any debts other than Charu's out of his share of the mortgage money.

It is significant that when Saradindu afterwards applied to be substituted in Charu's place in the partition suit and prayed for the appointment of a Commissioner of Partition, he annexed to his application copies of both the agreement and the conveyance, and yet he did not ask for allotment to him of "sufficient properties" out of the joint b estate. His prayer was only for an order that the Commissioner should be directed to make a partition in terms of the preliminary decree, and not of the agreement or the conveyance, that is to say, a division into "two equal parts or shares" and allotment of one such "equal half part or share" to either of the two parties. This might imply either that Saradindu was no longer minded to rely on the agreement, or that he could not justify its terms to himself. The first alternative is ruled out by the actual sequel which will be presently referred to, and the second therefore seems to be the more pro- c bable explanation. Whatever the reason, judging from his application to the Court, Saradindu did not at this stage appear to be claiming, upon partition, anything more than was properly attributable to Charu's moiety share: in other words, to all outward appearances, he seems to have adopted a perfectly correct interpretation of his rights as a purchaser of Charu's right, title and interest. In fact he did not care to raise any complications due to any supposed undertaking on his part to liquidate the secured debts of Mohendra's estate.

Turning now to the actual partition proceedings, it is not necessary to do more than d refer to the return of the Commissioner of partition which was made a part of the final decree. Mr. Gupta would rely on it to prove the fairness of the partition, but could not deny that on the face of it, it showed that the Commissioner made an unequal division, and this he did, in spite of the fact, as the Commissioner himself recites in his report, that both the preliminary decree and the writ of commission had expressly directed a division into two equal halves. It was stated that the parties had agreed that the Commissioner should divide the properties into two parts as specified by them, and that he should make his award on an agreed basis, which he accordingly did. In e our opinion, this one fact is sufficient to preclude any presumption of fairness that might otherwise be supposed to attach to a partition carried out under the directions of the Court. The partition here outwardly bore the imprimatur of the Court, but it was in truth and substance the result of a private arrangement. And what was the arrangement? Unquestionably, it was no more than giving effect to the agreement of 4th August 1920, for the allotment of "sufficient properties" out of the joint estate to Saradindu, though Saradindu, as we have seen, had not ventured to ask for an order from the Court in terms of this agreement. Whether this f amounted to practising a fraud on the Court need not be considered, but there can be little doubt that the partition as effected, seemingly under the auspices of the Court, was in fraud of the rights of parties like the present plaintiff who might already have acquired an interest in Mohendra's undivided share.

All that Mr. Gupta was in a position to point out from the Commissioner's award was that the total valuation of the properties which were divided was Rs. 2,14,187, and that Saradindu's allotment was charged with the payment of a sum of Rs. 2,10,000 g which was stated to be due to Suresh Chandra Chowdhury under the mortgage of 5th October 1921, besides which Saradindu was directed to pay a further sum of Rs. 4171-8-0 as owelty to the estate of Mohendra. These figures, however, lead to such an obviously absurd result that it seems impossible to place any reliance on them as a test of fairness of the partition effected. Saradindu would really be saddled thereby with a liability in his share for an amount practically equal to the total value of the properties allotted in severalty to both shares. It is hard to believe that Saradindu would willingly accept such a position. If the agree- h ment of 4th August 1920, was out of the way, as Saradindu himself would like to have it, there would indeed be no reason why at this stage, by a voluntary arrangement, he should take on himself a liability which was not properly his, and in the result, submit to what might be described as an onerous partition. On a consideration of all the attendant facts and circumstances, the conclusion seems to be irresistible that the whole scheme and design was to give the award a misleading appearance of fairness, knowing it to be unfair. The award, it will be seen, gives no separate valuations of the different items of

properties under partition, and even as regards the total valuation, there is nothing to show that it represented the market value, and not merely a valuation for the purposes of the partition. The statement that the valuations had been considered by the parties at several meetings and duly accepted by them carries no assurance whatever.

There is also no independent evidence forthcoming in the present suit from which it might be possible to check the fairness of the partition, apart from the Commissioner's award which represented nothing more than the interested statements of the parties. The least that the contesting defendants could do, if they wanted to uphold the partition against stranger mortgagees of an undivided share, was to have put the Commissioner of partition as well as the surveyor who had valued the properties into the box, and also to have produced full details of the valuations of all the properties. There should further have been evidence to show what was the total amount due to Suresh Chandra Chowdhury under his mortgage, or what enquiries had been made to ascertain the creditors of either share of the estate or the extent of their claims. The only piece of evidence which Mr. Gupta was able to refer to was the extract from the Corporation Assessment Book, which showed the annual valuation of premises No. 5, Padma Nath Lane, the only property allotted to Mohendra's estate, as Rs. 779. We were asked to deduce from this the market value of the property, and to hold that it was sufficient security for the plaintiff's claim, but we find ourselves wholly unable to accept the suggestion. There is nothing to show whether the valuation of the premises was made under cl. (a) or cl. (b) of S. 127, Calcutta Municipal Act, 1923 (Bengal Act, 3 of 1923), but even taking the value to be 20 times the annual value, we are not prepared to say that this afforded sufficient margin to the plaintiff's security. Further, the point raised is robbed of all merit and grace alike by defendant 3's claim of priority, which will be the next point to be examined, and which, if given effect to, would add considerably to the burden of the security. We must hold accordingly that the final partition in Suit No. 313 of 1909 was not a fair or equal partition, within the meaning of the rule laid down in 1 I.A. 106,[3] and our conclusion therefore on the second ground urged by Mr. Gupta on the strength of that case is wholly and decisively against the appellant. In our opinion, the mortgage is enforceable not only against a half share of premises No. 5, Padma Nath Lane, but against a half share of every other item of property specified in the mortgage deeds, whether such property was in the hands of Saradindu or of any transferee from him.

Mr. Gupta's third point in the appeal was directed against the rejection by the Court below of his client's additional written statement which was filed on 29th April 1935. In this Saradindu sought to raise a new plea of subrogation by virtue of payment of certain prior mortgages of the aggregate value of Rs. 28,000, three of which were said to have been in favour of himself, and one (for Rupees 22,000) in favour of another party, Radha Nath Pal and Kanai Lal Pal. It was alleged that these mortgages had been paid off out of the money raised on mortgage from Suresh Chandra Chowdhury, and it was accordingly claimed that the plaintiff could not get a decree on his mortgages without redeeming the said prior charges by payment to Saradindu. Mr. Gupta pointed out in this connexion that in both the mortgage deeds of the plaintiff there was reference to the incumbrance in favour of Radha Nath Pal and Kanai Lal Pal.

In our opinion, no sufficient grounds have been made out why we should interfere with the order of the learned Subordinate Judge. At the stage and in the circumstances the additional written statement was put in, we consider the Court was fully justified in rejecting it. There can be no doubt that thereby defendant 3 tried in effect to raise by way of amendment a new ground of claim which he had not set up in his previous pleading. In his original written statement he made the case that he was not bound or affected in any way by the plaintiff's mortgage, and he accepted the position that the plaintiff could proceed against the properties allotted to the share represented by Mohendra's estate. By the additional written statement he tried to throw on the plaintiff an additional burden, the effect of which, it might be said, would be to defeat the whole of the plaintiff's claim. Whether this was or was not introducing a totally inconsistent case in the sense that it involved "a complete change of front in the defence," (1880) 16 Ch. D. 440[4] at p. 466, it was certainly a case which, in our opinion, the defendant could not be allowed to raise without obvious injustice to the other party. We also find it difficult to hold on the facts of the case that

4. (1880) 16 Ch. D. 440 : 50 L.J. Ch. 260 : 43 L.T. 632 : 29 W.R. 197, Laird v. Briggs.

the application for amendment was made bona fide.

It is necessary and relevant in this connexion to refer to certain dates and proceedings from the order-sheet in the case which will speak for themselves. The suit was filed on 17th July 1933 and defendant 3 entered appearance a month later namely on 16th August 1933. Then on 2nd November following he filed his written statement, and on 20th of that month he filed the draft issues which he proposed. The issues were settled on 3rd January 1934. The case was thereafter fixed for peremptory hearing on 30th April 1934. On that date however, the defendant prayed for time, and similar applications were also made by him on various subsequent dates. A petition for further time on the ground that defendant 3 was staying at Madhupur for a change was however rejected on 14th November 1934. The previous adjournment had been taken on the self-same ground, and the Court considered the application to be frivolous and meant only to cause delay. Defendant 3's lawyers thereupon withdrew from the case, and the suit was heard ex parte and decreed in favour of the plaintiff. This led to an application by defendant 3 on 5th December 1934, under O. 9, R. 13, Civil P. C., for setting aside the ex parte decree. A similar application was also presented on behalf of defendant 5, the Ramkrishna Mission. These gave rise to two miscellaneous cases (Misc. Jud. Cases Nos. 71 and 72 of 1934), but it appears that after the petitioner in each case had been examined, the parties came to terms, and on 16th February 1935, on the plaintiff agreeing to the restoration of the suit, an order was made setting aside the ex parte decree, the defendant paying the plaintiffs a sum of Rs. 125 as costs. It was after this that defendant 3 put in his additional written statement on 29th April 1935. A similar further written statement was also filed on behalf of defendant 5. The plaintiff objected to the reception of these pleadings at this stage, and in the result, the Court made an order on 12th June 1935, rejecting the same. The order was in these terms : "The written statements filed by defendants 3 and 5 after the restoration of the suit are rejected."

It cannot be said that this was not a proper order to have made in the circumstances of the case. Mere delay in applying for amendment is of course no ground for refusing the application, in so far as it may be compensated for by the award of costs, which, as Bowen L. J., remarked, is the one panacea which heals every sore in litigation : (1884) 26 Ch.D. 700[5] at p. 711. This, however, was not a case of mere delay, delay as there had been, the original written statement having been filed on 2nd November 1933 and the additional on 29th April 1935. There was something more, and it was that the new case was sought to be sprung upon the plaintiff for the first time after he had been induced to agree to a restoration of the suit, which, it is only reasonable to assume, he could not have done, had he had any idea of the further case he would be called upon to meet at the re-hearing. There is nothing to show that the facts which Saradindu set up in his additional written statement were new matter which was not within his knowledge or could not be ascertained by him much earlier, at any rate before the restoration order was made. Three of the prior mortgages he referred to in the additional written statement were said to have been in his own favour, while on his own showing the fourth had been expressly recited in the plaintiff's mortgage deeds. The alleged re-payment of these charges was supposed to have been made on behalf of Saradindu himself, as otherwise of course he could not be claiming priority over the plaintiff in respect thereof. It is impossible, therefore, to avoid the conclusion that the attempt he made to supplement his defence after the restoration of the suit was not only not bona fide, but was tantamount to clear breach of faith with the plaintiff. In this view of the matter, it is hardly necessary to do more than just indicate the other objections to the reception of the additional written statement. For one thing, the averments in it as they stand are not sufficient to found a plea of subrogation. The particulars regarding the alleged prior mortgages are themselves inadequate : there is no statement that the mortgagors were the mortgagors of the plaintiff, or that the properties mortgaged were the same. Secondly, it is not stated categorically that the payment had been made by or on behalf of Saradindu : all that is said is that these prior charges had been paid "out of the consideration money of the mortgage in favour of defendant 4" (Suresh Chandra Choudhury). This mortgage was, however, as we have seen, a joint mortgage by the representatives of both Charu's and Mohendra's shares, and there is no reason, therefore, why the alleged payment could not be regarded as having been made by the execu-

5. (1884) 26 Ch.D. 700 : 53 L.J.Ch. 891 : 51 L.T. 733 : 33 W.R. 60, Cropper v. Smith.

tors. It is worth pointing out in this connection that from a list of documents filed on behalf of defendant 3 it appears that there was a reconveyance by Radha Nath Pal and Kanai Lal Pal in favour of the executors for a sum of Rs. 33,000 showing that the re-payment had been made by the latter, and not by Saradindu. Mr. Amarendra Nath Bose on behalf of the plaintiff-respondent further argued that on the admitted facts no case of subrogation could be made out, but we deem it sufficient to hold on the grounds already indicated that the additional written statement of defendant 3 (as well as that of defendant 5) was rightly rejected by the Court below. Mr. Gupta's third point in the appeal also consequently fails. There remains now the fourth and last point urged by Mr. Gupta, which he was enabled to advance by reason of the passing of the new Bengal Money-lenders Act, 1940 (Bengal Act, 10 of 1940) during the pendency of the appeal. A formal application under this Act was in fact presented before us on behalf of defendant 3. In our opinion, the appellant is entitled to relief on this application.

The application was resisted by Mr. Bose on behalf of the respondent on a number of grounds. His first point was that the relevant provisions of the Bengal Money-lenders Act, 1940, were ultra vires of the Provincial Legislature, but in view of a recent decision to the contrary by a Special Bench of this Court in 45 C.W.N. 581[6] he did not argue the point, but merely desired that the Court should put on record this particular objection of his in order to entitle him to a certificate under S. 205, Government of India Act, 1935, for the purpose of an appeal to the Federal Court. We accept Mr. Bose's suggestion in this respect, and certify that the case involves a substantial question of law as to the interpretation of the Government of India Act.

Mr. Bose next urged that Saradindu was not a 'borrower' within the meaning of the Act, and hence not entitled to relief thereunder. In 45 C. W. N. 530[7] Mitter and Khundkar JJ. held that a purchaser of the mortgagor's interest vis a vis the mortgagee comes within the definition of a "borrower" given in S. 2 (2), which, it will be seen, includes a successor-in-interest of the original borrower, who is there referred to as "a person to whom a loan is advanced." Saradindu would accordingly, on the authority of this ruling, be a "borrower," provided of course it could be said that he was a purchaser of the right, title and interest of the executors of Mohendra's estate who were the mortgagors in this case. As we have seen, however, this last mentioned point is hardly sustainable, and in answer to Mr. Bose, Mr. Gupta accordingly preferred to follow the line of least resistance by arguing that under the provisions of the Act, it was open even to a person who was not a "borrower" to show to what extent a "borrower" was liable, if thereby he could obtain any relief. This, he maintained, would be sufficient for his purposes, inasmuch as a decree could be moulded under the Act only on the basis of the original borrower's liability. Admittedly, some of the mortgaged properties are in the hands of Saradindu, and a decree has been passed against him jointly with the other defendants. He would certainly be interested in the scaling down of the mortgage debt. We agree with Mr. Gupta that there is nothing in the Act which would prevent the granting of relief, if otherwise obtainable, at the instance of a person in the position of defendant 3. We must consequently overrule Mr. Bose's objection on this head. Mr. Bose's next point was that the present appeal was not an appeal pending in respect of such a decree as was referred to in cl. (a) of sub-s. (6) of S. 36, and that it could not, therefore, attract the operation of cl. (b) of the said sub-section under which only the appellant could invoke the jurisdiction of this Court in a pending appeal. Sub-section (6) of S. 36, by cl. (b) provides as follows :

> (6) Notwithstanding anything contained in any law for the time being in force,—
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> * * * * *
>
> (b) any Court before which an appeal is pending in respect of a decree referred to in cl. (a) may either itself exercise the like powers as may be exercised under sub-ss. (1) and (2), or refer the case to the Court which passed the decree directing such Court to exercise such powers, and such Court shall after exercise thereof return the record with the additional evidence, if any, taken by it and its findings and the reasons therefor to the appellate Court and thereupon the provisions of R. 26 of O. 41 of Sch. 1, Civil P. C., 1908, shall apply.

There can be no doubt that the Bengal Money-lenders Act contemplates the giving of relief both in cases where a decree has not yet been passed and in cases where a decree has been already obtained, and it appears to be the object of sub-s. (6) of S. 36 to lay down the procedure which should be adopted in

6 ('41) 28 A. I. R. 1941 Cal 425 : 196 I. C. 80 : I. L. R. (1941) 2 Cal. 85 : 73 C. L. J. 316 : 45 C. W. N. 581, Promode Kumar Roy v. Benoy Krishna Chakravarty.

7 ('41) 28 A.I.R. 1941 Cal. 484 : I. L. R. (1941) 1 Cal. 514 : 73 C.L.J. 435:45 C.W.N. 530, Sailendra Nath v. Amarendra Nath.

applying for relief in the latter class of cases, cl. (a) dealing with applications to be made to the Court which passed the decree, including an executing Court, and cl. (b) with applications to be made to an appellate Court, if an appeal is pending. In either case it is provided that the decree in respect of which relief may be applied for under this sub-section must be a decree as is referred to in cl. (a), that is to say, a decree which was passed "in a suit to which this Act applies," and which "was not fully satisfied by the first day of January 1939." It is obvious that such a decree must necessarily be in a suit instituted before 1st January 1939, as otherwise there could be no question of the decree not being satisfied, fully or otherwise, by this date.

The argument is that the decree in the present suit satisfies one of the conditions laid down in cl. (a), namely that it was not fully satisfied before 1st January 1939, but that in view of the definition of a "suit to which this Act applies" as given in the definition clause, cl. (22) of S. 2, it does not fulfil the other requirement that it must be a decree passed in such a suit. It may be mentioned that sub-s. (1) of S. 36 which confers certain powers on a Court for the purpose of giving relief to a borrower contains an important proviso, namely proviso (ii), which also makes reference in similar terms to "a decree in a suit to which this Act applies which was not fully satisfied by the first day of January 1939." The object of this proviso is to lay down that in exercise of the powers conferred by this sub-section the Court shall not be entitled to do anything which affects any decree of a Court, other than a decree of the kind referred to above. Mr. Bose's argument seems to assume that a "suit to which this Act applies" cannot by the terms of its definition include a suit instituted before 1st January 1939. That would of course involve an inherent repugnancy in the words used in clause (a) of sub-s. (6) of S. 36, as well as in proviso (ii) to sub-s. (1). A reference to the definition contained in cl. (22) of S. 2 will, however, show that the assumption is wholly unjustified. A "suit to which this Act applies" is no doubt defined to mean any suit or proceeding (of the nature therein described) "instituted or filed on or after the first day of January 1939," but the definition does not stop here: it adds thereafter the words "or pending on that date," showing clearly that a suit instituted before 1st January 1939, may come within the definition as well as a suit instituted on or after that date. It should be added that by cl. (21) of S. 2, a "suit" is defined to include an appeal. It might still be contended that a suit could not be regarded as "pending" after a decree had been finally passed therein, merely because the decree still remains to be satisfied. But it is precisely to meet such an argument, as it seems to us, that the Legislature provided that suits in which unsatisfied decrees were outstanding on 1st January 1939, should come within the scope of the Act. It is only reasonable to construe a statute in a way which, if possible, would reconcile all its provisions. The interpretation we suggest would not only avoid repugnancy in the provisions of the Bengal Money-lenders Act, but give full effect to the object which the Legislature appears to have had in view in enacting this legislation.

The scheme of the Act is no doubt primarily to give relief in suits instituted on or after 1st January 1939, which is taken to be the material date irrespective of the date on which the Act actually came into operation but at the same time, suits instituted before 1st January 1939, are definitely not excluded as the definition itself will show. The latter category of suits come within the description of suits "pending on that date," the word "pending" being for this purpose given an extended meaning so as not to be limited to suits in which no decrees have been passed, but also to include suits in which decrees have been already obtained, provided that such decrees were not fully satisfied by 1st January 1939. We adopt in this matter the view which was expressed by a member of this Bench in a suit on the original side, Suit No. 1146 of 1936 decided on 4th April 1941.[8] In the present case, the question is made easier by reason of the fact that the decree passed in the suit is under appeal, and the suit cannot, therefore, be said to have been finally determined. From this point of view the suit might well be regarded as still pending, but the matter is put beyond all doubt by the express provision in cl. (21) of S. 2 that a suit includes an appeal. We must hold, therefore, that cl. (b) of sub-section (6) of S. 36, Bengal Money-lenders Act, applies to this case, and that under its provisions the borrower is entitled to such relief as the Court may think fit to grant in exercise of the powers conferred on it by sub-sections (1) and (2).

As this is an appeal and the appellate

8. *Reported in* ('42) 29 A. I. R. 1942 Cal. 121 : I.L.R. (1941) 2 Cal. 184 : 45 C. W. N. 859, Suresh Chandra v. Lal Mohan Chatterjee.

Court will be finally making the preliminary decree in the suit, the provisions of S. 34, Bengal Money-lenders Act, will also apply, and the decree will have to be made in accordance therewith. Further, under S. 31, interest on the decretal amount will be withheld. The result, therefore, is that in our judgment the appeal fails and must be dismissed with costs, but the preliminary decree for foreclosure made by the Court below will be affirmed, subject to the modifications required under the Bengal Money-lenders Act. There can be no question in this case of "reopening" a decree, and passing a "new decree in accordance with the provisions of this Act," as contemplated by cl. (a) of sub-s. (2) of S. 36, but relief will be given under cl. (c) of sub-s. (1) of the said section.

Consequently, we hold that in determining the amount to be declared due at the date of the preliminary decree of this Court on account of principal and interest, the borrower will be released of all liability in excess of the limits specified in cls. (1) and (2) of S. 30, interest being calculated from the beginning at the rate of 8 per cent. per annum simple. The amount of the decree will be varied accordingly. The parties are not agreed as to this amount, which in fact is the figure to be substituted for the sum of Rs. 15,000 awarded in the trial Court's decree. They agree however that the matter should be referred to the Registrar of the appellate side to make the calculation in accordance with the directions we have given, and they further agree that any figure which the Registrar may arrive at, after hearing the parties and considering such materials as they may place before him, will be accepted by them as final and incorporated in the decree. In determining the sum due, it is agreed that the Registrar will take into account the amount deposited in the Court below by the appellant to the credit of the plaintiff, which the plaintiff will be at liberty to withdraw, and also the amounts realized by the plaintiff from the mortgaged properties of which he obtained possession of execution of the final decree passed by the trial Court. To the amount so determined will be added the costs of the suit and of the appeal, and such costs as this Court may allow in respect of the inquiry before the Registrar.

In accordance with the provisions of S. 34, Bengal Money-lenders Act, we direct that the amount so to be declared due including costs shall be paid in two equal instalments, the first of such instalments to be paid on or before the 30th day from the date on which the preliminary decree is drawn up and signed, and the second within a year from the date of such payment. It is further directed that such further amount as this Court may adjudge due in respect of subsequent costs, charges and expenses as provided in R. 10 of O. 34, Civil P. C., shall be paid within a month of the payment of the last instalment aforesaid. The decretal amount shall carry no interest. We further direct that in default of payment as aforesaid of the amount due under the preliminary decree, the plaintiff shall be entitled to apply for a final decree for foreclosure, subject to the provisos to clause (a) of sub-s. (1) of S. 34, Bengal Money-lenders Act. As a result of the appeal, the final decree which was made by the Court below on 22nd November 1936, is hereby vacated. The Registrar is requested to take up the enquiry at an early date. Let a self-contained preliminary decree for foreclosure be drawn up in accordance with the directions given in this judgment after the Registrar has made his report.

Edgley J. — I agree.

[The parties then settled by agreement the amount of the decree.]

G.N./R.K. *Order accordingly.*

C. P. C. —
(a) ('40) Chitaley, S. 97, N. 5.
('41) Mulla, S. 97—New point.
(d) ('40) Chitaley, O. 34 R. 5, N. 17 Pt. 4.
Lim. Act —
(b) ('42) Chitaley, Art. 132, N. 2 Pt. 2a; Art. 147 N. 1 Pts. 13, 14.
('38) Rustomji, Page 1521 Pt. 4.
(c) ('42) Chitaley, Art. 147, N. 1 Pt. 12.
('38) Rustomji, Page 1520 Pt. 3.

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B. K. MUKHERJEA AND BISWAS JJ.

Abdul Awal Hasan Ali Munshi — Auction-purchaser — Petitioner

v.

Uday Chandra Das Ram Chandra Das and others — Opposite Party.

Civil Rule No. 652 of 1940, Decided on 2nd July 1941, for setting aside order of Sub-Judge, Noakhali, D/- 5th February 1940.

(a) Bengal Patni Regulation (8 of 1819), S. 14-A—Reversioners are not holders of patni held by widow and are not as such entitled to avoid sale under S. 14-A—But they are competent to avoid sale under S. 14-A as persons holding interest in patni by virtue of title acquired prior to sale.

The estate inherited by a Hindu widow from her husband is an estate of inheritance to herself and to heirs of her husband, and therefore it cannot be said that she holds only a particular estate or the interest of a life-tenant, the remaining interest being vested in the reversioners for the time being.

a So long as the Hindu widow is alive, she represents her husband's estate completely, and nobody else can be said to have a present interest in the property during her life-time. For all purposes of beneficial enjoyment she is the full owner though her powers of alienation may be subject to certain restrictions. Therefore the reversioners themselves cannot be said to be holders of the patni, and entitled as such to make the deposit under S. 14-A. A reversioner is deemed to have interest enough in the estate held by the widow to take steps to protect the corpus for the ultimate benefit of the persons to whom as reversioners the estate shall eventually go. Therefore, the reversioners must be held to be competent under S. 14-A to avoid a sale of the patni held by the widow during her life-time as persons holding an interest in the patni by virtue of a title acquired prior to the sale, the events which brought their right into existence being in b fact the death of the last male owner and his leaving a female owner as his heir with ultimate reversion to his male heirs on the death of the female owner, all these events being antecedent to the sale. [P 169*a*, *b*; P 170*a*]

(b) Hindu law — Reversioner — Nature of reversionary right explained — Suit for protection of reversion must be regarded as on behalf of all reversioners — Right to bring such suit belongs to presumptive reversioner — Contingent reversioners can be joined in aforesaid suit—Under certain circumstances even remote contingent reversioner can sue — Reversioner thus can sue under S. 42, Specific Relief Act, to protect corpus for ultimate benefit of persons to whom as reversioners estate shall eventually go.

c The interest of a reversionary heir during the life-time of a Hindu widow is of a contingent character, a mere possibility or spes successionis, and not until the death of the female heir opens the succession to the reversioners, it is possible to predicate which of them should succeed to the estate of the last male owner and therefore the Court will refuse the next reversioner for the time being a declaration of his reversionary right under S. 42, Specific Relief Act. But while the law does not take any notice of the interest of an individual reversioner as such, it still recognises the interests of the reversioners as a body which in fact constitutes the reversion, and reversionary heir is accordingly entitled to maintain a suit for the protection of the reversion, such a suit being regarded as one brought in a representative capacity and on behalf of all the d reversioners. As a general rule, the right to bring such a suit belongs to the presumptive reversioner, that is to say, the person who would succeed if the widow were to die at that moment and the contingent reversioners can be joined in such suit but under certain circumstances even a remote contingent reversioner is entitled to sue. Thus, a reversionary heir is competent to sue for a declaration under S.42, Specific Relief Act, that an adoption or an alienation made by the widow is not valid and binding against the inheritance. He can also institute a suit to restrain the widow from committing waste, and also make an application to set aside an execution sale of any portion of the widow's estate under O. 21, R. 90, Civil P. C.: ('16) 3 A.I.R. 1916 P.C. 117; ('15) 2 A.I.R. 1915 P.C. 124 and 6 Cal. 764 (P.C.), *Rel. on.* [P 169*b*, *c*, *d*, *e*, *f*]

(c) Civil P. C. (1908), O. 21, R. 89 — Reversioner can make deposit under O. 21, R. 89.

A reversioner is not an incompetent person to e make a deposit under O. 21, R. 89: ('19) 6 A.I.R. 1919 Pat. 127; ('26) 13 A.I.R. 1926 Mad. 959 and ('14) 1 A.I.R. 1914 Cal. 338, *Rel. on.* [P 170*b*]

Bhupendra Nath Roy Chowdhury and Hamidul Huq — for Petitioner.

Jitendra Kumar Sen Gupta—for Opposite Party.

B. K. Mukherjea J.—This rule is directed against an order of the Subordinate Judge, Noakhali, made on 5th February 1940, allowing an application of Opposite Parties Nos. 1 to 3 for setting aside a patni sale under S. 14-A of the Patni Regulations. The patni admittedly belonged to one Kshetra Nath Majumdar, who died leaving behind him a childless widow named Sashimukhi. Sashi- f mukhi held the patni in the limited interest of a Hindu widow, and in execution of a money decree obtained against her by certain persons, the tenure was sold and purchased by one Bagala Prasanna Das. From Bagala Prasanna Das, Mafizal Huq and others purported to derive their interest in the taluk, and in the last Cadastral Survey records the names of Mafizal Huq and his cosharers appeared as the holders of the patni. The patni was sold under Regn. 8 of 1819 at the instance of the zamindar on 16th May 1939, and the purchaser was Abul *(sic)* Awal who is the petitioner before us. On 12th June g 1939, opposite parties Nos. 1 to 3 who are the sister's sons of Kshetra Nath and the next reversionary heirs to his estate made the present application under S. 14A, Patni Sale Laws, to set aside the sale on deposit of the money which is required to be deposited under that section. The auction purchaser contested the claim of the opposite parties on the ground that they were not persons competent to make the deposit. This objection was overruled, and the patni sale was set aside. It is against this order that the present rule was obtained.

It has been conceded by both parties for h the purposes of this rule that the defaulting patnidars whose names appear in the settlement records held the patni in the same right as Sashimukhi did, and that the reversioners consequently did not lose their rights of succeeding to the property, if they happened to survive Sashimukhi. The whole question is whether in these circumstances the reversioners can be said to come within the description of persons competent to make a deposit under the said S. 14A. We do not agree with Mr. Sen Gupta that the reversioners can be regarded as the defaulting tenure-holders within the meaning of this section. It is well settled that the estate

which a Hindu widow inherits from her husband is, what has been described as an estate of inheritance to herself and to the heirs of her husband, and it is not true to say that she holds only a particular estate or the interest of a life-tenant, the remaining interest being vested in the reversioners for the time being. So long as the Hindu widow is alive, she represents her husband's estate completely, and nobody else can be said to have a present interest in the property during her life-time. For all purposes of beneficial enjoyment she is the full owner, though her powers of alienation may be subject to certain restrictions. We cannot hold therefore that the reversioners themselves are holders of the patni, and entitled as such to make the deposit under S. 14A. We think, however, that opposite parties Nos. 1 to 3 were competent to avoid the sale under this section as persons holding an interest in the patni by virtue of a title acquired prior to the sale. The interest of a reversionary heir during the life-time of a Hindu widow is undoubtedly of a contingent character, a mere possibility or spes successionis, and not until the death of the female heir opens the succession to the reversioners, it is possible to predicate which of them should succeed to the estate of the last male owner. As was held by the Judicial Committee in 43 I.A. 207,[1] the Court will accordingly refuse the next reversioner for the time being a declaration of his reversionary right under S. 42, Specific Relief Act; all the same, as was also pointed out in that case, a reversionary heir is

> recognized by Courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

There is really no inconsistency in this, for, as their Lordships are careful to explain, a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the corpus of the estate may pass unimpaired to those entitled to the reversion. (*See also* the earlier judgment of the Judicial Committee in 42 I.A. 125.[2]) In other words, the position seems to be that while the law will not take any notice of the interest of an individual reversioner as such, it will still recognize the interests of the reversioners as a body which in fact constitutes the reversion, and a reversionary heir is accordingly held entitled to maintain a suit for the protection of the reversion, such a suit being regarded as one brought in a representative capacity and on behalf of all the reversioners. As a general rule, the right to bring such a suit belongs to the presumptive reversioner, that is to say, the person who would succeed if the widow were to die at that moment, but it was recognized by the Judicial Committee in 8 I.A. 14,[3] that under certain circumstances even a remote contingent reversioner would be entitled to sue. It has also been held in 42 I.A. 125[2] that the contingent reversioners may be joined in the presumptive reversioner's suit.

It is thus that a reversionary heir has been held competent to sue for a declaration under S. 42, Specific Relief Act, that an adoption or an alienation made by the widow is not valid and binding against the inheritance. He can also institute a suit to restrain the widow from committing waste, and also make an application to set aside an execution sale of any portion of the widow's estate under O. 21, R. 90, Civil P. C. In substance, a reversioner is deemed to have interest enough in the estate to take steps to protect the corpus for the ultimate benefit of the persons to whom as reversioners the estate shall eventually go.

We think that on the same principle the reversioners must be held to be persons having such interest in the property during the life-time of the widow as will entitle them to save it from sale under S. 14A of the Patni Regulation. The section does not say that the interest of the person making the deposit must be an interest in praesenti. At a sale held under the Patni Regulation the purchaser does not get merely the right, title and interest of the holder of the tenure for the time being, but gets the tenure itself, without any such limitation as might affect the defaulting patnidar. The result is that not only the interest of the defaulting patnidar passes to the transferee, but the ultimate rights of the reversioners also go. In these circumstances we can see no reason why the reversioners should not be competent to make a deposit under S. 14A. In our opinion, the interest which they have in the property may be said to have accrued under a title acquired before the sale. The events which

1. ('16) 3 A.I.R. 1916 P.C. 117 : 37 I.C. 161 : 39 Mad. 634 : 43 I.A. 207 (P.C.), Janaki Ammal v. Narayanasami Aiyer.

2. ('15) 2 A.I.R. 1915 P.C. 124 : 29 I.C. 298 : 38 Mad. 406 : 42 I.A. 125 (P.C.), Venkatanarayana Pillai v. Subbammal.

3. ('81) 6 Cal. 764 : 8 I.A. 14 : 8 C.L.R. 381 : 4 Sar. 195 (P.C.), Rani Anund Kunwar v. Court of Wards.

brought their right into existence were in fact the death of the last male owner, Kshetra Nath Majumdar and his leaving a female owner as his heir with ultimate reversion to the male heirs of Kshetra Nath on the death of the female owner. All these events were antecedent to the sale.

We are not unmindful of the fact that the language of S. 14A of the Patni Sale Laws is somewhat different from that of O. 21, R. 90, Civil P. C., or of S. 174, Ben. Ten. Act. The expression used in this section approximates to that of O. 21, R. 89, Civil P. C. Although there is no direct authority on the point, yet there are observations in several judgments which go to show that a reversioner is not an incompetent person to make a deposit under O. 21, R. 89, Civil P. C.: *vide* 4 Pat. L.J. 360;[4] A.I.R. 1926 Mad. 959;[5] 19 C.L.J. 72.[6] We hold, therefore, that the Court below was perfectly right in allowing the opposite parties to make the deposit under S. 14A, Patni Sale Laws. The rule is accordingly discharged with costs, the hearing fee being assessed at two gold mohurs.

Biswas J. — I agree.

G.N./R.K. *Rule discharged.*

4. ('19) 6 A.I.R. 1919 Pat. 127 : 51 I.C. 359 : 4 Pat. L. J. 360, Brij Kishore Lal v. Pratap Narain.
5. ('26) 13 A.I.R. 1926 Mad. 959 : 97 I.C. 574, Adanamoli Chetti v. Chinnaswami Reddi.
6. ('14) 1 A.I.R. 1914 Cal 338 : 21 I.C. 207 : 19 C.L.J. 72 : 18 C.W.N. 778, Pankhabati Chowdhurani v. Nani Lal Singh.

C. P. C. —
(b) ('40) Chitaley, O. 1 R. 1, N. 5, Pt. 6.
(c) ('40) Chitaley, O. 21 R. 89, N. 15, Pt. 5.
('41) Mulla, Page 884, Pt. (m).

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DERBYSHIRE C. J. AND PANCKRIDGE J.

In re Royal Insurance Co., Ltd.

Income-tax Reference No. 7 of 1940, Decided on 13th February 1941.

Income-tax Rules, Rule 35 — 'Data' means facts and materials — Rule can be applied only in absence of more reliable data — Materials available—R. 35 method should not be applied.

The word 'data' in R. 35 appears to be misleading because it is ordinarily used both for actual materials from which inferences are to be drawn, and also for assumptions from which inferences are to be drawn. In R. 35 it is used in the sense of facts and materials. The method mentioned in R. 35 is only to be applied in the absence of more reliable data. Therefore, if an assessee, on proper materials, can show to the income-tax authorities that his profits and gains are in fact less than they would be if ascertained by some conventional or arbitrary method, such as that prescribed by the concluding paragraph of R. 35, it would be a serious injustice to relegate him to that method. The income-tax authorities should apply themselves to the data before them and ascertain the correct amount of the profits and gains in accordance with the methods customarily employed and designated by statute to be employed in estimating such profits : 6 I. T. R. 321 and ('36) 23 A. I. R. 1936 P. C. 55, *Rel. on.*

[P 172*g*,*h*; P 173*c*]

S. C. Issacs and A. C. Sen — for Appellant.

R. C. Pal — for Commissioner of Income-tax.

Derbyshire C. J.—The Royal Insurance Co., does business in the United Kingdom, India, and other parts of the world. It has done business in India for some 60 years. During that time it has carried on life assurance business. Previous to the year in question, the company had been assessed under R. 35, Income-tax Rules, which provides as follows:

> **The total income of the Indian branches of non-resident insurance companies (life, marine, fire, accident, burglary, fidelity guarantee, etc.) in the absence of more reliable data may be deemed to be the proportion of the total income, profits or gains, of the companies, corresponding to the proportion which their Indian premium income bears to their total premium income. For the purpose of this rule the total income, profits or gains of non-resident life assurance companies whose profits are periodically ascertained by actuarial valuation shall be computed in the same manner as is prescribed in R. 25 for the computation of income, profits and gains of life assurance companies incorporated in British India.**

Rule 25 is in these terms:

> **In the case of life assurance companies incorporated in British India whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income-tax assessment, and any Indian income-tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation.**

In the year 1925 the company began to have separate actuarial valuations of its Indian life assurance business made. Those valuations were made by an actuary in London. The beginning of the period was 1st January 1925, and the form of the valuation which is set out at p. 11 of the paper book follows the form that is prescribed by S. 8, Indian Life Assurance Companies Act of 1912, which provides:

> Every life assurance company shall once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form set forth in schedule 4.

a The form in question in this case is that set out in sch. 4 and is as follows : e

QUINQUENNIUM 1925-29

	£		£
Fund at 1st January 1925 ...	... 466,508	Claims paid and outstanding	... 184,571
Premiums	... 500,653	Surrenders	... 51,671
Interest, less income-tax ...	... 142,291	Bonuses paid in cash ...	... 4,229
		Commission	... 49,214
		Expenditure of management	... 43,410
		Taxes other than income-tax	... 191
		Fund at 31st December 1929	... 776,166
	1,109,452		1,109,452

Then follows the valuation balance sheet as at 31st December 1929 :

	£
Fund	... 776,166
Net liability	... 672,147
b SURPLUS	... 104,019 f

There was another valuation made for the Quinquennium 1930-34 which is as follows :

	£		£
Fund at 1st January 1930 ...	... 770,588	Claims paid and outstandings	... 297,160
Less amount transferred to share-holders life profits account	... 9,429	Surrenders	... 124,306
		Bonuses paid in cash ...	... 10,564
		Commission	... 49,856
	761,159	Expenses of management ...	... 38,486
		Proportion of Home Expenditure	... 12,336
Premiums	... 668,576	Taxes other than income-tax	... 692
Interest less income-tax ...	... 187,320	Fund at 31st December 1934	...1,083,655
	1,617,055		1,617,055

Underneath that is the actuarial balance sheet as at 31st December 1934 which is as

c follows : g

	£
Fund	... 1,083,655
Net liability	... 952,012
SURPLUS	... 161,643

Previous to the year of assessment now in question (1935-1936) the assessees had been assessed under the provisions of R. 35 of the Income-tax Rules on a proportion of their total world life profits. But in the year in question they claimed to be assessed on an annual income which was one-fifth of the surplus of £161,643. The reasons given were d that the proportionate assessment under R. 35 was not accurate in that the premiums on the Indian business were higher relative to the sums assured and the profits, and that consequently a wrong proportion was arrived at as the assessable income. The assessees tendered the balance sheets I have quoted as evidence of what their real income was. The Income-tax Officer and the Assistant Commissioner and the Commissioner, however, proceeded to assess the company under the proportionate provisions of R. 35 on the ground that the accounts provided by the company were not accurate, because (they said) the fund as at 1st January 1925, namely, £466,508, was not the correct figure, in that it was too low, and because of that the interest which was credited to the fund during the following quinquennium was too low ; consequently the fund as at 31st December 1929 and the surplus on that date were both too low following upon that the fund as at the beginning of the quinquennium 1930-34, namely, £770,588 was too low with the result that the interest credited in that quinquennium was too low so that the fund as at 31st December 1934 was too low and the surplus £161,643, one-fifth of which was to be taken as the income in the year of assessment, was also too low. h

In short the income-tax authorities contended that the foundation of the accounts was wrong. They base their objection to that starting fund of £4,66,508 because they alleged that it did not really represent the life fund attributable to Indian business at that date, and they refer to the report on the Quinquennial Valuation of the Royal Assurance Co.'s (world) Life Department as at 31st December 1924 which was signed by

a the company's Actuary on 24th April 1925. Some figures from that report are extracted in the case which has been stated, but not the whole of it, and I have referred to the report itself which, of course, was before the income-tax authorities at the time this case was stated and for sometime previous. At page 3 of the report it is stated :

The result of the valuation is to show a surplus of £1,611,626 as follows :

	Assurances £	Annuities £	Total £
Fund	15,187,179	1,420,341	16,607,520
Liability	13,595,380	1,400,514	14,995,894
Surplus	1,591,799	19,827	1,611,626

b Then follow these words; they are the actuary's words :

I recommend that £311,617 should be carried forward as an unappropriated balance, and in order that the amount carried forward may bear the same proportion to liabilities in the Annuity section, as in the Assurance section, I recommend that £10,000 be transferred from the Assurance Fund to the Annuity Fund.

This leaves £1,300,009 available for distribution. I recommend that £130,000 should be allocated to the shareholders and that £1,170,009 should be applied for the benefit of participating policy holders.

With the rest of the report I have no concern. It is common ground that the starting fund as at 1st January 1925, viz. c £466,508, is the amount at which the total liabilities of the company under its life policies in India were estimated acturially at that date. The income-tax authorities however say that the sum of £311,617 has been carried forward from the total world fund, but that no part of it has been carried forward to the Indian fund which was just enough on 1st January 1925 to meet the company's liabilities in India, and that the correct amount of the fund should be a sum of £466,508 plus some part of that £311,617 which could be said to be attributable to the Indian life fund which had been in operad tion for a large number of years. Now, the Insurance company contended that £466,508 was the correct value to be placed on the fund as at 1st January 1925 whether that figure is correct or not I do not propose to say, but it seems to me that the income-tax authorities were wrong in assessing the company under the proportionate scheme of R. 35 on the ground that they had no more reliable data. In 63 I. A. 99[1] Lord Thankerton at page 109 said :

1. ('36) 23 A.I.R. 1936 P. C. 55 : 160 I. C. 1 ; 60 Bom. 248 : 63 I. A. 99 (P.C.), National Mutual Life Association of Australasia, Ltd. v. Commissioner of Income-tax, Bombay Presidency and Aden.

The Income-tax Officer is only authorised to have recourse to the method of computation provided by e **R. 35 in the absence of more reliable data.**

Rule 35 applies to all kinds of insurance—Life, Fire, Marine, Accident, etc. One can well understand that the conditions as regards life assurance are different in India from what they are in other parts of the world, and it may be that the proportionate scheme under Rule 35 is not accurate but merely what was described in another case as a working rule. But were the data before the income-tax authorities more reliable ? As regards the method in which the profits and gains were computed in the two quinquenniums in question no objection can be f taken. The computation was in accordance with the scheme laid down by statute for insurance companies resident in British India. The computation was made by an actuary and it is not alleged except in one particular that it is wrong. The only particular objected to is the amount of the fund as at 1st January 1925. If that fund is wrongly stated there is ample material before the income-tax authorities from which they can correct it. It seems to me that if that sum £466,508 is wrong it is possible from the data that I have read out previously from the actuary's Report on the Quinquennial g Valuation of the company's Life Department at 31st December 1924 for persons who are competent in such matters (and the income-tax authorities have such competent persons) to ascertain what was the correct and proper Indian life fund as at 1st January 1925, reckoned in the way that the income-tax authorities say that it should be done.

That being so, it appears to me that instead of the income-tax authorities rejecting the valuation and revenue accounts of the company in toto and proceeding to assess the company under the proportionate scheme h of R. 35, they ought first to have applied themselves to the data before them and ascertained first the correct amount of the fund and then the profits as at 1st January 1924 in accordance with the methods customarily employed and, in fact, designated by statute to be employed in estimating the profits of life assurance companies. For that reason I am of the opinion that the income-tax authorities having before them reliable data on which they could have computed in the usual way the income, profits and gains of this company for the year in question, were wrong in proceeding to assess this company under the proportionate

scheme of R. 35. The result is that the question asked in the reference is answered in the negative. No order is made as to costs. The insurance company is entitled to a return of the deposit before the Commissioner.

Panckridge J.—I concur in the order which has been made, but I wish to add a few observations to what has fallen from my Lord. If an assessee, on proper materials, can show to the income-tax authorities that his profits and gains are in fact less than they would be if ascertained by some conventional or arbitrary method, such as that prescribed by the concluding paragraph of R. 35, it would be a serious injustice to relegate him to that method. Accordingly the rule provides that the method is only to be applied in, what is described as, "the absence of more reliable data." Beaumont C. J. in 6 I. T. R. 321,[2] observed at p. 329 :

> The introduction of the comparative is not, I think, very happy, because almost any data might be more reliable than the data on which the rule of the thumb is based. But I take it the rule means that it is to be applied unless the assessee provides some reliable data on which the Income-tax Officer can make a satisfactory assessment.

I respectfully agree with the learned Chief Justice's criticism of the language of the rule and I may add that in my opinion it is regrettable that in framing the rule, the Central Board of Revenue did not use ordinary English language, instead of importing what is really a Latin word, namely, "data." That word I consider to be misleading because it is used both for actual materials from which inferences are to be drawn, and also for assumptions from which inferences are to be drawn. But I think it is clear from the language of Rule 35, taken in connexion with the subject-matter, that the rule uses "data" in the former sense of facts and materials. Now, if the contention of the assessees is right, as to which I offer no opinion, that the taxable income, as they have shown it based on the calculations whose starting point is 1st January 1925, is conclusive, then there can be no question but that those data are more reliable than a result arrived at by following the method laid down in R. 35. Assuming that they are wrong, I agree that there were ample materials upon which the Income-tax Officer could fairly assess what the profits and gains of the Indian branch of the assessee company were. In addition to what is called the actuarial valuation, the Income-tax Officer had before him a statement which is Annexure "A" to the letter of reference and sets out the total life fund of the company and the total of the actuarially ascertained liabilities.

From the actuarial valuation itself and from the explanation furnished by the Actuary he knew that the figure shown as the fund at 1st January 1925, was the actuarially ascertained liabilities in India. He also knew the subsequent history of the company because he had the actuarial reports and the quinquennial valuations. If he required any further information, as for example, the proportion of Indian premium income into world premium income he had it at his disposal. It seems to me that if what the Income-tax Officer had before him cannot be described as more reliable data within the meaning of the rule no life insurance company can ever be in a position to furnish more reliable data and, in consequence, the Indian branch of every non-resident life insurance company will have to be assessed under what I may call the proportionate method prescribed by the rule. That is clearly not the intention of the rule, because life insurance companies are expressly mentioned as a class of insurance companies whose total income can only be fixed by the proportionate method in the absence of more reliable data. In these circumstances what the Income-tax Officer should have done was to ask for further information if he needed it, and if he thought that the starting figure was not justified, he should have worked on the basis of an increased starting figure for the fund and he could have decided fairly accurately, on the materials before him, what that figure should have been.

K.S./R.K. *Reference answered.*

2. ('38) 6 I. T. R. 321, Manufacturers' Life Insurance Co. of Canada v. Commissioner of Income-tax Bombay.

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EDGLEY AND BISWAS JJ.

Bibi Sakina Khatoon w/o Dr. Muhammad Ali — Defendant — Appellant

v.

Kshirode Chandra Manna and others — Plaintiffs — Respondents.

Appeal No. 1357 of 1938, Decided on 11th August 1941, from appellate decree of Addl. Dist. Judge, 24-Parganas at Alipur, D/- 16th June 1938.

(a) Bengal Land-Revenue Sales Act (11 of 1859), Ss. 6 and 13—Notice under S. 6—Validity —Test — Rules and special forms issued by Board of Revenue for drawing up notice of sale have no statutory force — Omission to give

particulars specified therein does not necessarily vitiate notice—Sale of estate or share therein—Mention of mouza or mouzas of which estate or share is composed is unnecessary—Share in estate sold—Omission to state jama of whole estate is not fatal. a

Sections 6 and 13 must be construed with reference to the object which a notice of sale has in view, namely, that it must enable likely purchasers to know exactly what is going to be sold, and to ensure thereby reasonable competition. The test of a valid notice under S. 6 must, therefore, be as to whether the specification of the estate or share of an estate therein is sufficiently definite from this point of view. No hard and fast rule can be laid down as to what will constitute such sufficiency. It must depend upon the particular facts of each case: ('15) 2 A.I.R. 1915 P. C. 24 and 32 Cal. 502 (F.B.), *Rel. on.* [P 175*e*,*f*]

The special rules and forms issued by the Board of Revenue for drawing up the notice of sale have no statutory force, not being framed under any authority conferred by the Act, and therefore omission to give any of the particulars therein specified does not necessarily vitiate the notice, if the particulars given are sufficient to identify the estate or share of an estate to be sold, and give prospective buyers full information as to what they are invited to bid for. In selling an estate or a share therein it is unnecessary to specify the mouza or mouzas of which the estate or the share is composed : 10 Cal 63 and 13 Cal. 208, *Rel. on.* [P 175*g*,*h*] b

Where only a share and not the whole estate is to be sold the omission to state the sadar jama of the whole estate is not fatal. [P 176*b*]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 6 — Sale date in notice form given as 24th September 1934 — Arrears for which sale was to be held shown to be recent in appropriate columns — Foot note not part of notice mentioning arrears to be for 1931—Discrepancy held did not render notice invalid. c

The sale date in the notice form was stated to be 24th September 1934 and the arrears for which the sale was going to be held were stated to be recent in the appropriate columns therein. But in the foot note in the notice the arrears were stated to be for the year 1931 :

Held that the foot note was not really a part of the printed notice and the discrepancy was so glaring that no one could conceivably be misled thereby and hence it did not render the notice invalid. [P 176*f*] d

(c) Bengal Land Revenue Sales Act (11 of 1859), S. 13 — Separate shares cannot be sold unless separate accounts opened — Separate share with separate account cannot be sold merely because it is in default — Whole estate must be liable to sale for arrears — Word "estate" in clause "if estate shall become liable to sale for arrears" in S. 13—Meaning—Separate shares with separate accounts must be deemed to be one integral estate.

Section 13 makes it clear that there can be no sale of separate shares unless separate accounts have been opened and a separate share for which a separate account has been opened cannot be put up to sale merely because that share is in default. The estate as a whole must itself be liable to sale for arrears. The term "estate" in the clause "if the estate shall become liable to sale for arrears of revenue" in S. 13 means the entire estate out of which the separate share has been carved. In order to justify the sale of a share in separate account the estate must have become liable to sale for arrears of revenue, and an arrear of revenue must be due from the share according to the separate account : ('14) 1 A.I.R. 1914 Cal. 58 and ('32) 19 A.I.R. 1932 P.C. 61, *Rel. on.* [P 177*a*,*b*] e

Though under Ss. 10 and 11 of the Act separate liabilities are created by the opening of separate accounts, the separate shares still must be deemed to constitute one integral estate. [P 177*c*]

(d) Bengal Land Revenue Sales Act (11 of 1859), Ss. 13, 14, 21, 31 and 37 and 13 Note 8—Shares in separate accounts — Joint sale is illegal—Separate sales should be held — Order in which separate accounts should be sold stated— Rule in Note 8 to S. 13 prescribing joint sale is not statutory rule and has no legal effect. f

A joint sale of two or more shares in separate accounts is contrary to law. Separate sales will best carry out the purposes of the Act and be consistent with all its provisions:('41) 28 A.I.R. 1941 Cal. 702, *Approved*; ('32) 19 A.I.R. 1932 P.C. 61, *Rel. on*; ('39) 26 A.I.R. 1939 Cal. 233, *Expl.* [P 177*f*;P179*a*]

There is no specific provision in the Act regarding the order in which the separate accounts should be put up to sale, but S. 21 can be taken as a guide, and, on the analogy of the rule therein laid down, for the sale of estates, the numerical sequence in which the separate accounts are recorded should be followed. The rule in Note 8 to S. 13 laid down by the Board of Revenue to the effect that shares of separate accounts should be sold together is not a statutory rule and has no legal effect whatever since upon a construction of the Act a joint sale is unwarranted. [P 178*h*;P 179*b*] g

Sarat Chandra Jana and Abdul Quasem (No. 2) — for Appellant.

Phani Bhusan Chakravarty and Kalipada Sinha — for Respondents.

Biswas J.—This appeal arises out of a suit for setting aside the sale of a khas mahal estate in the Sunderbans for default in payment of arrears of revenue, and the appellant is the defendant purchaser at such sale. The learned Munsif of Diamond Harbour who tried the suit in the first instance dismissed it, but that judgment was reversed on appeal by the learned Additional District Judge of 24-Parganas. Hence the present appeal. The property sold is described as F. plot, 4th part of lot Sunderban, Mouza Gobindapur, P. S. Mathurapur, and it was held by a number of cosharer lessees. At the instance of the cosharers, twelve separate accounts were opened in respect of the mahal under S. 10 of Act 11 of 1859 according to their respective shares one of which was numbered 2960/7, the residuary share being recorded as No. 2960. The former represented a five gandas share and the latter a two annas share. The plaintiffs are interested in the residuary mahal. Both these separate accounts fell into arrears, mahal No. 2960/7 to h

the extent of Rs. 17 odd on account of the fourth kist of 1933-34 and the first kist of 1934-35, and the residuary mahal to the extent of Rs. 37 odd for the first kist of 1934-35 only. The defaulting shares were accordingly advertised for sale under the provisions of the Act, and sold on 24th September 1934, when they were purchased by the present appellant for a sum of Rs. 60. A sale certificate was in due course issued to the purchaser on 3rd July 1935 under S. 28, and delivery of possession given to him on 26th August following. The sale was a joint sale of the two shares, and it is impeached on this ground as illegal, being contrary to the provisions of S. 13. A further point is also taken that the notice of sale under S. 6 had not been properly drawn up. It is also alleged that the sale processes had been suppressed. The defaulting proprietors had appealed to the Commissioner of the Division on these grounds. The Commissioner recommended to the Board of Revenue that the sale should be annulled, but the board refused to accept the recommendation. This led the plaintiffs to commence the present suit.

Both Courts found against the plaintiffs as regards the alleged non-service of sale processes, and the only questions left to be considered in the appeal therefore are, first, as to the propriety of the notice under S. 6, and secondly, as to the legality of the joint sale. On both these points, the Courts below differed, the learned Munsif holding against the plaintiffs and the learned District Judge deciding in their favour. We think the appellant is right in his contention that the plaintiffs' objections to the notice under S. 6 of the Act are not at all well founded. The alleged defects which are supposed to vitiate the notice are on the one hand that it does not mention all the necessary particulars, and on the other, that some of the particulars it mentions are inaccurate and misleading. As regards the errors of omission, the complaint is that it does not specify the name of the mouza or the sadar jama of the whole estate, and further, that the kists in arrear and the latest dates of payment are not separately shown for the two defaulting separate accounts As regards the inaccurate particulars, it is alleged that the notice actually gives a wrong statement of the kists in default.

Mr. Chakravarti for the plaintiffs-respondents did not himself press the first category of objections before us. As an essential condition of the validity of a sale for arrears of revenue under Act 11 of 1859, the Court will doubtless insist on strict compliance with the requirements of the law regarding the issue of the notification of sale, but as to what particulars a notice under S. 6 must contain, the Act gives no direction beyond providing in the section itself that it shall specify "the estates or shares of estates which will be sold," and then, in S. 13, that where the Collector has opened a separate account or accounts, the share or shares to be excluded from the sale shall also be specified. These provisions, in our opinion, must be construed with reference to the object which a notice of sale has in view, namely, that as the Judicial Committee of the Privy Council explain in 42 I.A. 79,[1] it must enable likely purchasers to know exactly what is going to be sold, and to ensure thereby reasonable competition. The test of a valid notice under S. 6 must therefore be as to whether the specification of the estate or share of an estate therein, as the case may be, is sufficiently definite from this point of view, and as the Judicial Committee also point out in the above case, no hard and fast rule can be laid down as to what will constitute such sufficiency. It must depend upon the particular facts of each case: see also the observations of Ghosh J. in the Full Bench decision in 32 Cal. 502.[2]

It is true that the Board of Revenue has issued special rules and also prescribed special forms for drawing up the notice of sale, which will be found in the Government Manual of the Revenue and the Patni Sale Laws, but these have no statutory force, not being framed under any authority conferred by the Act. They are in the nature of administrative directions to Government's own officers and have evidently been laid down with a view to avoid the chance of an incomplete specification. This means, in other words, that if the rules and forms are observed, the possibility of an objection is obviated almost to a certainty, but it does not follow that if any of the particulars therein specified are omitted, the omission will necessarily vitiate the notice, even though the particulars given may be sufficient to identify the estate or share of an estate to be sold, and give prospective buyers full information as to what they are invited to bid for. The mistake which the learned District Judge made in the present case was

1. ('15) 2 A.I.R. 1915 P.C. 24: 28 I.C. 699: 42 I.A. 79: 42 Cal. 897 (P.C), Raveneshwar Prasad Singh v. Baijnath Ram Goenka.
2. ('05) 32 Cal. 502 : 9 C.W.N. 343 : 1 C.L.J. 14 (F.B.), Ismail Khan v. Abdul Aziz.

to treat these rules and forms as though they were statutory directions which required to be literally complied with.

The property advertised for sale here was not the whole estate, but only two shares which were correctly specified. As for non-mention of the mouza, this was not at all a material omission. It may be pointed out that there is expressed authority that either in selling an estate or selling a share in an estate, it is unnecessary, and it may in fact not be possible always from the Collector's records, to specify the mouza or mouzas of which the estate or the share is composed: *see* 10 Cal. 63[3] and 13 Cal. 208[4] at p. 217. As the whole estate was not going to be sold, the omission of the sadar jama of the whole estate was also not fatal: this could not possibly mislead the bidders. It is not disputed that the sadar jamas of the shares which were exposed to sale were duly given. There was also a specification of the arrears due from each separate account. As already stated, one of the defaulting shares was in arrears for two kists, namely, the fourth kist of 1933-34 and the succeeding kist, the first of 1934-35, whereas the arrears due from the other share was only for the last of such kists, namely, the first kist of 1934-35. This was correctly shown, but it appears that only one latest date of payment was given in both cases—28th June 1934. This was, however, accompanied by a statement that the instalments in respect of which the notice was issued were due on or before 22nd Jaistha 1341 B. S., being the last day of that Bengali month and corresponding to 14th June 1934. These unpaid amounts clearly, therefore, became "arrears of revenue" within the meaning of S. 2 of the Act before the latest date of payment specified. This we consider to have been quite sufficient, and no bidder could possibly be prejudiced. The information given was enough to satisfy intending purchasers that the sale was going to be held on a proper date. All the objections taken to the validity of the notice on the ground of its insufficiency thus fail. As regards the plaintiffs' next point that the notice contains a wrong specification of the kists for the arrears of which the sale was to be held, it seems to us, as the appellant points out, the objection is based on an entire misapprehension. The original notice is not on the record, but on the strength of a certified copy, EX. 7, which the plaintiffs put in, they show that at the foot of the notice occurred a statement which reads as follows:

> The Government revenue of the said mahal for the realisation of which the sale will be held is the amount which was due on or before 19th Bhadra 1338 B. S. and of which the latest date of payment is 11th Aswin 1348 B. S. following, corresponding to 28th September 1931.

This could possibly have no reference to the mahal in question in this case, and is undoubtedly inconsistent with what was stated in the body of the notice and in the various columns set out therein. For one thing, the sale date was given as 24th September 1934 in the first part of the notice, and it would be ridiculous to suggest that the arrears for which the sale was going to be held were not recent arrears as shown in the appropriate columns therein, but past arrears of the year 1931. The discrepancy would itself be so glaring that we do not suppose any one could conceivably be misled thereby. Any one reading the notice would at once reject this particular statement occurring in a foot-note, which is really not a part of the notice. As Mr. Jana further pointed out to us, the entry itself appears in the foot-note only as an illustration of how the direction contained in the foot-note was to be carried out in completing the printed form of the notice which was used. The original notice had been called for by the Munsif and it is significant that no such objection was raised by the plaintiffs before him, which only shows that the original document would not have lent them any support. In our opinion, therefore, this particular objection which Mr. Chakravarty pressed with some instance before us must also fail. There remains now to consider the question of the supposed illegality of the joint sale, a question on which there appears to be no direct authority one way or the other. The answer must depend on a construction of the relevant sections of the Act, and not on any rules which the Board of Revenue may have promulgated, and which, as already explained have no statutory authority whatever. The first section to be considered is S. 13 which confers the authority to hold sales of separate shares of an estate for arrears of revenue. It provides as follows:

> Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due. In all such cases notice of the

3. ('84) 10 Cal. 63 : 13 C.L.R. 131, Amirunessa Khatoon v. Secretary of State.

4. ('86) 13 Cal. 208, Ram Narain Koer v. Mahabir Pershad Singh.

intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in S. 6 of this Act. The share or shares sold, together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the separate portions of jama assigned thereto.

The section makes it clear that there can be no sale of separate shares unless separate accounts have been opened. Secondly, it shows that a separate share for which a separate account has been opened cannot be put up to sale merely because that share is in default. The estate as a whole must itself be liable to sale for arrears. It was expressly ruled in 18 C.W.N. 490,[5] that the term "estate" in the clause "if the estate shall become liable to sale for arrears of revenue" means the entire estate out of which the separate share has been carved. The matter has since been put beyond the possibility of doubt by the decision of the Privy Council in 59 I.A. 68[6] (at p. 71), where it is definitely laid down that in order to justify the sale of a share in separate account (a) the estate must have become liable to sale for arrears of revenue, and, (b) an arrear of revenue must be due from the share according to the separate account. It may well be that though a separate share is in default, there is a surplus in the general account of the estate, and in that case, the share will be exempt from sale. It will further appear from the section that though under Ss. 10 and 11 separate liabilities are created by the opening of separate accounts, the separate shares will still be deemed to constitute one integral estate. The object evidently is to preserve intact the ultimate security of Government for their revenue demand against the estate. That is indeed the paramount consideration governing the whole of this Act, and the next succeeding section shows how, notwithstanding the provision for sale of separate shares the security may and will be still enforced by bringing the entire estate to sale. By permitting the opening of separate accounts, the Act seeks no doubt in terms of its preamble to give recorded shares of a joint estate who pay their share of the sadar jama an easy means of protecting their shares from sale for the default of their cosharers, but there is no ultimate protection if the Government demand is still unsatisfied. In that case the scheme of the Act is that the whole estate shall be made to answer for the demand.

It is rather unfortunate that the Act, though it authorises the sale of separate shares under S. 13, still makes no express provision regarding the procedure for the holding of such sales. In the case of whole estates, a separate sale of each such estate seems to be clearly contemplated by S. 21, but, in the case of separate shares, where there are more than one to be sold on the same date of sale, there is no provision as to whether the shares should be put up separately one after another, or put up jointly in one or more lots at the discretion of the Collector; and yet it is apparent that this is a matter of consequence, and not of mere form, which will lead to different results according as the one procedure or the other is followed. The question, as it seems to us, will, therefore, have to be decided with reference to the scheme of separate accounts as a whole as envisaged in the Act, apart from any light that may be thrown by the language used in any of the sections bearing on the matter. In other words, what has got to be considered is whether a joint sale or a separate sale will best carry out the purposes of the Act and be consistent with all its provisions.

One thing appears to be fairly certain, and it is that if a separate sale is held of each defaulting share in separate account, there can be no question of its contravening any of the provisions or declared objects of the Act. It has still to be seen whether a joint sale, if held, will be illegal. We may set out some of the considerations which ought to help towards a correct conclusion.

(i) A joint sale would really defeat the object of opening a separate account. That object, as Ss. 10 and 11 show, is to create "separate liabilities" of the share for which a separate account is opened, and this means not only a separation of the liability to pay the revenue by apportioning a specific share to the separate account, but also a separation of the liability to be put up to sale for default. As Mitter J. points out in 45 C.W.N. 890[7] at p. 895

> the liability for sale of the separate account is separated from liability for sale of other separate accounts or of the residuary (share) that is left after the opening of the separate accounts.

By a joint sale one defaulting share would be made to answer for the default of another

5. ('14) 1 A.I.R. 1914 Cal. 58 : 21 I.C. 953 : 18 C.L.J. 505 : 18 C.W.N. 490, Indra Mani Dasya v. Priyanath Chakravarty.

6. ('32) 19 A.I.R. 1932 P.C. 61 : 136 I.C. 410 : 59 Cal. 1034 : 59 I.A. 68 (P.C.), Krishna Chandra v. Pabna Dhana Bhandar Co. Ltd.

7. ('41) 28 A.I.R. 1941 Cal. 702 : I.L.R. (1941) 2 Cal. 353 : 74 C.L.J. 131 : 45 C.W.N. 890, Manmatha Nath v. Ananga Kumar.

which is the very thing that the opening of separate accounts is designed to prevent.

(ii) A joint sale would also involve the appropriation of the purchase money of one share towards the discharge of the arrears due from another, but this would be contrary to the provisions of S. 31 regarding the application of purchase money. The question as to the true meaning and effect of this section has already been the subject of judicial decision, and we see no reason for not accepting the interpretation which has been put upon it. In 42 C.W.N. 1203,[8] it was contended on the terms of this section that the surplus sale proceeds of the share of an estate can be applied to the liquidation of all arrears due from the entire estate, but this contention was expressly overruled by both the learned Judges, Nasim Ali and Henderson JJ., who decided the case. It was pointed out that the word "respectively" might not occur after the words "the estate or share of an estate sold," but all the same, if the Collector was to be at liberty to apply the surplus proceeds of the sale of any share to the satisfaction of the arrears of the whole estate, and necessarily, therefore, of the arrears due from other shares, there would have been no necessity for referring specifically to the share of an estate. The latter part of the section further showed that after the arrears due upon a separate account were discharged any surplus of the purchase money that might be left over, after meeting all other demands against it, must be held in deposit on account of the proprietor of that particular share. If, then, the purchase money of one defaulting share could not be applied for the benefit of another, it followed that a joint sale would be illegal.

(iii) Section 14, again, seems distinctly to point to a separate sale as the proper procedure. It provides that if in the case of a sale under S. 13, the highest offer for the share exposed to sale shall not equal the amount of arrears due "thereupon," the Collector shall declare that the entire estate shall be put up to sale on a future date, subject to certain conditions specified therein. The word "thereupon" can only mean "upon particular share which is exposed for sale." Under the General Clauses Act, the singular may include the plural, but neither the subject nor the context here requires the extended meaning.

(iv) Then, again, a joint sale of two or more defaulting separate accounts may be unfair to other recorded sharers of the estate under S. 14. It will be seen that when due to the insufficiency of the sale proceeds of one share, the Collector makes a declaration under this section for the sale of the entire estate, the other cosharers are given a right to avert such sale by paying within ten days the arrear due from the share which was first put up to sale. If two or more shares are joined together in one sale, the burden of such payment is necessarily made heavier, and this might in effect defeat the right which the section gives.

(v) A joint sale may also work an injustice as between the several defaulting sharers. Thus, it may happen that one of the shares is subject to an incumbrance, but the other is not, and as under S. 37, only an entire estate, and not a share of an estate is sold free from incumbrances, it would be manifestly unfair to include a share on which there is no incumbrance in the same sale with a share which is burdened with an incumbrance. It might easily affect the bids, and thus prevent the proprietor of the share which is free from incumbrance from realizing the price which he might otherwise have obtained. It may again be that though a number of shares are advertised for sale, each being in arrear in its separate account, still the sale proceeds of one share may be sufficient not only to liquidate the arrears due upon that share, but thereby also to wipe out the demand in the general account of the estate. In such a case, as explained by the Judicial Committee in 59 I. A. 68,[6] the other shares, though in default, could not yet be brought to sale. But by the holding of a joint sale, these other shares would be necessarily deprived of the chance of thus obtaining an exemption from sale. A joint sale from this point of view might really nullify the provisions of S. 13 as interpreted by the Judicial Committee.

(vi) Another difficulty about a joint sale is that of determining how many or which defaulting shares are to be included in one sale. The Act gives no guidance whatever on the point, but it is only reasonable to suppose that some directions would have been given if joint sales had been really contemplated. It is true that there is no specific provision in the Act regarding the order in which the separate accounts should be put up to sale, but S. 21 might be taken as a guide, and on the analogy of the rule therein laid down for the sale of estates, the numerical sequence in which the separate accounts

8. ('39) 26 A.I.R. 1939 Cal 233 : 180 I.C. 665 : I.L.R. (1938) 2 Cal 549 : 42 C.W.N. 1203, Nirmal Nalini v. Harsamukhi Dasi.

are recorded might be followed. We are not unmindful that the order in which the sales are held might affect the interests of the defaulting sharers as between themselves.

Two main arguments were advanced on behalf of the appellant in support of a joint sale. One was based on a rule laid down by the Board of Revenue in Note 8 to S. 13 in the Government Manual, and the other on the words occurring in the last part of S. 13. As regards the first point, the Board's rule no doubt directs that "all the shares of separate accounts of one estate which fall into arrears should be advertised for sale together and not separately, and should be put up to sale together," but all that need be said about it is that this is not a statutory rule, and can have no legal effect whatever, if upon a construction of the Act a joint sale is found to be unwarranted. As regards the second contention, the words relied on are that the share or shares sold will be "charged with the separate portion or the aggregate of the separate portions of jama assigned thereto," special stress being laid on the reference to the "aggregate" of separate portions of the jama. It is said that these words can have no possible application except in a case of joint sale. We do not think that is so. In our opinion, the language used is quite appropriate to cover a case where, on a separate sale, several separate accounts are purchased by one and the same person. All that is contemplated is that in such a case the several separate accounts will be merged into one in the hands of a common purchaser. We cannot hold therefore that the words referred to necessarily indicate a joint sale of a number of defaulting shares in one lot. It is not necessary to consider if the words are also meant to apply to a case of several separate accounts being held by one and the same recorded co-proprietors before the sale.

It might be relevant to notice another argument which might possibly be raised in view of the actual decision in a case which has already been referred to on the question of the interpretation of S. 31: 42 C.W.N. 1203.[8] It was held in that case that where a bid for one separate account is not sufficient, the Collector may at once make a declaration under S. 14 for the sale of the entire estate without previously putting up the other separate accounts which are also in arrears and have been advertised for sale. It may be suggested that if this view is correct, it practically renders separate sales of separate shares infructuous, besides involving a differential treatment of one separate account as against another which is equally in default. A joint sale may thus appear to be called for as the only fair and possible remedy to avoid such an anomalous result. The answer is, in the first place, that the decision itself postulates a separate sale. Secondly, it does not hold that in every case where the first sale of a separate account fails to realise the full amount of arrear due thereupon, the Collector shall be bound to drop the sale of the other defaulting shares, and further, no anomaly is really involved. The case was decided on the basis that after the first sale, the Collector found it useless to proceed with the other sales which had been notified. The position in fact was that even if the other sales were held and the proceeds were sufficient in each case to cover the amount due upon the share sold, the estate as a whole would still have been left in arrear, and a declaration under S. 14 would have been inevitable in any circumstances. It was not possible therefore to save any of these defaulting separate accounts: the deficiency in one case was sufficient to destroy the chance of escape of every one of the other shares which were in arrears. If, then, in this state of things, it was held that after the sale of one separate account the Collector was justified in making an order under Sec. 18 (as he must have done to regularise the procedure) exempting the other separate accounts from sale, though advertised, this in our opinion could not be taken to be a pronouncement of the Court against the rule or practice of separate sales of separate accounts. The Court was not called upon to consider a case where the arrears due upon one or more of the separate shares advertised for sale, if realised, would have been sufficient to wipe off the demand against the estate as a whole.

In a case where there is such a possibility the Collector, in our opinion, shall be bound to proceed with the sales of the separate accounts seriatim, stopping only when he finds that by appropriating the purchase money of each share sold to the liquidation of its own arrears, the estate as a whole is freed from its liability for arrears of revenue in the general account. Under the provisions of S. 13, as already explained, the Collector will indeed have no option but to stop when such a stage is reached. There is nothing in the decision in 42 C.W.N. 1203[8] which militates against this view, and that case cannot therefore be held to have decided against separate sales in any view of the

matter. There is no anomaly either involved in the decision which requires to be corrected by a joint sale. A joint sale would, on the other hand, create more anomalies than it would answer. In our judgment, upon a careful consideration of all the relevant provisions of the Act, it must therefore be held that a joint sale of two or more separate accounts is contrary to law, and cannot be supported. On this ground, if not on the other ground regarding the validity or otherwise of the notice under S. 6, the sale in the present case must consequently be declared void and set aside. The result is that the appeal will stand dismissed and the suit decreed with costs in both the Courts below. We make no order for costs in this Court. We direct that a copy of this judgment be forwarded to the Board of Revenue.

Edgley J. — I agree.

G.N./R.K. *Appeal dismissed.*

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R. C. MITTER AND KHUNDKAR JJ.

Nawab Syed Mahammad Hashim Ali Khan, Plaintiff 1, and another plaintiff 1 (a)—Appellants

v.

Iffat Ara Hamidi Begum, Defendant 1 (a) and others — Respondents.

Appeals Nos. 239 of 1935 and 25 and 26 of 1936, Decided on 20th May 1941, against original decrees of Sub-Judge, 3rd Addl. Court, 24 Parganas at Alipore, D/- 13th June 1935.

(a) Mahomedan law—Wakf—Shia—Conception of, explained—Wakf is not completed until giving of possession — Wakif himself appointing mutwalli—Change of possession—Proof of.

According to the conception of Shia law "wakf is a contract the fruit or effect of which is to tie up the original of a thing (corpus) and to leave its usufruct free." The wakf property or the subject of appropriation (corpus) is transferred, so to become the property of the mowkoof alehi (persons on whom the settlement is made), for they have a right to the advantages or benefits (usufruct) to be derived from it. The contract is not rendered obligatory except by giving possession, that is, the wakf is not completed unless either possession of the wakf property is delivered to the first beneficiaries or they are authorised to administer it or where the dedication is for the benefit of a number of persons a mutwalli is appointed and possession is delivered to the latter. Where the wakif appoints himself the first mutwalli a change in the character of his possession from owner to mutwalli would fulfil the requirement of the rule. Application of the usufruct by him to the purposes of the wakf is the strongest evidence of such change but that is not the only method of proving the change of possession. Mutation of his name from malik or owner to mutwalli in respect of the properties of the wakf is another criterion to indicate the change of possession but mutation of name is not the only method of proof : ('37) 24 A.I.R. 1937 P.C. 127, *Rel. on.* [P 187*f,g,h*]

(b) Mahomedan law—Wakf—Shia — Change of possession is question of fact.

The question whether a change of possession followed the execution of a wakfnama is pre-eminently one of fact. [P 187*h*]

(c) Mahomedan law—Wakf—Shia— Validity — Wakf followed by delivery of possession by wakif to mutwalli—No intention on wakif's part to divest himself of ownership—Real intention to utilize wakf as shield against claims — Wakf is invalid.

A deed of wakf (even when followed by delivery of possession by the wakif to the mutwalli) executed without the wakif having any intention of divesting himself of his ownership and with the real intention to utilize the document, should occasion arise, as a shield against claims against him which may ultimately affect his worldly possession is invalid under the Shia law : ('30) 17 A.I.R. 1930 P.C. 255 and ('32) 19 A.I.R. 1932 Cal. 93, *Rel. on*; 10 C.W.N. 449, *Ref.* [P 188*c,d*]

(d) Mahomedan law — Wakf—Shia — Conditions which wakf property must satisfy in order to make wakf valid, stated.

The mowkoof or the subject-matter of the wakf under the Shia law must be (a) a substance, (b) the property of the appropriator, (c) capable of being used without being consumed and (d) capable of being delivered. These four subsidiary conditions follow from fundamental principles of the Shia law. As a Shia wakf implies the transference of ownership from the wakif to the mowkoof alehi (beneficiaries) the transferor (wakif) must have the ownership, for he who has no title cannot vest title in another by his act. As a wakf must be perpetual the subject-matter must be such as may last for ever, one which must not be consumed by use. As in Shia law delivery of possession must be made the mowkoof (property) must be capable of being delivered. This necessarily implies that the mowkoof must be a specified object (Ayn) and not indeterminate things (Deyn). As the carrying out of the object of the wakf would require money, the mowkoof must be substance, that is, that which would yield income or profit. It therefore follows that all property which produces income or profits and which would not be consumed by use can be dedicated by way of wakf, except those which are expressly excluded by the Muslim jurists. [P 190*e,f*]

(e) Mahomedan law—Wakf—Shia —Delivery of possession does not necessarily mean physical delivery—Wakf of property subject to lease is valid.

In the case of a wakf under the Shia law, the condition of delivery of possession of the wakf property does not require that there should in all cases be physical delivery. The nature of the delivery would depend upon the nature of the subject and the purpose for which the subject has to be applied according to the terms of the wakfnama. A property which is subject to a lease in favour of a third person can be made the subject-matter of a wakf. The leased property cannot be possessed by the landlord in khas. Through receipt of rent he possesses the subject. If he grants a lease and thereafter makes a wakf of such property he can transfer his possession to the mutwalli by asking the lessee to attorn to the mutwalli by authorising the mutwalli to receive the

rent reserved by the lease. That is the only way in which he can deliver possession to another. If the wakfnama directs the income to be utilized for the object of the wakf the inclusion of a property previously leased out by the wakif would not render the wakf invalid. Before the determination of the lease, the lessor's profits would be appropriated to the purposes of the wakf and would enure to its benefit, and after determination of the lease the profits which had been intercepted by the leases would automatically enure to the benefit of the wakf by way of accretion : ('22) 9 A.I.R. 1922 Cal. 429, *Rel. on.* [P 190*g*,*h*; P 191*a*,*b*]

(f) Mahomedan law—Wakf—Shia—Validity — Conditions which wakf to be valid must satisfy, stated—Wakf by will is valid provided appropriation is not postponed later than wakif's death.

For the validity of a wakf under the Shia law, it is necessary (a) that the wakf must be perpetual, (b) absolute and unconditional, (c) that possession must be given of the mowkoof (subject-matter) and (d) that the mowkoof must be entirely taken out of the wakif or the appropriator himself. [P 191*b*,*c*]

Thus, when a man makes a wakf for an object which must necessarily cease with the efflux of time the wakf would be void on the ground of non-fulfilment of condition (a) : ('35) 22 A. I. R. 1935 All. 856, *Rel. on.* [P 191*c*]

The meaning of condition (b) is that the appropriation must be of immediate effect and cannot be postponed or be made to depend upon a future event, whether it is likely or possible to occur or even which is certain to occur. Thus, where a wakf is created by a deed, the appropriation must be from the date of the execution of the deed, the time from which the deed operates. But a Shia can make a wakf by will. This implies a postponement of the appropriation till the death of the wakif. But even in the case of a wakf created by will the appropriation cannot be postponed to a period later than the death of the wakif : 25 All. 236 (P.C.), and ('38) 25 A.I.R. 1938 P. C. 184, *Rel. on*; 24 All. 231, *Ref.* [P 191*e*,*f*]

(g) Mahomedan law—Wakf—Shia—Creation of reserve fund does not invalidate wakf—Provision for acquisition of properties from reserve fund does not amount to creation of wakf in future of those properties—Acquired properties become wakf properties.

The provision for the creation of a reserve fund from out of the income of the dedicated properties to be applied for the objects of the wakf and for improving and enlarging the corpus of the wakf does not invalidate the wakf and a provision in the wakf for the inclusion of the properties purchased from the reserve fund in the wakf does not amount to an attempt to create a wakf in future of those properties. The properties so acquired would be wakf properties being accretions to the wakf : ('37) 24 A.I.R. 1937 P. C. 127 and ('32) 19 A.I.R. 1932 Cal. 93, *Rel. on*; ('33) 20 A. I. R. 1933 P. C. 83, *Expl.* [P 192*c*,*d*]

(h) Mahomedan law—Wakf—Shia—Validity —Wakif cannot "eat out of wakf"—Wakif becoming mutwalli—He is entitled as mutwalli to remuneration fixed for mutwallis generally in wakf — Rule that wakif qua mutwalli cannot reserve to himself salary more than fixed for mutwallis generally, explained—Two classes of mutwallis with different scales of remuneration are permissible.

Under the Shia law in the case of a wakf the "mowkoof" (the subject-matter of the wakf) must be entirely taken out of the wakif or the appropriator. The wakif cannot "eat out of the wakf." He cannot make a settlement upon himself or make it a condition that he should have to himself a part or whole of the usufruct of the dedicated property. If he does the whole wakf is void. When any benefit is given to a class of persons by the wakfnama and the wakif becomes adventitiously a member of that class, he can partake of the benefit. The rule that if a wakif "makes an appropriation for the poor, and he should himself subsequently become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits," is not an exception to the rule that a wakif shall not eat out of wakf but is not within that rule. It is lawful for a Shia wakif to appoint himself mutwalli by the terms of the wakfnama, and make it a condition that he should receive an amount of remuneration which mutwallis generally are to receive under the terms of the wakfnama. The wakf would not be void if such a condition is made. Where the wakif does not in express terms appoint himself the mutwalli but subsequently happens to become the mutwalli, as for instance on a vacancy through appointment by the Court or by the appointing authority mentioned in the wakfnama there is no objection to his taking the salary or remuneration that has been fixed in the wakfnama for mutwallis generally : ('27) 14 A. I. R. 1927 P. C. 2, *Expl., and Rel. on*; ('25) 12 A. I. R. 1925 P. C. 272 ; ('37) 24 A. I. R. 1937 P. C. 127 ; ('33) 20 A. I. R. 1933 Oudh 107 and ('37) 24 A. I. R. 1937 P. C. 174, *Ref.* [P 192*h*; P 193*a*,*b*,*c*]

The rule that the wakif qua mutwalli cannot reserve to him a salary or remuneration more than what has been fixed for mutwallis generally, means that he must not make a distinction in his favour between himself and other mutwallis following him. The fact that two classes of mutwallis were contemplated with different scales of remuneration would not make any difference. [P 196*g*,*h*]

(i) Mahomedan law—Wakf—Shia — Validity — Immediate and not postponed substantial dedication to charity—Wakf is valid—Dedication to charity held not illusory.

A wakf under the Shia law is valid if there be an immediate and not postponed substantial dedication to charity and in such a case it is not necessary to invoke the aid from the Mussalman Wakf Validating Act of 1913 : ('40) 27 A. I. R. 1940 Cal. 501, *Rel. on.* [P 197*e*]

The income of the wakf properties was divided into ten parts and distributed in the wakfnama as follows: (1) 5/10th mutwalli remuneration, (2) 2/10th allowance for the wakif's descendants, (3) 2/10th for mosque and Imambara and (4) 1/10th reserve fund set apart for the extension and improvement of the wakf :

Held that the benefit of item (4) would be participated by the objects mentioned in items (2) and (3). As the remuneration for the mutwallis was in the nature of management charges, the balance which was available for the objects of the trust was thus distributed equally between the descendants of the wakif and objects of a religious, pious and charitable nature which would enure to the benefit of Mussalmans in general. Therefore it could not be said that the concurrent gift to public purposes

was of an illusory or unsubstantial nature. The dedication of 2/10th of income to the expenses of the mosque and Imambara and the expenses of Muharram, Chehllum and Nowchandi Majlises and the provision of a reserve fund which would enure in great measure to the benefit of those objects, constituted a substantial dedication to purposes of a religious, pious and charitable character : 17 Cal. 498 (P.C.), *Disting.*; ('27) 14 A.I.R. 1927 P.C. 191, *Rel. on.* [P 197*g*; P 198*a*,*b*; P 209*d*,*e*]

(j) Mahomedan law—Wakf—Shia—Mutwalli —Remuneration — Limitation that mutwalli's remuneration should not exceed 1/10th of net income explained—Test for determining whether remuneration fixed by wakif for himself as mutwalli is justified, stated — Reservation of 5/10th of wakf income as mutwalli's remuneration held valid.

It is only when the Court fixes the mutwalli's remuneration that it cannot be more than 1/10th of the net income but there is no such limitation on the powers of the wakif in the matter of fixing the mutwalli's remuneration. There is no absolute rule of law to indicate the maximum proportion of the total income of the wakf which it would be permissible for the wakif to reserve to himself as mutwalli's salary. Gross and glaring disproportion between the amount prescribed by the wakif as mutwalli's salary for himself and that prescribed for future mutwallis would be always bad and would ordinarily be evidence of intention to participate as a beneficiary under the wakf. But in case where the disproportion is not of that kind, the dividing line must be to some extent a question of fact, and may depend upon a variety of circumstances. [P 197*g*; P 207*h*]

In the case of a wakf-alal-aulad the status in society of the wakif, of his son and his son's descendants who are to be the future mutwallis is a circumstance which should be taken into consideration. [P 208*e*]

The reservation of 5/10th of the income as mutwalli's salary for the wakif (son of ex-King of Oudh) and his son and son's descendants who were to be the future mutwallis held was not a subterfuge designed to secure a life settlement on the wakif himself: ('27) 14 A.I.R.1927 P.C. 2; ('33) 20 A.I.R. 1933 Oudh 107 and ('37) 24 A. I. R. 1937 P.C. 174, *Ref.* [P 208*c*]

(k) Mussalman Wakf Validating Act (1913), Ss. 4 and 3 — Shia wakf—On extinction of line of wakif's children half of share reserved for their benefit to be spent on "proper acts of charity" — Gift to charity held neither remote nor illusory.

Under the Shia law heirs of a man fall within two categories : (1) heirs by consanguinity and (2) heirs by marriage. They are subdivided in two classes — sharers and residuaries. That law does not recognize the claims of 'distant kindred.' All heirs of a Shia accordingly include persons (except the false grand parents and their descendants) who come within the description 'family, children or descendants' for whom it is legitimate after the Mussalman Wakf Validating Act, 6 of 1913, to make provision even to the extent of the whole of the income of the wakf properties, provided there is an ultimate gift over to the poor or to charitable, religious and pious purposes of a permanent nature on the extinction of 'the family descendants or children' of the wakif. Where the wakfnama expressly states that on the extinction of the line of the wakif's children the share reserved for their benefit shall be divided into two equal parts and one of such parts (3/20th) shall be spent on 'proper acts of charity,' and the other part (3/20th) shall go to the reserve fund established for the improvement and extension of the wakf, the ultimate gift to charity cannot be said to be more remote than allowed by the Wakf Validating Act. Nor can it be said to be illusory. [P 198*d*,*e*]

(l) Mahomedan law—Wakf-alal-aulad—Shia — Validity — Provision for small pension for faithful servants does not invalidate wakf.

The provision for a small pension for the faithful servants in a wakf-alal-aulad does not render the wakf invalid when the main purpose of the wakf is not to make a settlement on those servants. [P 198*e*]

(m) Mussalman Wakf Validating Act (1913), S. 3, Proviso — Object — Construction — S. 3, Proviso does not effect any change in Muslim conception of wakf-alal-aulad but simply states what Muslim law is — Effect of S. 3, Proviso must be judged by principles propounded by Muslim jurists—Two distinct principles stated — Religious, pious or charitable purposes in S. 3, Proviso need not be expressly stated in wakfnama—If any of those purposes can be implied from wakfnama S. 3, Proviso is complied with—Ultimate gift to "proper acts of charity" held implied gift to the poor.

The Mussalman Wakf Validating Act validates a species of wakfs—wakfs-alal-aulads, which had been declared invalid by the Judicial Committee in a series of cases. According to the Muslim conception a wakf must be perpetual, that is to say, the objects of the wakf must last for ever. In the case of a wakf-alal-aulad that condition cannot be fulfilled by simply providing for allowances for the family, descendants and children of the wakif, for there may be the possibility of those objects failing by the family, etc., of the wakif becoming extinct. It is therefore necessary that that contingency must be provided for, to make the wakf perpetual, and that can only be done by providing that in that event the usufruct of the wakf properties is to be applied for the benefit of the poor, for the poor as a class must of necessity exist for ever, or for the benefit of some religious, pious and charitable object of a permanent nature. The proviso to S. 3, therefore, does not effect any change in the Muslim conception but simply states what the Muslim law is. The effect of that proviso must, therefore, be judged by the principles propounded by Muslim jurists. According to them, there are two distinct principles. One is analogous to the cypres doctrine. "If one should make an appropriation for a masalat (object of general utility) which has ceased to be used, it is to be applied to any good and pious purpose. And it is for such purposes generally, it is expended on the poor and indigent, and in any other way by which approach is made to Almighty God." The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakif, the usufruct is to be applied to the benefit of the poor. [P 198*g*,*h*; P 199*a*,*b*,*c*]

The proviso to S. 3 contemplates an ultimate gift effective in law and states that the ultimate benefit in a wakf-alal-aulad can also be impliedly reserved for the poor or for any purpose recognized by the Mussalman law as religious, pious or charitable purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. If any of those purposes can be implied from the terms of the wakfnama, with the aid of prin-

ciples formulated by Muslim jurists, the proviso would be complied with. [P 199*d*]

Where in the case of a wakf-alal-aulad the wakif in the wakfnama designs the ultimate gift to 'proper acts of charity' the words 'proper acts of charity' would imply a gift to the poor, as the benefit to the poor is the prime concern of the Muslim jurists : ('32) 19 A. I. R. 1932 Oudh 71, *Approved ;* ('35) 22 A.I.R. 1935 Lah. 596 and ('40) 27 A.I.R. 1940 Oudh 324(F.B.)*(majority view)not approved;* (1804-05)10 Ves. 521 and 23 Bom 725 (P.C.), *Disting.* [P 199*d*]

(n) Mussalman Wakf Validating Act (1913), S. 3, Proviso—Shia wakf-alal-aulad—Wakf deed manifesting overriding intention to charity on failure of wakif's descendants—Cypres doctrine applies—Wakf is valid.

Where in the case of Shia wakf-alal-aulad the wakf deed manifests an overriding intention to charity in the contingency of the failure of the descendants of the wakif the cypres doctrine applies and the wakf is valid : ('32) 19 A.I.R. 1932 Cal. 93, *Rel. on.* [P 199*e*]

(o) Court-fees Act (1870), S. 7 (iv) (b) and Sch. 2, Art. 17 (vi)—Joint property — Partition suit — Plaintiff must be in possession either actually or constructively at date of suit — Plaintiff not in possession at date of suit — Defendant in actual possession in assertion of hostile title known to plaintiff — Suit for partition on fixed fee is not maintainable — Suit for possession either joint or on partition must be brought on payment of ad valorem court-fee.

As the scope and object of a suit for partition is to convert the joint possession of the cosharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the joint property but his cosharer, the defendant, is and there is no ouster, the suit would be maintainable, for, his cosharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, on a fixed court-fee of Rs. 15 but a suit for possession, either joint possession or possession after partition, must be brought on payment of ad valorem court-fees : 6 C.L.J. 651; ('15) 2 A.I.R. 1915 Cal. 357 and ('27) 14 A.I.R. 1927 Cal. 411, *Rel. on.* [P 200*a,b*]

(p) Limitation Act (1908), Art. 142 — Phrase "discontinuance of possession" in Art. 142 — Meaning of — Mahomedan creating wakf of his properties, appointing himself as mutwalli and his son after him — Wakif continuing in possession as mutwalli till death — On wakif's death, his daughter suing her brother for partition of her share in her father's properties on ground that wakf was invalid—Brother asserting wakf to be valid and claiming to be in possession as mutwalli—Suit being within 12 years of wakif's death when right to sue accrued to plaintiff held within time—Art. 142 held inapplicable.

The phrase "discontinuance of possession" in Art. 142 connotes abandonment of possession by the owner followed by the taking of possession by another the wrong doer. [P 200*f*]

A Mahomedan made a wakf of his properties and appointed himself as the first mutwalli and provided that after him his son should be the mutwalli. The wakif continued in possession of the wakf properties till his death as mutwalli. On the death of the wakif his daughter instituted a suit for partition of her share in the properties which belonged to her father, on the ground that the wakf created by her father was invalid. Her brother's defence to the suit was that the wakf was valid and he was in possession of the suit properties as mutwalli :

Held that the suit was not barred by time as it was instituted just within 12 years of the death of the wakif when his daughter's right as heir accrued. Article 142 did not in terms apply, as the suit was not for recovery of possession, that prayer having been deleted at the plaintiffs' instance. Nor was the case one of dispossession, for the wakif could not be said to have dispossessed himself. As the wakif continued to be in possession after the execution of the wakfnama but only changed the character of his possession, the case would not be governed by Art. 142, time running from the date of the execution of the wakfnama, even if the suit (which it was not) had been a suit for possession. [P 200*e,f,g*]

(q) Mahomedan law — Wakf — Mutwalli — Adverse possession — Wakf void — Mutwalli's possession is on behalf of persons entitled.

Where a wakf is found to be void, the possession of the mutwalli would be possession on behalf of and not adverse to the persons who would have been entitled to those properties on that contingency : ('40) 27 A.I.R. 1940 Cal. 501, *Rel. on.* [P 200*g*]

Nor can the wakif as mutwalli prescribe against himself as owner : (1889) 42 Ch. D. 312, *Expl., and Disting.* [P 200*h*]

(r) Practice—New plea—Appeal — Point that party had relinquished his claim to inheritance cannot be raised for first time in appeal.

The question that a party had relinquished his claim to inheritance depends on investigation of facts, and when that question has not been pleaded in the written statement and the facts have not been put in issue, the question cannot be allowed to be raised for the first time in appeal. [P 201*c,d*]

(s) Mahomedan law—Wakf—Wakif's daughter, pardanashin, receiving money under form of receipt stating that she was receiving it in terms of wakfnama — Receipts held did not amount to relinquishment of her inheritance by daughter — Wakf found invalid — Effect of receipts stated.

The wakif's daughter, a pardanashin lady, had received money from the mutwalli under a form of receipt stating that she was receiving it in terms of the wakfnama. It was contended that the receipts amounted to a relinquishment of her inheritance by the daughter :

Held that since there was nothing to show that the daughter, a pardanashin lady, understood or was made to understand, that those receipts would amount to a relinquishment of her inheritance, those receipts could not have that effect. Those receipts at most only had the effect that the daughter recognized the wakf but if the wakf had been invalid in law, her recognition would have had no legal effect. [P 201*d,e*]

(t) Civil P. C. (1908), S. 2 (11)—Legal representative and his transferee can raise defences which were open to deceased party to suit.

A person who is brought on record as a legal representative of a deceased party to a suit can raise defences which were open to the deceased. The same defences can be raised by the transferee from the legal representative. Consequently, where the plaintiff assigns his interest in the suit property to a third party during the pendency of the suit and dies subsequently, his legal representative or the transferee from the legal representative can question the validity of the conveyance when the same could have been challenged by the plaintiff. [P 201*e*]

(u) Civil P. C. (1908), O. 21, Rr. 58 to 63 — Construction.

The provisions of O. 21, R. 58 and the following rules of that Order up to R. 63 is a reasonable adjustment of two principles. The first is that a judgment-creditor should have the fruits of his decree as quickly as possible ; and the other principle is that a third party should not be allowed to be harassed by the decree-holder's attempt to take in execution his property. The adjustment is made by allowing the third party to intervene in the execution proceedings as a claimant but the first principle which keeps in view the interest of the decree-holder requires that the claim proceeding should not be prolonged, for that would delay execution. Hence, the investigation of the claim by the executing Court must be of a summary nature, ordinarily to be decided on the basis of possession. The summary nature of the investigation of the claim by the executing Court requires in the interest of justice that the party against whom an adverse order is made by the executing Court should be given the opportunity within a short period of time to reagitate in a more detailed form the question of his claim in a regular suit. [P 202*b*,*c*,*d*]

(v) Civil P. C. (1908), O. 21, Rr. 63 and 58 — Issue raised in suit under R. 63 must be of same nature as issue in claim case in executing Court — In execution, judgment-debtor cannot challenge decree on ground of fraud — Nor can claimant urge that decree is bad or barred by time—He can only urge that property attached is his property — Whether property attached belongs to judgment-debtor or claimant is only issue in suit under R. 63 — Claimant cannot even if he be judgment-debtor's reversioner question validity of decree under execution to which he was not party.

The issue that can be raised in a suit instituted under the provisions of Order 21, R. 63 must in essence be of the same nature as the issue in the claim case in the executing Court, although the ambit of the enquiry of that issue would be more detailed in the suit. In the execution proceedings the judgment-debtor cannot challenge the validity of the decree under execution on the ground of fraud and the claimant can only urge that the property attached is his property and not of the judgment-debtor. He cannot urge that the decree is bad or even the execution is barred by time : ('21) 8 A. I. R. 1921 Pat. 311 and ('29) 16 A. I. R. 1929 Rang. 152, *Rel. on*. [P202*d*,*e*]

That the issue, namely whether the property at the date of the attachment was the property of the judgment-debtor or of the claimant can be the only issue in a suit under O. 21, R. 63 (apart from issues in bar, e. g., of limitation) is also indicated by the language of O. 21, R. 63 itself, for that rule speaks of a suit "to establish the right which he claims to the property in dispute." [P 202*e*,*f*]

The claimant even if he is the reversioner of the judgment-debtor cannot be allowed in a suit under O. 21, R. 63 to question the validity of the decree under execution to which he was not a party and by which he is not directly affected : 10 Bom. 659 and ('39) 26 A. I. R. 1939 Pat. 430, *Rel. on* ; 17 Mad. 389, *Not approved* ; ('14) 1 A. I. R. 1914 Cal. 380, *Expl.* [P 202*g*]

Though the decree under execution cannot be challenged in a suit under O. 21, R. 63 a decree which was the foundation of the claimant's title certainly can be challenged, because the claimant's title to the property attached is the issue in such a case and accordingly all the links in his title can be examined : ('14) 1 A. I. R. 1914 Cal. 380, *Approved.* [P 203*c*]

(w) Civil P. C. (1908), O. 21, Rr. 63 and 58— Suit under R. 63 is review of executing Court's summary order on claim—It is continuation of claim proceedings in different forum.

A suit under O. 21, R. 63 is in essence a review of the summary order passed by the executing Court on the claim : 35 Cal. 202 (P. C.), *Rel. on.* [P 202*f*]

It is a mere continuation in a different forum of the claim proceedings : ('39) 26 A. I. R. 1939 Pat. 138, *Rel. on.* [P 202*f*]

(x) Civil P. C. (1908), O. 21, R. 63 — Suit under R. 63 by decree-holder or claimant — Judgment-debtor is not necessary but only proper party.

The judgment-debtor is not a necessary but only a proper party to a suit under O. 21, R. 63 where the plaintiff is the decree-holder : 28 All. 41, *Rel. on.* [P 202*f*]

The judgment-debtor is not a necessary party even when the unsuccessful claimant is the plaintiff: ('34) 21 A. I. R. 1934 Mad. 587, *Rel. on.* [P 202*g*]

(y) Civil P. C. (1908), O. 21, R. 58 — It is doubtful whether judgment-debtor's reversioner can prefer claim under O. 21, R. 58 *(Quære).*

A reversioner has no interest in præsenti in the property. He has only a spes successionis. Whether such a remote interest would enable the judgment-debtor's reversioner to prefer a claim under O. 21, R. 58 is doubtful. [P 203*a*]

(z) Fraud — Decree — When can be set aside on ground of fraud.

Falsity of the claim by itself is not enough to set aside a domestic judgment on the ground of fraud. To set aside a decree on the ground of fraud the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and the decree sought to be set aside must be obtained by that contrivance : ('40) 27 A. I. R. 1940 Cal. 489, *Rel. on.* [P 203*h*]

(aa) Costs — Suit dismissed — It is wrong to award costs to plaintiff against contesting defendants.

When a suit is dismissed it is wrong to award costs to the plaintiff against the contesting defendants. [P 204*b*]

(bb) Mahomedan law—Wakf—Phrase "Kar-i-khair" — Meaning of — It is entirely different from word "dharam" in Hindu will.

The nearest English rendering of the expression "Kar-i-khair" would be "works of charity." The connotation of "Kar-i-khair" includes almsgiving, or liberality to the poor. [P 212*a*]

The phrase "Kar-i-khair" in a wakfnama is

entirely different from the word "dharam" as used
a in a Hindu will. (1876)1 C.P.D.374,*Rel.on.* [P 212*h*]

(cc) Mahomedan law—Wakf—Cypres doctrine explained.

The principle underlying the doctrine of cypres is deeply rooted in Muslim law. Under English law expressions which are too wide (such as 'philanthropic' or 'benevolent purposes') by their vagueness and uncertainty make the whole bequest invalid. Under Muslim law, if the wider expression includes purposes which are valid objects of wakf, the valid objects prevail, the rest are rejected : the wider expression is cut down and given effect to only to the extent to which it includes valid objects of wakf. Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the
b poor or to objects as near as possible to the objects which failed. [P 213*c,d*]

(dd) Mahomedan law — Wakf — Mutwalli—Remuneration — Whether wakif's salary as mutwalli is larger than that fixed by him for succeeding mutwallis — It is doubtful whether amount which succeeding mutwallis were to take as beneficiaries can be considered *(Quære)*.

In deciding the question whether the settlor as mutwalli has fixed as his salary a larger amount than he has fixed as salary of the succeeding mutwallis, it is doubtful whether the amount which the succeeding mutwallis are to take by way of salary can be added to what they are to take as beneficiaries under the wakf: ('33) 20 A.I.R. 1933 Oudh 107, *Doubted*. [P 194*e*]

(ee) Mahomedan law—Wakf — Objects must
c **be indicated with reasonable certainty.**

The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty. But it is not necessary that the objects should be named. [P 212*a*]

Sir Syed Wazir Hasan, Moulvi Zahur Ahmed, C. S. Saran, Dr. Sen Gupta, Amiruddin Ahmed, Rakhal Ch. Basu and Purna Chandra Bose (in 239), Panchanan Ghose. A. C. Mukherjee, Satyendra Nath Ghose and Manimoy Ghose (in 25 and 26) — for Appellants.

Khurshed Hussain, H. L. Chuckerbutty, Provash Chandra Bose, Kshetra Mohan Chatterjee, S. Ibni Imam (in 239, 25 and 26), P. Ghose, Satyendra Nath Ghose, Diptendra Mohan Ghose, Sarojendra M. Roy Choudhury, Narendra Nath Mitter (in 239), Sir Syed Wazir
d *Hasan, Moulvi Zahur Ahmed, C. S. Saran, Mahendra K. Ghose, Rakhal Chandra Bose and Sachindra Chandra Das Gupta (in 25 and 26)* — for Respondents.

R. C. Mitter J. — Prince Qamar Qadar Mirza Mohammad Abed Ali Bahadur, hereafter called the Prince, a muslim governed by the Shia law died on 31st January 1919 leaving him surviving his wife Shah Banu Amir Begum, a son Mirza Mohammad Syed Ali and a daughter, Nawab Zinat Ara Zinab Begum alias Juhi Begum as his heirs. His widow, Amir Begum died in 1928 leaving her son Mirza Mohammad Syed Ali and her daughter Juhi Begum as her heirs. The Prince in his old age was infatuated with a mistress of his named Shaheba Khatoon in whose
e favour he executed a lease for a term of ten years on 12th July 1916. That lease comprised twenty eight items of immovable property in the suburbs of Calcutta but mostly within the local limits of the Calcutta Municipal Corporation. By its terms Shaheba Khatoon undertook to pay the Prince a clear sum of Rs. 500 as rent per month. This lease was in supersession of an earlier lease which the Prince had executed in her favour for the selfsame properties under which Rs. 1500 was payable as the net monthly rent. On 14th June 1917, the Prince executed a wakfnama (Ex. R-A 38) which covered those twenty-
f eight items of immovable property included in Shaheba Khatoon's lease and eleven more items of immovable property. The principal question involved in these three appeals is the validity of this wakf. By this wakfnama, the Prince appointed himself the first mutwalli and his son Mirza Mohammad Syed Ali his successor to that office. His daughter Juhi Begum is the central figure in these litigations.

Juhi Begum married Humayun Kadar, on whose death in March 1918 she became a widow. She married again on 20th December 1918 and her second husband's name is
g Nawab Hashem Ali Khan. On the allegation that her first husband Humayun Kadar had undertaken to pay her a dower (den-mohar) of twelve lacs of rupees she purported to assign her claim thereto for an alleged consideration of rupees one lac to one Hashem Ibrahim Saleji on 28th September 1918. Saleji instituted a suit in the original side of this Court (No. 1515 of 1918) against her and the other heirs of her deceased husband Humayun Kadar on 6th December 1918 to recover the said amount of rupees twelve lacs (Plaint Ex. H-A 319). Saleji became an insolvent in December 1921. The Official
h Assignee of Calcutta in whom the estate of Saleji had vested on his insolvency got himself substituted in Saleji's place and continued the suit. As in her deposition in that suit Juhi Begum took up the position that she had before her conveyance to Hashem Ibrahim Saleji relinquished her claim to the dower in favour of the other heirs of her deceased husband, the plaint was amended at the instance of the Official Assignee who then prayed for a decree for the sum of rupees one lac with interest against Juhi Begum only on the ground that he was entitled to recover the same as there was a failure of consideration. The plaint was amended and he obtained an ex parte decree against

a Juhi Begum for the sum of Rs. 1,28,266-2-8 and costs on 21st August 1923 (Ex. I-A 343). Khatija Bibi, the wife of Saleji purchased this decree from the Official Assignee for Rs. 3000. She had this decree transferred to the Court of the District Judge, 24-Parganas and applied for execution of the same by attachment and sale of one-third share in the properties now in suit on the ground that Juhi Begum had inherited the same from her father the Prince and her mother, Amir Begum, who in turn had inherited a share therein from the Prince. As those properties were included in the Prince's wakfnama (Ex. R), Mirza Mohammad Syed Ali
b preferred a claim to them as mutwalli. The said claim of Mirza Mohammad Syed Ali was allowed by an order of the executing Court dated 15th February 1930. Title Suit No. 8 of 1931, later numbered as Title Suit No. 1 of 1934, was instituted under the provisions of O. 21, R. 63, Civil P. C., by Khatija Bibi on 12th February 1931. Mirza Mohammad Syed Ali and Juhi Begum were made defendants. Both of them died during the pendency of that suit and their heirs were brought on the record. The main defence of Mirza Mohammad Syed Ali was that the Prince had made a wakf which comprised
c the properties sought to be attached by Khatija Bibi and so Juhi Begum had not inherited any share thereof through her father the Prince or her mother Amir Begum. The learned Subordinate Judge upheld the wakf and dismissed the suit. Khatija Bibi has preferred the appeal, being No. 26 of 1936 against that decree and Nawab Hashem Ali Khan has filed a memorandum of cross-objection.

On 30th January 1931 Juhi Begum instituted suit No. 17 of 1931, subsequently numbered 2 of 1934 against her brother Mirza Mohammad Syed Ali. She claimed one-third
d share in properties which had belonged to her father, the Prince but which had been included in the wakfnama on the allegation that the wakfnama was invalid and that she had inherited the same from her father and mother. She claimed partition, in the alternative for recovery of possession. This suit has been complicated by later events which I will recite later on. Mirza Mohammad Syed Ali's defence was that the properties claimed in this suit had been made wakf by the Prince and he was the mutwalli. Thus the validity of the wakf is also the principal question in this suit. Juhi Begum died on 16th April 1931, leaving her second husband Nawab Hashem Ali Khan and her brother Mirza Mohammad Syed Ali as her e heirs. Shortly before her death she purported to convey all her rights in the properties in suit to Mamuda Bibi, a daughter of Saleji, by a conveyance dated 17th February 1931 (Ex. 7-B 610). On the basis of the said conveyance Mamuda Bibi applied to be substituted as plaintiff in the place of Juhi Begum in the suit, but before the said application could be heard Juhi Begum died and her husband Nawab Hashem Ali Khan was substituted in her place. Nawab Hashem Ali Khan later on filed an objection to Mamuda Bibi's application for substitution wherein he challeged her conveyance, but in f spite of his objection the learned Subordinate Judge added Mamuda Bibi as co-plaintiff 2 leaving the matter of the validity of the said conveyance to be determined at the final hearing of the suit. (Order No. 26 dated 23rd November 1931-C 70.) This order which had the effect of allowing a plaintiff to raise an issue against his co-plaintiff has unnecessarily enlarged the scope of the suit. Later on, an assignee from Nawab Hashem Ali Khan, Syed Ashiq Hossein, was added as co-plaintiff 1 (a). The learned Subordinate Judge found Mamuda's conveyance (Ex. 7) to be binding on Juhi Begum, but as he upheld the wakf he dismissed this suit also. g Mamuda Bibi, and Nawab Hashem Ali and Syed Ashiq Hossein have preferred two independent appeals which are Nos. 25 of 1936 and 239 of 1935 respectively. Mirza Mohammad Syed Ali's legal representatives (he having died while the suit was pending in the lower Court) who are the respondents have filed memoranda of cross-objections in First Appeals Nos. 25 and 26 of 1936 relating to costs. The common question in all three appeals relates to the validity of the Prince's wakf and if that wakf is upheld all the three appeals will have to be dismissed. I will accordingly take up that question first.

h Sir Wazir Hasan appearing for the appellants in Appeal No. 239 of 1935, namely Nawab Hashem Ali Khan and Syed Ashiq Hossein and Mr. Panchanan Ghose appearing for Khatija and Mamuda Bibi have challenged the wakf on the following grounds only:

(1) The wakf deed is a fictitious one — never intended to be acted upon by the Prince and was not in fact acted upon by him.

(2) It is at any rate invalid under the Shia law; (a) because the wakif, the Prince, created an interest in himself; (b) because (i) the appropriation was postponed to a

a future date, namely, till the expiry of Shaheba Khatoon's lease; and (ii) because the appropriation of 2/10th given as allowance to the "heirs" of the wakif was postponed till the Prince's death; (c) because the landlord's reversion which was in the Prince after the execution of the lease in favour of Shaheba Khatoon cannot in law be the subject-matter of a wakf; (d) because the whole of the income was not appropriated as a provision for a reserve fund was made; (e) because no substantial concurrent gift to charitable or pious objects had been made in the wakfnama; and (f) because no change of possession followed the execution of the
b wakfnama.

(3) The wakf has not been made valid by the Wakf Validating Act (6 of 1913); (a) because it is otherwise invalid under the Shia law; (b) because the ultimate gift to charity (3/16th of the net income is too small); (c) because the ultimate gift to charity is more remote than allowed by the said Act; (d) because the proviso to S. 3 of the Act has not been complied with, as the ultimate gift is not valid in law, the charitable and pious object not being specified by the wakif; (e) because of para. 8 of the wakfnama where provision has been made for persons other
c than the family, children or descendants of the wakif.

Mr. Panchanan Ghose has urged an additional point, namely: (4) That the wakf is invalid as the wakfnama had been executed by the Prince under the undue influence of Shaheba Khatoon. I will first deal with points (1), 2 (f) and (4) as they involve controversies on questions of fact. It may be accepted that Shaheba Khatoon had acquired great influence over the Prince and had exercised that influence to her own advantage. She had succeeded in inducing the Prince in his old age to desert his wife, to
d leave his family house and to live with her in a separate house. It may also be taken as established that she had designing people as her advisers and her object was to fleece the Prince. She had succeeded in getting a lease for ten years from the Prince of bulk of his valuable properties at a grossly inadequate rent and had also succeeded in getting the Prince's Government promissory note of more than one lac of rupees (possibly of two lacs) endorsed in her favour. It may also be that she got a large portion out of the Prince's monthly pension of Rs. 4000. But there is no reliable evidence to show that she had any hand in the execution of the wakf. The oral evidence on the point, as for instance of Abdul Quaem (C. 375) is unreli- e
able. The wakfnama did not confer any benefit on her. The execution of the wakf had the effect of checking her further intentions on the Prince's properties, if her desire for enrichment had not been already satiated. I do not see any ground for holding either that the wakfnama had been executed at her request, or she had taken any part in respect thereto, far less for holding that it was executed through her influence, much less under influence, over the Prince. The execution of the wakfnama has been admitted by the appellants. They urge that the wakf is invalid as there was no change in
f the character of possession, the Prince continuing to hold possession of the properties in the same manner as he was doing before the execution of the wakfnama.

According to the conception of Shia law "wakf is a contract the fruit or effect of which is to tie up the original of a thing (corpus) and to leave its usufruct free" (Bailie Pt. II, p. 211). The wakf property or the subject of appropriation (corpus) is transferred, so to become the property of the mowkoof alehi (persons on whom the settlement is made), for they have a right to the advantages or benefits (usufruct) to be derived
g from it. The contract is not rendered obligatory except by giving possession (Bailie II, p. 212), that is, the wakf is not completed unless either possession of the wakf property is delivered to the first beneficiaries or they are authorized to administer it or where the dedication is for the benefit of a number of persons a mutwalli is appointed and possession is delivered to the latter. Where the wakif appoints himself the first mutwalli a change in the character of his possession from owner to mutwalli would fulfil the requirement of the rule. Application of the usufruct by him to the purposes of the wakf is the strongest evidence of such change but h
that is not the only method of proving the change of possession. Mutation of his name from malik or owner to mutwalli in respect of the properties of the wakf is another criterion to indicate the change of possession but mutation of name is not the only method of proof: 64 I. A. 158[1] at p. 168.

The effect of the entire evidence on the point must be considered. The question is pre-eminently a question of fact. Before dealing with the facts bearing upon this point and the point that the wakf was a ficti-

1. ('37) 24 A. I. R. 1937 P. C. 127 : 167 I. C. 884 : 16 Pat 344 : 64 I. A. 158: 31 S. L. R. 310 (P. C.), Ali Zamin v. Akbar Ali.

tious one, never intended to be acted upon, a I will notice an argument advanced by Mr. Khursed Hossein appearing for the respondents. He says that if we came to the conclusion that the terms of the wakfnama do not make it an invalid wakf under the Shia law, the wakf must be upheld as soon as it is proved that the wakfnama was duly executed by the Prince followed by change of the character of his possession and the question whether it was meant to be operative or not, in this case, where the wakf is challenged not by the creditors of the Prince but by his legal representatives or those claiming in the right of the Prince, is not pertinent. b His argument is that the document being in form, delivery of possession by the wakif to the mutwalli, or change in the character of his possession when he himself is the first mutwalli of the wakf, completes the wakf and vests the wakf properties in the *mowkoof alehi* under the Shia law. Only in the case where the wakf was made by the wakif with the intention of defrauding his creditors and had in fact defrauded them that it becomes a voidable wakf—a valid wakf till avoided by the creditors of the wakif in a suit framed under S. 53, T. P. Act. For supporting his broad contention so urged c he has relied upon the observations made in 10 C. W. N. 449[2] at pp. 484-485. This broad contention was repelled in 59 Cal. 402[3] at pp. 424-426, where those observations in 10 C. W. N. 449[2] made by Woodroffe J. were explained. To me it appears that the question has been set at rest by the Judicial Committee of the Privy Council in 35 C.W.N. 324[4] at p. 332. Facts can be examined for the purpose of finding whether a deed of wakf (even when followed by delivery of possession by the wakif to the mutwalli) had been executed without the wakif having any intention of divesting himself of his ownership and that his real intention was to utilize the d document, should occasion arise, as a shield against claims against him which may ultimately affect his worldly possession. If the facts establish that such was his intention the wakf will have to be declared invalid.

As I agree with the conclusions of the Subordinate Judge on both points 1 and 2 (f) I will notice only the main items of evidence from which I have come to the e conclusion that the Prince changed the character of his possession from malik to mutwalli of the wakf, that the wakf was not a fictitious one, intended to serve as a shield against the Prince's creditors, and that it was in fact acted upon during his life-time. The Prince was a religious man and had a desire to make wakf in accordance with the traditions of his family. This desire he often expressed to his friends and relatives. He discussed the terms of the intended wakf about two years before the execution of the wakfnama in question and took legal opinion. Mr. Unsud Dowla is one of the witnesses who gives material evidence on these f points, and he is supported by the evidence of the members of the royal family. Mr. Unsud Dowla is a respectable person who held positions of responsibility and honour in public life. He has been believed by the learned Judge and I see no reason why his statements should not be adopted. The Prince had conceived the idea of making a wakf in 1915 or so according to this evidence. It is necessary to examine the financial position of the Prince in 1915 and in 1917 when the wakf was created and to see if the Prince was so much pressed with the burden of his debts as to lead us to the inference g that the creation of the wakf was a plan designed upon to shield his properties from creditors.

There is no definite evidence as to whether the Prince was indebted to any person in 1915, save and except to his wife Amir Begum for her dower. The circumstances rather point to the fact that he was not in debt to any outsider, for it is proved that he had at about this time Government promissory notes of the face value of more than one lac of rupees which he subsequently endorsed to Shaheba Khatoon. He became intimate with Shaheba Khatoon in 1914 or h so and from that time the Prince became gradually indebted. It would be a safe conclusion to make that in 1915 the Prince was fairly solvent, with no appreciable amount of debt and that probably the only person who had a legal claim for money against him was his wife who was not at that time particularly anxious to demand her dower or enforce her claim, whatever may be the amount of her dower. Possibly, Rs. 12,50,000 was a notional figure, if it was at all the figure fixed for her dower, named not with a view to payment but for the purpose of indicating the family prestige and dignity of the husband and the wife. I make these ob-

2. ('06) 10 C. W. N. 449, Kulsoom Bibi v. Golam Hossein Cassim Ariff.

3. ('32) 19 A. I. R. 1932 Cal. 93 : 133 I. C. 657 : 59 Cal. 402 : 54 C. L. J. 80 : 35 C. W. N. 1159, Masuda Khatun Bibi v. Muhammad Ibrahim.

4. ('30) 17 A. I. R. 1930 P. C. 255 : 128 I. C. 647 : 35 C. W. N. 324 (P. C.), Mohammad Ali Mohammad Khan v. Mt. Bismillah Begam.

servations, for the suit which she instituted later on against her son Mirza Mohammad Syed Ali in which she claimed Rs. 12,50,000 as dower money due to her, was ultimately withdrawn by her and was compromised by Mirza Mohammad Syed Ali with her creditor Haji Allabux for Rs. 35,000 only (Ex. 1 (a), B. 446 and 449.) Thus, the Prince was not heavily involved in 1915 when he conceived the idea of making a wakf and made preliminary preparations. In June 1917, about the time when he executed the wakf he was indebted to the following persons : (a) Prince Babar and others who had recovered a personal decree against him; (b) Mr. Rose; (c) Mr. and Mrs. Remfry; (d) Amir Begum, his wife, for her dower.

Leaving aside the claim of Amir Begum, the amount due to the other three creditors was about Rs. 50,000: *see* Ex. 14 G. 12 and 28-A. 385. There is no evidence that any of those creditors or Amir Begum had either demanded their dues or had put pressure upon the Prince before the execution of the wakf on 14th June 1917. Amir Begum only sent a letter of demand four days after the execution of the wakf (Ex. 11-A. 74). It has not been proved that an earlier letter of demand dated 2nd June had been sent on her behalf (deposition of Mr. Satya Ranjan, C. 406). Mr. and Mrs. Remfry filed an application in insolvency against the Prince in 1918. The Prince was adjudicated an insolvent on 23rd July 1918 but later on the said adjudication was annulled by the Prince paying up his creditors in full by utilizing some of the Government promissory notes which he had previously endorsed in favour of Shaheba Khatoon. It appears to me that the Prince was not actuated with an intention to defraud his creditors by creating a fictitious wakf. He had conceived the idea of making a wakf when he was not involved in debts to outsiders. He did not make the wakf in a hurry or in secret. He discussed its terms with friends and relatives for a considerable time and had executed the instrument openly, making one of his creditors who had obtained a decree against him (Prince Mirza Ibrahim Ali) an attesting witness.

It appears to me that on hearing of the wakf some of his creditors became nervous and for the purpose of realizing their money with the least amount of trouble they banked upon the prestige of the Prince and so took recourse to insolvency proceedings, with the hope, which was actually fulfilled, that the Prince would pay them from the resources at his disposal to save his name and prestige. The account books of Prince's time have not been produced but from that fact alone I cannot infer that the income of the properties made wakf was not applied by the Prince to the objects of the wakf, or infer that he never intended the wakf to be a real one. He was at the time of his death living separate from the members of his family and with his mistress. On his death curator proceedings were taken and everything including the papers found at his residence was removed to Court. It has not been proved that during the last part of his life he kept regular account books or that these account books came to the possession of Mirza Mohammad Syed Ali after his death. The oral evidence is that he spent money on the upkeep of the mosque and the Imambara and after the execution of the wakfnama the Imambara was run on a more lavish scale. These were the principal, religious and pious objects of the wakf.

The documentary evidence on the record establishes a change in the character of possession of the Prince after the execution of the wakfnama. The wakfnama comprised thirty-nine items of immovable property. Three items were in Lucknow and of them two are untraceable. Regarding the remaining items at Lucknow the Prince's name was not changed from owner to mutwalli in the Collector's record. Two items were Daripin holdings in Kidderpore. In respect thereof there was also no mutation. The rest were immovable properties within the jurisdiction of the Calcutta Municipality. There are rules in Chap. 5 of the Assessment Manual of the Calcutta Municipal Corporation for the mutation of names. The procedure according to those rules has been described in the evidence of Hari Santosh Chatterjee (C. 280). Under the Municipal Act then in force, assessment of taxes was revised by the municipality at intervals of five years, and for each period of assessment one set of assessment registers were kept in which mutations made during the currency of that particular assessment were noted. The assessment registers for 1913-1914 to 1918-1919 and 1914-1915 to 1919-1920 as also other assessment registers of later periods have been proved (Ex. O series A-4). Those of the later period after 1919 are not material for the purpose of the question I am now discussing because they were of Syed Ali's time. The official year begins on 1st April and ends on 31st March of the following year. The assessment register of the year 1918-1919 would accordingly end on 31st March 1919 and that of the year 1919-1920 would end on 31st March 1920. The Prince

died on 31st January 1919. Those assessment
a registers show that the Prince's name was changed from owner to mutwalli of the wakf estate, but neither the date of the mutations nor the dates of the applications on which mutation was made are noted in the registers. Those applications have been destroyed under the rules. But having regard to the rules of the assessment manual, and the procedure that has to be followed in making the mutations the applications for mutation must have been made by the Prince and that it must have taken a considerable time in noting the mutations on the registers. Those assessment registers ending either with the
b official year 1919 or 1920 show the Prince's name was mutated from owner to mutwalli in respect of about nineteen items of property. I accordingly hold that the Prince had his name mutated as mutwalli in the records of the Corporation of Calcutta in respect of a considerable number of the properties included in the wakfnama.

Shortly after the execution of the wakfnama, the Prince wrote a letter to the Collector of 24-Parganas informing him of the wakf. A certified copy of the wakfnama was enclosed with the letter (EX. J 5-A 80). Later he offered to put into the safe custody of the
c Collector the title deeds and other papers relating to the wakf properties (EX. J 4-A 82). Certainly he would not have so acted if he meant the wakf to be a fictitious one. He was a son of the late King of Oudh, and was drawing from the Collector a political pension of RS. 4000 a month. In proceedings before the Court, in plaints, written statements filed by him and in his deposition given in Court, he openly declared that he had made a wakf and was holding the properties comprised therein as mutwalli (EX. H (1)-A 195; EX. A 3 at 204-205, EX. CC, A 298); in his capacity as mutwalli he also granted pottas to tenants (EX. S. A-252,
d EX. K (1) 1-A 258). I accordingly hold that the Prince changed the character of his possession from owner to mutwalli and the wakf was thus completed in law. The Sharaya-ool-Islam, the principal authority on Shia law, enumerates four principal conditions of a wakf namely (1) those which relate to the mowkoof or thing appropriated; (2) those which relate to the wakif or the maker of the wakf; (3) those which relate to mowkoof alehi, or the beneficiaries and (4) those which relate to the wakf itself (Bailie Digest of Moohamedan Law PART II p. 213 et. seq. Edn. 2). In these appeals we are concerned only with first and the fourth conditions. The mowkoof or the subject-matter of the e wakf must be (a) a substance, (b) the property of the appropriator, (c) capable of being used without being consumed and (d) capable of being delivered. These four subsidiary conditions follow from fundamental principles of the Shia law. As a Shia wakf implies the transference of ownership from the wakif to the mowkoof alehi (beneficiaries) the transferor (wakif) must have the ownership, for he who has no title cannot vest title in another by his act. As a wakf must be perpetual the subject-matter must be such as may last for ever, one which must not be consumed by use. As in Shia law delivery of possession must be made the f mowkoof (property) must be capable of being delivered. This necessarily implies that the mowkoof must be a specified object (Ayn) and not indeterminate things (Deyn). As the carrying out of the object of the wakf would require money the mowkoof must be substance, that is, that which would yield income or profit. It would follow that all property which produces income or profits and which would not be consumed by use can be dedicated by way of wakf, except these which are expressly excluded by the Muslim jurists. The condition of delivery of possession in my judgment does not require g that there should in all cases be physical delivery. The nature of the delivery would depend upon the nature of the subject and the purpose for which the subject has to be applied according to the terms of the wakfnama.

A property which has been leased out at a rent cannot be possessed by the landlord in khas. Through receipt of rent he possesses the subject. If he grants a lease and thereafter makes a wakf of such property he can transfer his possession to the mutwalli by asking the lessee to attorn to the mutwalli or by authorising the mutwalli to receive the h rent reserved by the lease. That is the only way in which he can deliver possession to another. If the wakfnama directs the income to be utilised for the object of the wakf I do not see why the inclusion of a property previously leased out by the wakif would render the wakf invalid. If however he directs in the wakfnama that a mosque is to be built on site of the property so leased out before the creation of the wakf or directs that property to be used for a purpose which would require physical or khas possession of the same the wakf would be invalid, for the appropriation would then be necessarily postponed till the determination of that

lease, or as has been said, would then depend on a future contingency. It would be void on the ground of non-fulfilment of one of the principal conditions which relate to the wakf, that is of the fourth condition which I will notice and examine hereafter. In fact the Muslim jurists recognize that a property which is subject to a lease in favour of a third person can be made the subject-matter of a wakf (Ameer Ali's Mohamedan Law Vol. I p. 184 Edn. 3). This is also the view expressed in 49 Cal. 477[5] at p. 483. Before the determination of the lease the lessor's profits would be appropriated to the purposes of the wakf and would enure to its benefit, and after determination of the lease the profits which had been intercepted by the leases would automatically enure to the benefit of the wakf by way of accretion. This in my judgment is the meaning of the passage at p. 563 Vol. I of Bailie's Digest of Mohamedan Law (Edn. 2), when it is said that "after the expiration of the term (of the lease) the land would revert to the purposes to which it was appropriated." I cannot therefore give effect to point 2 (c) raised by the appellants.

The fourth principal condition of a wakf, conditions which relate to the wakf itself requires (a) that the wakf must be perpetual, (b) absolute and unconditional, (c) that possession must be given of the mowkoof (subject-matter) and (d) that the mowkoof must be entirely taken out of the wakif or the appropriator himself (Bailie, Digest of Mohamedan Law Part 2 p. 218, Edn. 2). Thus when a man makes a wakf for an object which must necessarily cease with the efflux of time the wakf would be void on the ground of non-fulfilment of condition (a). A.I.R. 1935 ALL. 856[6] affords an illustration in this respect. One of the grounds on which the wakf in question there was pronounced to be void was that the dedication of the bulk of the income was not in perpetuity. The bulk of income was given for the maintenance of named individuals, and there was no gift over to the poor or to other objects of charity of a permanent nature. It is for the fulfilment of condition (a) that in a wakf-alal-aulad there must be an ultimate gift for the poor, for the poor as a class must necessarily exist till eternity, or to religious, pious or charitable purpose of a permanent character.

The meaning of condition (b) is that the appropriation must be of immediate effect and cannot be postponed or be made to depend upon a future event, whether it is likely or possible to occur or even which is certain to occur. Thus, where a wakf is created by a deed, the appropriation must be from the date of the execution of the deed, the time from which the deed operates. The cases have gone even to this extremity that if it is provided that the wakf would take effect from the date of registration of the deed, the wakf would be void, as some appreciable time must elapse between execution of the deed and its registration: 24 ALL 231.[7] It is now recognized that a Shia can make a wakf by will (30 I. A. 94.[8]) This implies a postponement of the appropriation till the death of the wakif. But even in the case of a wakf created by will the appropriation cannot be postponed to a period later than the death of the wakif. In 65 I. A. 198[9] at p. 211 the Right Hon'ble Sir George Rankin observed thus :

> On the other hand, a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications inter vivos. 'If one should say I have appropriated when the beginning of the month has come . . . the appropriation would not be valid' (Sharaya-ool-Islam Bailie Vol. II, 218). Their Lordships recognize that the decision in 30 I. A. 94,[8] which permits a Shia to create a wakf by will, is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future.

In my judgment the Prince's wakf has not violated this rule. I cannot find anything in its terms, the effect of which is to postpone the appropriation till after the expiry of Shaheba Khatoon's lease. The income derivable from the lease, that is the rent payable by Shaheba Khatoon, could have been applied from the time of the execution of the wakfnama to the objects of the wakf. On the expiry of Shaheba Khatoon's lease the additional income accruing from those properties would automatically become available for the objects of the wakf. I cannot therefore uphold contention 2 (b) (i) of

5. ('22) 9 A.I.R. 1922 Cal. 429 : 67 I. C. 77 : 49 Cal. 477 : 34 C. L. J. 444 : 26 C. W. N. 749, Jinjira Khatoon v. Mohammad Fakirulla Mia.
6. ('35) 22 A.I.R. 1935 All. 856 : 156 I. C. 609, Mt. Latifunessa v. Najimuddin Shah.
7. ('02) 24 All. 231 : 1902 A. W. N. 32, Syeda Bibi v. Mughal Jan.
8. ('03) 25 All. 236 : 30 I. A. 94 : 8 Sar. 397 (P.C.), Baker Ali Khan v. Anjuman Ara Begum.
9. ('38) 25 A.I.R. 1938 P. C. 184 : 174 I. C. 870 : 65 I. A. 198 : 32 S. L. R. 749 : I.L.R. (1938) Lah. 383 (P.C.), Mt. Ali Begam v. Badr-ul-Islam Ali Khan.

a the appellants. Contention 2 (b) (ii) depends upon what interpretation we would give to the words "heirs" used in para. 6 of the wakfnama. In my judgment the wakif meant by that word his children and their descendants and intended the 2/10th to be distributed amongst them immediately from the date of the execution of the wakfnama in the proportion indicated in the Shia law of inheritance. To take an instance. He intended his son to take 2/3rd of the 2/10th and his daughter the remaining 1/3rd of that fraction even while he was alive. I am fortified in this view by the phrase used in para. 7 namely "three parts (instead of two b as provided for in para. 6) shall be divided amongst my children according to the Imamia law." Point 2 (b) (ii) is accordingly overruled.

I cannot also accept contention 2 (d). I do not see how the provision for a reserve fund can invalidate the wakf. The argument that till the money of the reserve fund is actually applied for the purposes indicated in the wakfnama, e.g., those mentioned in paras. 2, 6 and 7 it would be in suspense — not appropriated — is in my judgment a falacious argument. The property (corpus) was appropriated from the date of the wakf- c nama. On what objects the usufruct of the property is to be applied is also indicated. The reserve fund money was to be applied for the improvement and extension of the wakf and in rebuilding the mosque and Imambara on certain contingencies. The benefit of reserve fund is to result to objects of the wakf. The income of the properties dedicated being trust money, so to say, any property acquired from a portion of the accumulated income of those properties that is the portion which goes to make up the reserve fund, would be impressed by the trust. The condition made by the Prince that immovable properties purchased from d the reserve fund are "to be included in this wakf" does not in my judgment amount to an attempt on the part of the Prince to make a wakf in future of those properties so to be acquired. Even without that express statement the properties thus acquired would be wakf properties, accretions to the wakf. In my judgment the Prince was merely emphasising by that statement made in that part of para. 6 what would have been the normal effect in law. In 59 Cal. 402[3] a Division Bench of this Court did not find anything wrong in the wakf when the wakif provided for acquisition of properties from out of the surplus income. The learned advocates for the appellants wish to distinguish that case e on the ground that that was a wakf created by a Sunni Mussalman and there was no express provision for a reserve fund. That may be so, but I do not see any valid distinction on those grounds.

In 64 I. A. 158,[1] which was the case of a Shia wakf, there was a provision for the creation of a reserve fund from out of the income of the dedicated properties, but notwithstanding that provision their Lordships of the Judicial Committee upheld the wakf. The contention of the learned advocates for the appellants would lead to the absurd result that a Shia wakf would be invalid because of what they call the rule of imme- f diate appropriation if the wakif does not direct by the wakfnama that every pice realised as income from the dedicated properties should be spent immediately after receipt by the mutwalli on the objects of the wakf, at least in those cases where the terms of the wakfnama direct the mutwalli to spend at periodic intervals. If the Shia law in this respect is what has been urged before us by the learned advocates of the appellants many wakfs would be in danger of being destroyed, by reason of the properties included therein being sold for public changes in years of calamity and distress for g want of a reserve fund. The creation of a reserve fund to meet unforeseen events, or to preserve the wakf properties is a prudent act of management and I do not see why a provision in the wakf deed for such a reserve fund intended for preserving the wakf properties, etc., would be the cause of the destruction in law of the wakf itself. If there was an express provision in the Shia law to that effect I would have been bound to follow it, but I am not prepared; where there is no such express text in the Shia law, to give so unreasonable an effect to what has been called in the argument of the appel- h lant's advocates a necessary and logical deduction from the fundamental principles of appropriation in Shia law. I accordingly overrule ground 2 (d) also. The third sub-rule of the fourth principal rule which requires delivery of possession has already been dealt with in the earlier part of my judgment and I have recorded my findings on the question of fact, namely whether there was a change in the character of the Prince's possession. The fourth sub-rule has now to be discussed. It is that the "mowkoof" must be entirely taken out of the wakif or the appropriator. The wakif cannot "eat out of the wakf." He cannot make a settlement

upon himself or make it a condition that he should have to himself a part or whole of the usufruct of the dedicated property. If he does, the whole wakf is void. In the Sharaya-ool-Islam it is stated that if a wakif makes an appropriation for the poor and he should himself subsequently become poor, or for lawyers, and himself become a lawyer, there is no objection to his participating in its benefits : (Baillie Part II, page 219).

This is not an exception to the rule that a wakif shall not eat out of a wakf but is not within that rule. An elaborate argument has been advanced before us by the learned advocates for the appellants on this passage of the Sharaya-ool-Islam and it has been contended before us that the Right Hon'ble Sir John Wallis by misreading this passage, has in 54 I.A. 33[10] misapplied it to a case where the wakif had expressly appointed himself as the mutwali and, in his capacity of mutwali, had provided a remuneration for himself qua mutwali which he had fixed for mutwalis generally. I will deal with this criticism of the decision in 54 I. A. 33[10] later on. It is lawful for a Shia wakif to appoint himself mutwali by the terms of wakfnama. Where he reserves by its terms no remuneration for himself as mutwali the case is clear. Where he makes others mutwalis and provides for payment of salary or remuneration for mutwalis, and does not in express terms appoint himself the mutwali but he subsequently happens to become the mutwali, as for instance on a vacancy through appointment by the Court or by the appointing authority mentioned in the wakfnama there is no objection to his taking the salary or remuneration that has been fixed in the wakfnama for mutwalis generally. This position has been admitted by the learned advocates for the appellants and they say that this is the only effect of the analogy that can be drawn from the above mentioned passage of the Sharaya-ool-Islam. Their argument is that the wakif cannot appoint himself the mutwali by the terms of the wakfnama and by its terms take as salary or remuneration in his capacity of mutwali, even though the amount of salary or remuneration be the same as has been fixed for mutwalis generally. In such a case, according to them the wakf, which by its terms authorizes him to take the remuneration or salary as mutwali would be void under the Shia law.

The case of the wakif receiving benefit out of the wakf qua mutwali is not dealt with in the Sharaya-ool-Islam. The subject has, however, been dealt with elaborately at pages 344 and 345 of the Jamaa-ush-Shittat (Teheran edition), a portion of which has been translated at pp. 416 to 418 to Vol. 1 of Ameer Ali's Mahomedan Law (Edn. 3), and at page 39 of Orwatul Osqua Vol. 1 Book 2 (Haidari Press Publication). From the passage of the Jamaa-ush-Shittat Mr. Ameer Ali has drawn the conclusion that the wakif can lawfully take the allowance fixed for mutwalis generally when he himself holds the office. This passage at 418 covers the case where the wakif becomes the mutwali under the express terms of the wakfnama, that is, where he appoints himself as the mutwali, and also the case where without such appointment he subsequently happens to become the mutwali, as for instance by appointment by the Court or other appointing authority. In 54 I. A. 33,[10] a Shia wakif appointed herself as the first mutwalli and fixed her remuneration as mutwalli at Rupees 1500 a year. After her two mutwallis at a time were to function and the salary of each was fixed at Rs. 180 a year. At p. 39 of the report, Sir John Wallis expressed the approval of the statement of the law as made by the learned Subordinate Judge to the effect that the wakif or settlor could, when he was himself to be the mutwalli, reserve as his allowance as mutwalli what had been fixed for mutwallis generally. The view expressed by Mr. Ameer Ali at p. 418 (Edn. 3) was approved by him and that view was further supported on the ground that that case was no exception to the rule that the wakif cannot eat out of wakf but did not come within that rule at all, for, what the wakif would take would not be in the capacity of settlor but in another capacity altogether, namely in the capacity of a mutwalli. For supporting the view, that the Muslim jurists themselves recognize and maintain the distinction between two capacities that a wakif may fill, reliance was placed on that text of the Sharaya-ool-Islam which states that if an appropriation is made for the poor or for lawyers the wakif can participate if he himself happens to become poor or a lawyer. The wakf in that case was declared void as the wakif did not change the character of his possession from owner to mutwalli and this was expressly made the ground for the advice tendered to His Majesty. In that case it was also pointed out that the wakf could not be supported on the ground that the wakif by fixing for herself as mutwalli a far larger

10. ('27) 14 A. I. R. 1927 P.C. 2 : 99 I.C. 669 : 54 I.A. 33 : 6 Pat. 259 (P.C.), Abadi Begum v. Kaniz Zainab.

allowance, which represented nearly the whole of the income (the wakf property being valued at Rs. 19,000 and the allowance was Rs. 1500 a year), than what had been fixed for the succeeding mutwallis, had indicated that she intended "to eat out of wakf" on the pretence that what she was to take out of the usufruct was her salary as mutwalli.

The statement of the law made by the Right Hon'ble Sir John Wallis that it is lawful to the wakif to take as mutwalli such an allowance as had been fixed for mutwallis generally is no doubt an obiter dictum and it would not have been open to us to re-examine the statement of law thus made on the principle formulated in 52 I.A. 398[11] at p. 417 but for the fact that their Lordships of the Judicial Committee reserved further consideration in case the question arose in future, as they had had not then the assistance from the judgment of the High Court on that point. In view of that reservation I hold that it is open to us to re-examine the question in view of the arguments advanced before us. But after having listened to those arguments addressed to us in an elaborate form I am of opinion that the view expressed by Mr. Ameer Ali at p. 418, (Edn. 3) is the correct interpretation of the Shia law on the point and in such a case, that is, where the wakif appoints himself the mutwalli with a salary or remuneration which he provides for all mutwallis generally, the wakf is not void under the Shia law.

In 64 I.A. 158[1] the wakif appointed himself the first mutwalli with a salary which had been reserved for mutwallis generally. The Right Hon'ble Sir George Rankin noticed that fact and upheld the wakf. In dealing with the large appropriations of money by the wakif he expressed the view that his salary as mutwalli could be set off against the item of Rs. 17,000 shown in accounts as having been taken by the wakif personally. There is no doubt no discussion of the point in that judgment apparently because the learned counsel appearing for the respondent did not argue the point on the view that the statement of the law on the subject as made in 54 I.A. 33[10] was correct and could not be challenged. In 8 Luck. 246[12] at p. 264 that part of the judgment in 54 I.A. 33[10] which dealt with the question of the wakif taking a part of the usufruct as his salary as mutwalli was analysed and explained. In that case the settlor had fixed as his salary a larger amount than he had fixed as salary of the succeeding mutwallis, and it was held that that fact did not render the wakf invalid as the amount which the succeeding mutwallis were to take by way of salary added to what they were to take as beneficiaries under the wakf, equalled or exceeded what the wakif was to take in his capacity of mutwali. Whether the benefits which the other mutwalis were to take in their capacity of beneficiaries could be taken into consideration in deciding that question is a point which may be open to doubt—and I doubt the soundness of that reason—but the fact remains that when the case was carried in appeal to His Most Gracious Majesty in Council the Right Hon'ble Sir George Rankin, while reversing the judgment of the Chief Court of Oudh on other points, observed that 54 I.A. 33[10] had been rightly distinguished by that Court in 41 C.W.N. 933[13] at p. 940. One of the grounds on which the Judicial Committee of the Privy Council were inclined to hold the wakfs to be invalid in 54 I.A. 33[10] was that the remuneration reserved to the wakif as mutwali was not that which had been reserved for mutwallis generally but represented a sum which nearly swallowed up the income of the dedicated properties, and was a cloak or pretence.

Sir Wazir Hasan appearing for some of the appellants severely criticised the view expressed by Mr. Ameer Ali at Vol. I, P. 418 of his book on Mahomedan Law (Edn. 3) to the effect that the wakif can lawfully take the allowance fixed for mutwallis generally when he himself holds the office. He says that view is not supported by the Jamaa-ush-Shittat, but, on the other hand, is quite contrary to what has been stated as law in that book of authority in a later passage which Mr. Ameer Ali did not translate. A translation of the omitted passage was supplied to us by him, but as there were disputes between the learned advocates appearing for the appellants and the respondents on the correctness of the translation so supplied to us and as the matter appeared to us to be important we had a translation made by our Court Translator. As the translation supplied to us by the learned advocate for the appellants does not agree with the translation made by the Court officer we have preferred to follow the translation made by the latter.

11. ('25) 12 A.I.R. 1925 P.C. 272 : 91 I.C. 370 : 52 I.A. 398 : 28 O.C. 352 : 47 All. 883 (P.C.), Mata Prasad v. Nageswar Sahai.

12. ('33) 20 A.I.R. 1933 Oudh 107 : 141 I.C. 501 : 8 Luck. 246 : 9 O.W.N. 750, Mahabir Prasad v. Mustafa Hossein.

13. ('37) 24 A.I.R. 1937 P.C. 174 : 168 I.C. 418 : 31 S.L.R. 379 : 41 C.W.N. 933 (P.C.), Mahabir Prasad v. Syed Mustafa Husain.

We have directed the Court translation to be put on the record. The passage (pp. 344 and 345 of the Taheran edition) contains an involved discussion. A portion has only been translated in Mr. Ameer Ali's book on Mahomedan Law at pp. 416 to 418 (Edn. 3). An analysis of the whole passage including what has been omitted in Mr. Ameer Ali's book discloses that the following subjects are considered and answered : (I) Whether the wakif when he is the mutwali can eat out of the wakf.

Answer — He can reserve to himself as mutwali what has been reserved for mutwalis generally. It makes no difference whether he has made it a condition that he should become mutwali with a salary reserved for other mutwalis generally, or happens to become so. "The legality of the mutwali eating out of the wakf depends upon his quality as mutwali and not upon the fact of the wakif being the mutwali" . . . The reasons given in support of this answer are as follows : "The case is akin to the case where a wakf is created for the poor or the theologians and he himself (the wakif) becomes poor or a theologian"—a case which shows that a distinction is recognised by the Muslim jurists between the two capacities of the wakif, one as settlor and the other as a poor man or a theologian. The answer to the question is also sought to be supported by the author by invoking the principle underlying a case of another description. That case is that where a man makes a public wakf—for instance of a mosque or a tank—it is valid for the wakif to be benefited therefrom,

for in a public wakf his primary object is to give benefit to the public and his own benefit therefrom is not contemplated and no condition is made in that behalf because his object is the benefit of Musalmans and as a secondary object it necessarily follows therefrom that he should include his own food along with those of the Musalmans in general.

This illustrative case is brought in aid of the view that it is lawful for the wakif to receive as mutwali the same benefit out of the wakf as all mutwalis can take by the following line of reasoning, namely, "The question of self comes as subsidiary. The inclusion of himself as mutwali in the matter of profit comes as secondary and indirect issue."

Rider to the answer : — A wakif who is also the mutwali cannot take for himself anything he likes out of the usufruct of the wakf properties simply because he is the mutwali, for in that case the wakif does not in substance divest from him entirely the mowkoof (the subject-matter of the wakf) but "makes himself a participant—a chief partner," and for that reason the wakf is a nullity.

(II) The precise scope of the rule that "when a wakf is created for the poor or the theologians (translated as lawyers by Baillie) the wakif can lawfully take if he becomes a poor man or a theologian"—the case used to support the first answer by way of analogy —is considered by the author parenthetically. His view is that the wakf would be valid whether the wakif was a poor man or a theologian at the time of the wakf or became so subsequently, but "whenever there is a condition of including oneself (the wakif) amongst the poor is made," the wakf would be a nullity. The discussion in this part of the passage has nothing to do with the case of a wakif eating out as mutwali, but only with the case where he eats out as beneficiary.

(III) The case of the wakif deriving benefit from the wakf as beneficiary in an indirect manner which was used as another reason for supporting what I have called the first answer is then considered with a view to put proper limitations. It is not permissible for the wakif to do so in every case (save and except in case of public wakfs). As for instance he cannot provide for his own maintenance or get any benefit on the ostensible ground that it is charity. The argument in support of this view as stated is that there is the definite rule that the wakif shall not derive benefit from the wakf and the absolute necessity for divesting the mowkoof from himself and this definite rule cannot be filtered away by reasonings and deductions from the rule that a wakif can lawfully make it a condition that he should get benefit from the wakf in his capacity as mutwali. The analysis that I have made of the whole of the passage shows that it is perfectly lawful for a wakif to reserve such salary for himself as mutwali which he provides in the wakf deed for mutwalis generally. This rule is not confined to the case only where he happens fortuitously to become the mutwali but where he makes it a condition that he would be the mutwali and receive such salary as had been provided for in the wakfnama for mutwalis generally. I have not been able to find out what authority as a jurist the author of the Orwatul Osqa—Syed Mohamad Karim Taba—Tabai, who describes himself as the last of the order of Ulemas, has in the sphere of Muslim law. So I do not place any reliance on the

passage at p. 39 of that book for arriving at my decision. I simply quote the passage which runs thus :

> There is no difficulty if the wakif fixes from the income of the wakf properties a share as remuneration for towliat and in the case when the wakif constitutes the towliat for himself, till he is alive, then it is necessary for the wakif to take the fixed amount of remuneration, and in such a case this sort of wakf will not be regarded as a wakf on himself, because of the fact that the mutwali is not "the object of the wakf," rather he takes the share for the pains he undergoes in protecting, improving, giving on rent and supervising expenditure in respect of the wakf like other paid servants. And it may also happen that the wakif may set apart his share of profit as (remuneration of the mutwali); and in fixing this remuneration of the mutwali, the matter lies in the hands of the wakif—it may be small or large. And it is not necessary that this share be the exact wages of the mutwali (in proportion to his labour); rather it is allowed that the remuneration be more than the exact wages, specially when the wakif has set apart the share of the mutwalis. In such circumstances it is allowed to him to fix remuneration of towliat for himself in the first stage as 9/10 share of the profits and 1/10th of the profits for the objects of the wakf (mowkoof alehi) or in the second stage, to fix for those (mutwalis) coming after him in the reverse ratio. And this will not be taken as a wakf for the wakif himself, on the basis of the general notion, because the general notion cannot hold good in the face of reason on which I hold the above opinion against the conjectures of the Muhaqiq Qumil "(the learned man of Qumi)."

The author was here differing from another jurist, the learned man of Qumi, not on the proposition he had formulated in the first part of the passage but on the further proposition stated in the second part of the passage, namely whether it is lawful to the wakif to reserve more or even the bulk of the income as his remuneration when he is the mutwali, than what he allots to his successors in the office of mutwali. Who is meant by him to be Muhaqiq Qumi I cannot ascertain. He was a jurist who resided in Qumi in Persia; not certainly the author of the Sharaya-ool-Islam who was known by the name of Muhaqiq (the learned), for the author of Sharaya-ool-Islam was an inhabitant of Arabia and not of Persia.

Even if by the words "Muhaqiq Qumi" he referred to the author of the Sharaya-ool-Islam the point is not of much importance in the case before us, because the difference of the author of the Orwatul Osqua was on a point where the wakif had reserved for his salary as mutwali much more than what the wakfnama gave to his successors-in-office as their remuneration. I accordingly answer the point of law involved in the point 2 (a) in the following manner. A wakif can appoint himself mutwali by the terms of the wakfnama and make it a condition that he should receive an amount of remuneration which mutwali generally are to receive under the terms of the wakfnama. The wakf would not be void if such a condition is made. By the wakf the Prince appointed himself the first mutwali for his life, or as long as his health would permit. His son Syed Ali was to come in next after him as mutwali and mutwaliship was to continue in the line of the descendants of Syed Ali. If that line became extinct then the mutwaliship was to devolve on such male members of the family of Prince who may be capable. The mutwalis falling within these categories will hereafter be called the first class of mutwalis. If none coming within the first class be alive the mutwaliship was to devolve on a suitable male person of the line of the Prince's father, Shaha Wajid Ali. If none of that line be existing, then a man of high family whom the prominent Shiahs residing in Matiabruz, Calcutta and in the suburbs of Calcutta may elect would be the mutwali. Mutwalis coming within these categories will be designated as falling within the second class of mutwalis. The remuneration of the mutwalis falling within the first class, which included the Prince, was fixed at 5/10ths of the net income and those falling within the second class at 2/10ths of the net income. As the possibility of having mutwalis of the second class was very remote for the Prince had many children and descendants of his children, though only a son and a daughter survived him, I must consider the remuneration fixed for the first class of mutwalis to be the remuneration of mutwalis generally for the purpose of the rule. Moreover, I would hold that the rule which requires that the wakif qua mutwali cannot reserve to him a salary or remuneration more than what has been fixed for mutwalis generally, means that he must not make a distinction in his favour between himself and other mutwalis following him. The fact that two classes of mutwalis were contemplated with different scales of remuneration would not in my judgment make any difference.

Moreover, even if the remuneration fixed for the second class of mutwalis be taken for the purpose of the rule to be the remuneration fixed for mutwalis generally I do not see how that rule has been infringed in this case, for the Prince would receive an amount much less than what would be received by the second class. At the time of wakfnama he was about 67 years old. He was not in

good health. He was ailing off and on from 1914 and had a stroke of paralysis in 1915 (Exs. 27 (b), 27 and 27 (c), A-33-35). It could not have been expected that he would live long after the execution of the wakf. In the wakf thirty nine items of immovable property had been included. Of these, twenty eight (the most valuable of the Prince's properties) had been included in Shaheba Khatoon's lease of 12th July 1916. Rent of Rs. 6000 a year was payable under that lease. The lessees profits were considerable—much more than rupees 12,000 a year, for the previous lease in favour of that favoured mistress was 18,000 a year. We do not know what the income from the remaining eleven items of properties was. Of those, eleven properties one was the family dwelling house, which yielded no income; three were small properties at Lucknow—a grove and two other small plots of land which were untraceable. There were besides two small Daripin holdings. This leaves six items of possibly income bearing property which had not been included in Shaheba Khatoon's lease. The Prince was not expected to survive Shaheba's lease which would expire in 1926. The income till the expiry of the lease would be Rs. 6000 plus the income of at most the aforesaid six items of property and the Prince was to get half of that income as the remuneration for the mutwalliship. The evidence discloses what the income would have been on the expiry of Shaheba Khatoon's lease. After the expiry of that lease when the parcels demised by the said lease came into the khas possession of Syed Ali as mutwalli, Sundermall Johar Mull offered a selami of Rs. 40,000 and a net annual rent of Rs. 30,000 rising to Rs. 33,000 for all the income bearing properties included in the wakf for a lease for a term of 60 years (Exs. B7-B 368). Permission was given to the mutwalli, Syed Ali by the District Judge to conclude a lease with Sundermall Johar Mull on those terms. Some members of the public opposed the grant of the permission on the ground that the offer was too low and the lease was not eventually made on that objection coming from the public. Half of the net income of the wakf properties while Shaheba Khatoon's lease would be running would therefore appear to me to be far less in amount than 2/10ths of the net income after the termination of that lease. I accordingly hold that though the proportion (5/10ths) of the net income was reserved for the Prince as his remuneration for the mutwalliship, the Prince was to receive actually an amount far less than what the other mutwallis of the first class as also the mutwallis of the second class were to receive in terms of the wakfnama. I accordingly overrule point 2 (a) urged by the appellants.

The next point for consideration is whether there was substantially a concurrent gift to objects of charity or objects of a pious or religious nature, for if there be an immediate and not postponed substantial dedication to charity the wakf would be valid under the Muslim law as interpreted by the Judicial Committee, and the aid from the Wakf Validating Act of 1913 has not to be invoked by the respondents (44 C. W. N. 974).[14] Two such objects of the Prince's wakf are the maintenance of the mosque and the Imambara. I will take the two paragraphs 6 and 7 of the wakfnama separately. The net income is divided into ten parts and by Para. 6 is distributed as follows :

(1)	5/10ths	mutwalli remuneration.
(2)	2/10ths	allowance for the wakif's descendants.
(3)	2/10ths	for mosque and Imambara.
(4)	1/10th	reserve fund set apart for the extension and improvement of the wakf.

The benefit of item (4) would be participated by the objects mentioned in items (2) and (3). As the remuneration for the mutwallis is in the nature of management charges, the balance which is available for the objects of the trust is thus distributed equally between the descendants of the wakif and objects of a religious, pious and charitable nature which would enure to the benefit of Mussalmans in general. In my view it cannot be said that the concurrent gift to public purposes is of an illusory or unsubstantial nature. It is only when the Court fixes the mutwalli's remuneration that it cannot be more than 1/10th of the net income but there is no such limitation on the powers of the wakif in the matter of fixing the mutwalli's remuneration. By Para. 7 the net profits are distributed thus :

(1)	2/10ths	mutwalli's remuneration.
(2)	3/10ths	allowance for the wakif's descendants.
(3)	3/10ths	for mosque and Imambara.
(4)	2/10ths	reserve fund to be employed for extension and improvement of the wakf.

If the line of descendants of the wakif were to become extinct the 3/10ths share reserved for them would have to be divided in two equal parts, 3/20ths going to the reserve fund and 3/20ths to "proper acts of charity". In

14. ('40) 27 A. I. R. 1940 Cal. 501: 192 I. C. 693: I. L. R. (1940) 2 Cal 464: 44 C. W. N. 974, Mohiuddin Ahmed v. Safia Khatun.

a my judgment the concurrent gift to purposes of a religious, pious and charitable nature which would enure to the benefit of the Mussalmans in general made in this paragraph is also substantial and not illusory. I accordingly hold that even apart from the Wakf Validating Act, 6 of 1913, the wakf in question is a valid one under the Shia law. This finding is sufficient for the dismissal of the three appeals, and hence I would record my judgment on the other points in a brief manner. I have expressed my opinion on point 3(a). I do not find any substance in point 3(b). On the contingency contemplated the net income would be distributed thus,

b according to para. 7 of the wakfnama:

(1) 2/10 ths mutwalli's remuneration.
(2) 3/10 ths for mosque and Imambara.
(3) 7/20 ths reserve fund set apart for improvement and extension of the wakf.
(4) 3/20 ths for "proper acts of charity".

The benefit of item 3 would ultimately enure for the objects mentioned in items (2) and (4). Hence, the whole of the remaining net income left after payment of the mutwalli's remuneration, which is in the nature of management charges, goes to objects of public utility. I will discuss hereafter whether the gift of the 3/20 ths parts of the net income to "proper acts of charity" is a valid

c provision or not. The ultimate gift of 3/20 ths to "proper acts of charity" is not in my judgment more remote than what is allowable by the Wakf Validating Act. Under the Shia law, heirs of a man fall within two categories: (1) heirs by consanguinity and (2) heirs by marriage. They are subdivided in two classes — sharers and residuaries. That law does not recognise the claims of "distant kindred". All heirs of a Shia accordingly include persons (except the false grand parents and their descendants) who come within the description "family, children or descendants" for whom it is legitimate after

d the Wakf Validating Act, 6 of 1913, to make provision even to the extent of the whole of the income of the wakf properties, provided there is an ultimate gift over to the poor or to charitable, religious and pious purposes of a permanent nature on the extinction of "the family descendants or children" of the wakif. Paragraph 7 of the wakfnama expressly states that on the extinction of the line of his children the share reserved for their benefit shall be divided into two equal parts and one of such parts (3/20 ths) shall be spent on "proper acts of charity" and the other part (3/20 ths) shall go to the reserve fund established for the improvement and extension of the wakf. The ultimate gift to charity is therefore not more remote than e allowed by the Wakf Validating Act, 6 of 1913. Accordingly I cannot see any substance in contnetion No. 3 (c).

I do not see why the provision for a small pension for three of the faithful servants would render the wakf invalid. The main purpose of the wakf is not to make a settlement on those servants. Paragraph 8 provides that those three servants must be retained in their posts at a moderate salary fixed by the wakif. If they resign they are to get half of their salary as pension. Those provisions are provisions concerning management. On their deaths half of what they f were getting while in service were to be paid to their heirs only on the footing of poor men. I accordingly overrule contention No. 3 (e). I now come to the question as to whether the wakf in question has complied with the provision to S. 3, Wakf Validating Act, 6 of 1913. The Prince had provided that on the failure of the line of his descendants half of what had been provided for their allowance was to go to the reserve fund and the other half was to be spent on "proper acts of charity". I cannot accept the respondents' contention to the effect that the Prince had specified in the deed in express terms those proper acts of charity. The g preamble of the deed on which reliance has been placed does not lead me to the conclusion that by that phrase he intended the mosque and the imambara, for the support of which he had made the allotment of a specific and ear-marked share of the profits. The question therefore is whether the proviso to S. 3 has been complied with when the Prince did not in express terms specify the objects of the ultimate gift.

The Wakf Validating Act validates a species of wakfs—wakfs-alal-aulads, which had been declared invalid by the Judicial Committee in a series of cases, 17 I.A. 28;[15] h 22 I.A. 76;[16] 54 I.A. 372.[17] In those cases it was held that where the wakif in substance makes settlement on the family of the settlor and provides for an ultimate gift to charity on the extinction of the family, the ultimate gift over to charity is too remote and illusory and such a wakf is not valid. The Wakf Validating Act, 6 of 1913, in effect enacts that such a wakf would not be invalid. As I have

15. ('90) 17 Cal. 498: 17 I.A. 28: 5 Sar. 476 (P.C.), Mohamed Ahsanullah v. Amarchand Kundu.
16. ('95) 22 Cal. 619: 22 I.A. 76: 6 Sar. 572 (P.C.), Abul Fata v. Rasamaya Dhur Chowdhri.
17. ('27) 14 A.I.R. 1927 P. C. 191 : 103 I. C. 518 : 54 I.A. 372 : 9 Lah. 203 (P.C.), Balla Mal v. Ata Ullah Khan.

observed before, according to the Muslim conception a wakf must be perpetual, that is to say, the objects of the wakf must last for ever. In the case of a wakf-alal-aulad that condition cannot be fulfilled by simply providing for allowances for the family, descendants and children of the wakif, for there may be the possibility of those objects failing by the family, etc., of the wakif becoming extinct. It is therefore necessary that that contingency must be provided for, to make the wakf perpetual, and that can only be done by providing that in that event the usufruct of the wakf properties is to be applied for the benefit of the poor, for the poor as a class must of necessity exist for ever, or for the benefit of some religious, pious and charitable object of a permanent nature. The proviso to S. 3 of Act 6 of 1913, therefore, does not effect any change in the Muslim conception but simply states what the Muslim law is. The effect of that proviso must, therefore, in my view be judged by the principles propounded by Muslim jurists. According to them there are two distinct principles. One is analogous to the cypres doctrine.

If one should make an appropriation for a masalat (object of general utility) which has ceased to be used, it is to be applied to any good and pious purpose. And it is for such purposes generally, it is expended on the poor and indigent, and in any other way by which approach is made to Almighty God. (Bailie II. 216).

The other principle is that a wakf will not fail for mere vagueness or uncertainty of the object. For when the object is not specified by the wakif, the usufruct is to be applied to the benefit of the poor, (Ameer Ali Vol. I, 323, Edn. 3), for according to the Mussalman jurists "an unrestricted wakf is for the poor by custom and practice, and what is customary is as if conditioned" (Wajiz-ul-Muhit quoted by Ameer Ali at I, 150, Edn. 3). The proviso to S. 3, Wakf Validating Act, states that the ultimate benefit in a wakf-alal-aulad can also be impliedly reserved for the poor or for any purpose recognized by the Mussalman law as religious, pious or charitable purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. If any of those purposes can be implied from the terms of the wakfnama, with the aid of principles formulated by Muslim jurists, the proviso would be complied with. In the Prince's wakfnama he designs the ultimate gift to "proper acts of charity" and as the benefit to the poor is the prime concern of Muslim jurists, those words used in the wakfnama would in my judgment imply a gift to the poor. In my judgment this principle was lost sight of in the two series of cases which have taken opposite views on the interpretation of the proviso to S. 3 and I cannot fully agree with everything that has been said in them. Those cases are, 7 Luck. 300;[18] A.I.R. 1935 Lah. 596[19] and 15 Luck. 586.[20] The proviso contemplates an ultimate gift effective in law. In my view there is an effective gift in this case—a gift implied for the benefit of the poor. Even if I am wrong in this view the wakf deed manifests an overriding intention to charity in the contingency of the failure of the descendants of the Prince. This would call in the application of the cypres doctrine. I agree with the principles formulated in 59 Cal. 402[3] at pp. 423 and 424. These principles are equally applicable to the case before us and in a Shia wakf. I accordingly hold that if the wakf cannot be upheld without the aid of the Wakf Validating Act, it is a good wakf as it has complied with the provisions of that Act. Contention 3 (d) is accordingly overruled.

I will now formulate and deal with the special points raised in the three appeals. The finding that the wakf is a good and valid one makes the decision on those points unnecessary but still I express my opinion thereon. All these points have been urged on the footing that the wakf is a void one. The special points urged in Appeals No. 239 of 1935 and No. 25 of 1936 by the appellants and respondents are :

(I) Whether that suit is maintainable.

(II) Whether that suit is barred by limitation.

(III) Whether Juhi's right was extinguished by reason of adverse possession.

(IV) Whether Juhi Begum had relinquished her claim to the inheritance.

(V) Whether the conveyance by Juhi Begum in favour of Mahnuda Bibi is effective.

The points urged in Appeal No. 26 of 1936 and in the memorandum of cross-objection filed by Nawab Hashim Ali Khan and Ashiq Hossein which arise in the suit instituted by Khaija Bibi Title Suit No. $\frac{8 \text{ of } 1931}{1 \text{ of } 1934}$ are :

(I) Whether the decree in favour of the

18. ('32) 19 A.I.R. 1932 Oudh 71: 135 I. C. 372: 7 Luck. 300 : 8 O. W. N. 1302, Sheik Ramzan v. Mt. Rahmani.

19. ('35) 22 A.I.R. 1935 Lah, 596 : 158 I. C. 937 : 37 P.L.R. 766, Punjab Sindh Bank Ltd. v. Anjuman Himayat Islam.

20. ('40) 27 A.I.R. 1940 Oudh 324 : 189 I. C. 391: 15 Luck. 586 : 1940 O. W. N. 689 (F.B.), Mt. Ahmadi Begam v. Mt. Badrunnissa.

Official Assignee in Suit No. 1515 of 1918 was obtained by fraud.

(II) Whether such a question of fraud can be raised in this suit.

After the amendment of the plaint the suit instituted by Juhi Begum is a suit for partition only. As the scope and object of a suit for partition is to convert the joint possession of the cosharers into possession in severalty, it is essential that the plaintiff should at the date of the institution of the suit be in possession of the joint property either actually or constructively. If at that material time he is in actual possession of a part of the joint property or if he be not in actual possession of any part of the joint property but his cosharer, the defendant, is and there is no ouster, the suit would be maintainable, for his cosharer's possession in such a case is constructively his possession. But if he was not at the date of the suit in actual possession of any item of the properties claimed as joint and the defendant is in actual possession of the whole on the assertion of a hostile title known to the plaintiff, a suit for partition is not maintainable, on a fixed court-fee of Rs. 15 but a suit for possession, either joint possession or possession after partition, must be brought on payment of ad valorem court-fees. These principles have been formulated in 6 C. L. J. 651[21] at p. 655; 21 C. L. J. 253[22] and 54 Cal. 524.[23] Juhi's suit would only be maintainable if she was either actually in possession of a part of the joint property or was in constructive possession of the properties in suit at the time she filed the plaint. Her case is not that she was in actual possession at the date of suit of all the properties in suit, but that she was in possession of one item only —a house in Rangalal Street, where she died after the institution of suit, I find that she was not in occupation of that house at the date of the suit but was permitted to occupy it by her brother Syed Ali on considerations of humanity in March 1931, about two months after she had instituted the suit. Syed Ali was in possession of all the properties claimed by her as joint property as mutwalli, that is, under an adverse title and that adverse claim was known to her. She even received allowances from him in terms of the wakfnama. I therefore, answer point 1 in the negative. For the purposes of avoiding payment of ad valorem court-fees on the plaint the alternative prayer for recovery of possession was deliberately withdrawn by the plaintiffs. I do not consider the suit to be barred by time. It was instituted just within 12 years of the death of the Prince when Juhi Begum's right as heir accrued. To meet this position the respondents urge that the suit is governed by Art. 142 of Sch. 1, Limitation Act, and time had already begun to run against her predecessor-in-interest, the Prince, from the date when the Prince executed the wakfnama. I cannot accept this contention. Article 142 does not in terms apply, as the suit is not for recovery of possession, that prayer having been deleted at the plaintiffs' instance. It is admitted further that the case is not a case of dispossession, for the Prince cannot be said to have dispossessed himself. It is in my view not a case of discontinuance of possession either. That phrase in Art. 142 connotes abandonment of possession by the owner followed by the taking of possession by another, the wrong-doer. As the Prince continued to be in possession after the execution of the wakfnama, but only changed the character of his possession I do not think that the case would have been governed by Art. 142, time running from the date of the execution of the wakfnama, even if the suit (which it is not) had been a suit for possession. I answer point 2 in the negative.

Juhi Begum's title by right of inheritance, if she had the title, would not have been extinguished by adverse possession. If the wakf had been void the possession of the mutwalli would have been possession on behalf of the persons who would have been entitled to those properties on that contingency. I do not wish to repeat the reasons for this view. Those reasons have been indicated in the judgment of Roxburgh J., and myself in 44 C.W.N. 974[14] at p. 981. I cannot accept the contention that the Prince as mutwalli prescribed against himself as owner. The case in (1889) 42 Ch. D. 312[24] cited by the learned advocate for the respondent and intended to support the proposition that a person in one capacity can prescribe against himself in another capacity does not bear him out. There one Thorngate executed a charitable trust by an unenrolled deed by which he vested the trust properties in three

21. ('07) 6 C. L. J. 651 : 12 C. W. N. 37, Bidhata Rai v. Ram Chariter Rai.

22. ('15) 2 A.I.R. 1915 Cal. 357 : 27 I. C. 465 : 21 C. L. J. 253 : 20 C. W. N. 51, Lokenath Singh v. Dhakeswar Prosad Narayan Singh.

23. ('27) 14 A.I.R. 1927 Cal. 411 : 101 I. C. 622 : 54 Cal. 524 : 31 C. W. N. 406, Sabjan Bibi v. Ashanulla.

24. (1889) 42 Ch. D. 312 : 58 L. J. Ch. 586 : 61 L. T. 113 : 37 W. R, 682, Churcher v. Martin.

trustees one of them being Emanuel Churcher. The trustees went into possession and they and their successors-in-office remained in possession for the statutory period applying the proceeds of the trust properties to charity. The trust however turned out to be invalid in law. By his will, Thorngate devised all his estate to Emanuel Churcher who in turn by his will appointed G. Churcher, W. E. Churcher, G. Bone and Smith as the executors of his estate and devised his estate to them. G. Churcher, G. Bone and Smith brought the action against the trustees of Thorngate for recovery of the trust properties on the ground that the trust being invalid Emanuel Churcher got those properties under the will of Thorngate. A plea that the plaintiffs' title had been extinguished by reason of adverse possession on the part of Emanuel Churcher as trustee was taken and given effect to. But Kekewitch J. made the following observations :

> If Emanuel Churcher had been the sole trustee, the aspect of the case would have been very different, but here he was one of several.

These observations demolish the contention of the advocate of the respondent, as the Prince was the sole mutwalli. On the facts also there can be no case of adverse possession because Syed Ali as mutwalli had not continuous possession throughout the statutory period. His possession as mutwalli was interrupted at times: *see* Syed Ali's admission in his deposition in Miscellaneous Judicial Case No. 43 of 1920, Ex. 29-B 375 at 376, I, 39-41. The third point is accordingly answered in the negative.

The contention which is the subject-matter of the fourth point was not raised in the lower Court. The case that Juhi Begum had relinquished her claim to the inheritance has not been pleaded in the written statement. This contention depends upon investigation of facts not put in issue in the Court below. I cannot allow such a new point to be made for the first time here. Besides the contention is based on the slender foundation that in the year 1928 Juhi Begum had received money from Syed Ali under a form of receipt stating that she was receiving it in terms of the wakfnama (Ex. D. series B. 544 to 554). There is nothing to show that she, a pardanashin lady, understood or was made to understand, that those receipts would amount, as is now contended, to a relinquishment of her inheritance. Those receipts would have at most only this effect that she recognized the wakf but if the wakf had been invalid in law, her recognition would have had no legal effect. This contention is overruled also.

The conveyance by Juhi Begum to Mahumada Begum in my view can be challenged by Nawab Hashem Ali Khan and his transferee Syed Ashiq Hossein. I do not think that the learned Subordinate Judge was right, when he said that they cannot do so on the supposed authority in 12 C.W.N. 393 = 35 I.A. 48.[25] Nawab Hashem Ali Khan is the legal representative of Juhi Begum and so he and his assignee Syed Ashiq Hossein can raise the defence which was certainly open to Juhi Begum. The consideration for the conveyance as recited therein was some debts said to be due by Juhi Begum to Saleji on two promissory notes marked (Exs. Y 1 and Y) which the latter had assigned to Mamuda Bibi and the payment to her of a monthly allowance of Rs. 100 as long as she would live. The claim on those promissory notes was barred at the date of the conveyance and the payments said to have been made by Juhi Begum on the promissory notes from time to time and said to have been endorsed by her on the back of them to keep them alive are fictitious and false. (Exhibits Y1 and Y. B 357-360). Juhi Begum had no means to make those payments. She had a small political pension and even according to the case of Mamuda Bibi she was in a state of perpetual indebtedness and want. No attempt has been made in this case either to prove those payments or endorsements.

Juhi Begum was a pardanashin lady. Shortly after the death of her first husband she had been taken in hand by an unscrupulous man, Saleji, and was within his clutches. For executing the said conveyance in favour of Mamuda Bibi, a daughter of Saleji, she was taken to a house in Upper Chitpur Road which was adjoining if not a part, of Saleji's house at Amratolla Lane, and she executed the conveyance there. Mr. G. C. De who had acted for Saleji in the past as his solicitor acted for Juhi Begum and Mr. P. L. Mitter, Mr. G. C. De's son-in-law who shared the same office room with him, acted for Mamuda Bibi. Mr. De did not care to ascertain some relevant and important particulars which as the adviser of a pardanashin lady he was in duty bound to ascertain. He says in his evidence that he had translated the document to her in Hindi, but having regard to his own defective knowledge of Hindi it is doubtful whether

25. ('08) 35 Cal. 420 : 35 I.A. 48 : 12 C.W.M. 393 : 7 C.L.J. 335 (P.C.), Raja Rai Bhagwat Dayal v. Debi Dayal Sahu.

the translation made by him conveyed the real meaning of the document to Juhi Begum. At any rate it appears to me that he did not clearly explain the nature of the transaction to the lady and did not draw to her attention the fact that she was conveying her claim to vast properties for a mere song. There seems to me to be an element of unfairness and undue influence also. I cannot uphold this conveyance. I cannot agree with the finding that two instalments of allowance payable under the deed reached Juhi Begum. No doubt an insured order was addressed to her at Lucknow by Mamuda Bibi, but the cover was received not by her but one of the evil men who had surrounded her and who helped Saleji in compassing her financial ruin. I answer this point in the negative.

I take up now the two points raised in Appeal No. 26 of 1936. In my view having regard to the scope and nature of Title Suit No. $\frac{8 \text{ of } 1931}{1 \text{ of } 1934}$ the decree passed in Suit No. 1515 of 1918 cannot be challenged, as bad. The provisions of O. 21, R. 58, Civil P. C., and the following rules of that order up to R. 63 is a reasonable adjustment of two principles. The first is that a judgment creditor should have the fruits of his decree as quickly as possible; and the other principle is that a third party should not be allowed to be harassed by the decree-holder's attempt to take in execution his property. The adjustment is made by allowing the third party to intervene in the execution proceedings as a claimant but the first principle which keeps in view the interest of the decree-holder requires that the claim proceeding should not be prolonged, for that would delay execution. Hence the investigation of the claim by the executing Court must be of a summary nature, ordinarily to be decided on the basis of possession. The summary nature of the investigation of the claim by the executing Court requires in the interest of justice that the party against whom an adverse order is made by the executing Court should be given the opportunity within a short period of time to reagitate in a more detailed form the question of his claim in a regular suit.

From this it follows that the issue that can be raised in a suit instituted under the provisions of O. 21, R. 63 must in essence be of the same nature as the issue in the claim case in the executing Court, although the ambit of the enquiry of that issue would be more detailed in the suit. In the execution proceedings, the judgment-debtor cannot challenge the validity of the decree under execution on the ground of fraud and the claimant can only urge that the property attached is his property and not of the judgment-debtor. He cannot urge that the decree is bad or even the execution is barred by time : A.I. R. 1921 Pat. 311,[26] A. I. R. 1929 Rang. 152.[27] As possession is prima facie evidence of title, an investigation based on the evidence of possession would be a rough and ready and expeditious mode of investigation of the claim by the executing Court. That that issue, namely, whether the property at the date of the attachment was the property of the judgment-debtor or of the claimant can be the only issue in a suit under O. 21, R. 63, (apart from issues in bar e.g. of limitation) is also indicated by the language of O. 21, R. 63 itself, for that rule speaks of a suit "to establish the right which he claims to the property in dispute." A suit under that rule is in essence a review of the summary order passed by the executing Court on the claim : 35 I.A. 22[28] at p. 24. It is a mere continuation in a different forum of the claim proceedings: 17 Pat. 588.[29] The judgment-debtor would not be a necessary but only a proper party to such a suit, where the plaintiff is the decree-holder, 28 ALL. 41,[30] and not a necessary party even when the unsuccessful claimant is the plaintiff: A.I.R. 1934 Mad. 587.[31] I do not see on what principle the claimant can be allowed in a suit under O. 21, R. 63 to question the validity of the decree under execution to which he was not a party and by which he is not directly affected. This is the view which has been taken in 10 Bom. 659[32] and A.I.R. 1939 Pat. 430,[33] with which view I entirely agree. I cannot agree with the view expressed in 17 Mad. 389[34] to the effect that in a suit under S. 283, Civil P. C. of 1882 (O. 21, R. 63, Civil P. C. of 1908) it would not be ordinarily

26. ('21) 8 A. I. R. 1921 Pat. 311 : 60 I. C. 375 : 2 P.L.T. 275, Jalaluddin v. Mt. Maniran.

27. ('29) 16 A.I.R. 1929 Rang. 152 : 117 I.C. 578 : 7 Rang. 132, Somasundaram Chettyar v. Ma Shwe Thit.

28. ('08) 35 Cal. 202: 35 I.A. 22 : 7 C.L.J. 36 : 12 C.W.N. 169 (P.C.), Phul Kumari v. Ghanshyam Misra.

29. ('39) 26 A.I.R. 1939 Pat. 138: 180 I.C. 983: 17 Pat. 588 : 20 P.L.T. 76, Mt. Bas Kuer v. Gaya Municipality.

30. ('05) 28 All. 41 : 1905 A.W.N. 172 : 2 A.L.J. 491, Ghasiram v. Mangal Chand.

31. ('34) 21 A.I.R. 1934 Mad. 587: 155 I.C. 17: 67 M.L.J. 585, Suppan Asari v. Alima Bibi.

32. ('86) 10 Bom. 659, Guli Bai v. Jagannath.

33. ('39) 26 A.I.R. 1939 Pat. 430 : 183 I.C. 371, Deoki Singh v. Raghavindra Bhagwan.

34. ('94) 17 Mad.389, Narayyan v. Nageswarayyan.

a open to a claimant who is a stranger, in no way connected to the judgment-debtor, to challenge the decree sought to be executed but it would be open to such a claimant when he is the reversioner of the judgment-debtor.

The qualification so made proceeds upon conceptions which seem to me to be erroneous. In the first instance a reversioner has no interest in præsenti in the property. He has only a *spes successionis*. Whether such a remote interest would enable a claim to be preferred under O. 21, R. 58 appears to me to be doubtful. The judgment-debtor not being a necessary party to a suit under b O. 21, R. 63 cannot be allowed to raise an issue relating to the validity of the decree under execution and I do not see how a person who is related to the judgment-debtor or has some connection with his estate (very remote in the case under consideration) can do so. The case in 23 I.C. 755[35] on which the learned advocates appearing for Nawab Hashan Ali and Syed Ashiq and the legal representatives of Syed Ali, (for in respect of this question their interest is the same) has placed reliance for supporting their contention that the decree under execution can be challenged in a suit instituted under O. 21, c R. 63 does not support them. In that case the decree under execution was not challenged at all, but a decree which was the foundation of the claimant's title was. That can certainly be done in such a suit, because the claimants' title to the property attached is the issue in such a case and accordingly all the links in his title can be examined. I accordingly answer the second question raised in Appeal No. 26 of 1936 in the negative.

On the merits I cannot hold that fraud has been established. The original scope of Suit No. 1515 of 1918 was to recover out of the assets of Humayum Kader the dower money said to be due to Juhi Begum on the d basis of her assignment to Saleji. She was defendant 1 and she along with the other heirs of Humayun Kader would have been affected if a decree had been passed on the said cause of action, for the share of the properties which she had inherited from her husband would have beem liable to be taken in execution. She was served with the summons of that suit but did not choose to appear. She knew of the suit, for she deposed as a witness. After she gave her deposition and on that deposition the Official Assignee who had substituted himself in the place of Saleji, the original plaintiff, could not e proceed on the cause of action as originally laid in the plaint. He was advised to amend the plaint. Personal service of the application for amendment of the plaint was not required on Juhi Begum, as she had been served with the summons of the suit and had not chosen to appear. The amendment was granted and an ex parte decree was passed against her as late as 21st August 1923. Her Jagir at Lucknow was attached and sold in 1926 in execution of that decree through the District Court at Bara Banki (Ex. 3B 354). She knew that such a decree had been obtained against her and one of her properties had been sold for satisfaction thereof. She f had knowledge of the decree in 1930, if not earlier, as would appear from a judgment in Money Suit No. 89 of 1930 to which she was a party and in which she had actively supported the purchaser at the execution sale (Ex. B598). Still she did not take any step to set aside that decree.

In Khatija Bibi's suit a general allegation of fraud was made in the written statement filed by Syed Ali. Nawab Hasen Ali Khan or his assignee did not file any written statement but at the time of the trial they filed a petition on 20th August 1935 in which they gave particulars of fraud not pleaded g by them, but by another (D-86). In those particulars they alleged fraud of Saleji and not of the Official Assignee. Saleji's interest in the subject-matter of Suit No. 1515 of 1918 had ceased in his insolvency on 8th December 1921. The Official Assignee had substituted himself as plaintiff in Saleji's place on 6th June 1922 and from that time had the carriage of the suit. It is a serious thing now to charge the Official Assignee, a responsible officer of this Court, with fraud and a more serious thing where there is no tangible evidence to sustain the charge. The claim on the amended cause of action has h not been shown to be false, much less false to the knowledge of the Official Assignee, though falsity of the claim by itself is not enough to set aside a domestic judgment on the ground of fraud. To set aside a decree on the ground of fraud the fraud alleged must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the facts of the case and the decree sought to be set aside must be obtained by that contrivance: I. L. R. (1940) 2 Cal. 477.[36] The application

35. ('14) 1 A.I.R. 1914 Cal. 380 : 23 I.C. 755, Bama Charan v. Bogala Charan.

36. ('40) 27 A.I.R. 1940 Cal. 489 : 192 I. C. 563 : I. L. R. (1940) 2 Cal. 477 : 72 C. L. J. 447 : 44 C. W. N. 912, Kunja Behary v. Krishnadhone.

for amendment of the plaint in Suit No. 1515 of 1918 may have been an irregular one and the order granting it may have been a bad order. It may also be that the order would not have been made if that application had been opposed. But I do not see any tangible evidence of a meditated contrivance on the part of the Official Assignee designed to keep the other party and the Court in ignorance of the real facts. It is on this ground and also on the ground that a new case of fraud was attempted to be made here on appeal, a fraud not of Saleji but of the Official Assignee, that I overrule the first point urged in Appeal No. 26 of 1936.

In the result I dismiss all the three appeals with costs to the respondents who are the representatives of Syed Ali. The several applications for leading additional evidence except one dated 23rd November 1939 are rejected but without costs. Although both the suits were dismissed by the lower Court in the decrees as drawn in that Court costs have been awarded in favour of the plaintiffs against the contesting defendants. This is obviously wrong. The decrees of the lower Courts are corrected in respect of costs. The plaintiffs must pay the costs of the contesting defendants incurred in the lower Court in both the suits. The two cross-objections by Mr. Chatterjee's client in Nos. 25 and 26 are allowed to that extent but without costs. The cross-objections filed by Mr. Bose's client Nawab Hashim Ali Khan in No. 26 are dismissed but without costs.

Khundkar J. — I agree, but desire to make a few comments upon the very elaborate argument by which the validity of the wakf has been assailed, and as I propose to confine myself to that argument only, I would re-arrange its main brances in the following way :

Firstly—(A) Under the Shia law a wakif may not reserve to himself any benefit under the wakf even though it be as mutwalli's salary. (B) Alternatively, even if the Shia law permits a wakif to appoint himself a mutwalli reserving to himself a portion of the income of the wakf as mutwalli's salary, the amount must not be in excess of that reserved for mutwallis generally.

Secondly—There is in the present case no substantial concurrent dedication to charity, and therefore to save the wakf from being wholly defeated the provisions of the Mussalman Wakf Validating Act, 1913, have to be called in aid.

Thirdly—In so far as the reserve fund provided for in the wakfnama would have the effect of holding back certain property from immediate dedication, and of postponing its inclusion in the wakf to a future date the direction to create such a fund, renders the wakf invalid in Shia law.

Fourthly—As the ultimate gift over to charity does not satisfy the requirements of the proviso to S. 3, Mussalman Wakf Validating Act, 1913, that Act does not save the wakf from failing entirely.

Fifthly—The wakf, in so far as certain properties are concerned, has been made subject to the lease in Saheba Khatun's favour, and this is a further violation of the Shia law.

Before I consider these arguments it is desirable that I should set out a summary of the main clauses of the wakfnama which is as follows: (1) The wakif declares that for the purpose of carrying out the ordinances of his religion, and for the maintenance and well-being of his children generation after generation, and for the continuance of charitable acts for all time to come, he has created this valid and legal wakf after reciting the formula of wakf through a vakil. He further declares that having taken out the immovable properties mentioned in the schedule from his ownership, he has for the sake of God included them in the wakf. (2) The wakif states that he has constituted a mosque and Imambara at premises known as Khusro Manzil so that Namaz, Taziadari in Muharram, and Chehllum and Nowchandi Majlises may always be held in it. He directs that if Government purchases this building or if it falls down, then to the price of the land and the building is to be added a further sum to the amount of 5 years income of the share which under cls. (6) and (7) of the wakfnama will be set apart for the improvement of the wakf, and with this amount a magnificent mosque and Imambara are to be built at a suitable place. (3) The Towliat is to remain in the wakif during his life-time for as long as his health permits and he desires to remain mutwalli. His son is to be the next mutwalli, and after him the Towliat is to continue in the line of his son's descendants. If these fail the Towliat is to be given to such male members of his family as may be capable. Then follow further directions as to the Towliat in the event of no male members of his family remaining. These are contained in cls. (3) and (4) and need not be set out. (5) A committee of five Shias is to be constituted whose duties will be to supervise the administration of the wakf and to see that the mutwalli carries out his

duties properly. (6) The income of the wakf, after meeting Government dues, law charges, expenses of collection, and repairs to the wakf properties, is to be divided into ten shares. As long as the Towliat remains in the hands of the wakif or of his descendants five of these shares are to be given to the mutwalli; two shares are to be divided amongst his "heirs according to the Imamia law," two shares are to be set apart for the expenses of the mosque and Imambara and for the expenses of Muharram Chehllum and Nowchandi Majlises; and the remaining one share is to be set apart for the extension and improvement of the wakf so that from time to time immovable properties may therewith be purchased and included in the wakf. (7) In the event of the Towliat not remaining in the line of the wakif's descendants, the mutwalli's remuneration is to be two instead of five out of the ten shares into which the income is divided, and out of the remaining eight shares, three are to be apportioned amongst the wakif's descendants (heirs) according to the Imamia law, three are to be set apart for the expenses of the mosque and Imambara, and the remaining two shares are to be reserved for the extension and improvement of the wakf properties. If no descendants of the wakif remain, then half of the share allotted to them (i. e. $\frac{3}{20}$) is to be added to the reserve fund for the expansion and improvement of the wakf properties and the other half ($\frac{3}{20}$) is to be spent on "proper charitable acts."

To preclude misunderstanding, I ought to state here that cl. (6) of the English translation of the wakfnama EX. R renders as "descendants" Urdu word "nasl," which may also be translated as "line of descendants:" and as "heirs" the Urdu word "warsa." In cl. (7) the word "children" appears as the translation of the Urdu word "aulad," which also means progeny. There is no dispute as to the rendering of these words which I have adopted in the summary just set out. In the development of the first alternative branch of the first argument reliance has been placed on the proposition that in Shia law wakf is a contract between the wakif and the mowkoof alehi or beneficiaries, the effect of which is to vest the entire benefit in the property in the latter; and this, it is contended, is the foundation of the rule that the wakif should divest himself completely of the dedicated property, as also of the rule that possession of the dedicated property must be delivered either to the first beneficiaries, or, in cases where the wakf is for a body of persons, to the first mutwalli. In Baillie's "Digest of Mohummudan Law" Edn. 2 Part 2, the following passages are of importance. At p. 218 the four conditions of wakf (according to the Suraya, the leading Shia authority) are set out:

1st. It must be perpetual; 2nd. absolute and unconditional; 3rd, possession must be given of the mowkoof or thing appropriated; 4th, it must be entirely taken out of the wakif or appropriator himself.

At p. 211 the relationship of wakf to contract is thus expressed: "Wakf is a contract the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free." The theme is continued at p. 212: The contract is not rendered obligatory except by giving possession; but when so completed it cannot be revoked if made in health . . ." At p. 219 is the proposition:

The seizin which is required is that of the first *mowkoof alehi*, or person for whom an appropriation is made; and all regard to possession ceases in the subsequent steps.

Great reliance has been placed on certain passages in the judgment of Mahmood J. in 14 ALL. 429.[37] The most important of these for the purposes of the argument are the following (at page 448):

Under Shia law wakf is a contract. Under Sunni law it is unilateral disposition of property and as such not subject to the rules of contract.

At pages 450 and 451:

The Sharayi-ul-Islam which is the most authoritative text book of the Shia law, deals with wakf as a contract (*aqd*), . . . The Masalik-ul-Afhan a celebrated and authoritative commentary on the Sharayi-ul-Islam, as also the Jawahir-ul-Kalam another authoritative commentary on the same text book, throughout deals with wakf as a contract inter partes as distinguished from unilateral disposition of property.

Mahmood J. then refers to the Jami-ul-Shattat (Jamaa-ush-Shittat) in which it is said "wakf is a contract needing offer and acceptance." In connexion with this passage and those which follow it, Mahmood J. makes the following observation:

But whilst thus generally expressing the necessity of the contractual formalities of offer and acceptance, the text goes on to explain how in some cases exceptions are to be made, and in dealing with these exceptions the author, meeting the difficulty which arises out of the word *iqaa*, which in English, means "declaration" or rather unilateral disposition of property, goes on to explain that—'The meaning of *aqd*, contract, here covers declarations (*iqaa*, unilateral dispositions).' But in thus extending the ordinary technical meaning of the word *aqd* (which means contract needing offer and acceptance), the learned author is anxious to explain that the extended meaning applies only to certain classes of wakf, and after dealing with the various opinions upon the subject, arrives at the

37. ('92) 14 All. 429 : 1892 A. W. N. 187 (F.B.) Agha Ali Khan v. Altaf Hossain Khan.

conclusion that acceptance may be dispensed with a in cases where such acceptance is impossible, such wakf being for public charities, such as a mosque, or maintenance of faqirs, that is to say, the general public.

At page 653 of the report there is a quotation from the Durus "a work of higher authority than the Jami-ul-Shattat" :

The fourth condition is acceptance which is correlative to offer when it is possible for those in whose favour the wakf has been made. Acceptance is not rendered necessary in the case of mendicants nor in the case of public charities because of the impossibility of securing acceptance.

Mahmood J. goes on to discuss the bearing of the rules which follow from this doctrine upon the question whether actual b delivery by the wakif himself of the appropriated property to the mutwallis is essential to the validity of the wakf. He considers a number of other texts and states their effect. The most important conclusion to which these discussions lead is that actual delivery of possession by the wakif himself or by his permission is a condition precedent to the validity of wakf. Sir Wazir Hasan on behalf of the appellants in Appeal No. 239 of 1935, has strongly pressed this line of reasoning in support of the further proposition, that the wakif must divest himself of the dedicated property in so complete a sense, as to c retain no benefit whatever to himself under the wakf. Mutwalli's salary according to Sir Wazir Hasan derives its legitimacy from the wakfnama, and is on the same footing as all other payments under the trust. The mutwalli is therefore as much a beneficiary as any *cestui que trust*. Baillie states the rule of Shia law thus : "If a person should make a settlement on himself it would not be valid" (Edn. 2, Part II, p. 218). The only way in which a mutwalli may consistently with the Shia law take a benefit under the wakf is that indicated in the Sharaya-ul-Islam—Baillie (Edn. 2, Part II) at page 219 :

But if one should make an appropriation for the d poor and should himself subsequently become poor, or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits.

A wakif may not therefore expressly appoint himself mutwalli when any remuneration has been made to attach to that office. That according to Sir Wazir Hasan is the full implication of the rule which is enshrined in the homely phrase, "a wakif may not eat out of the wakf." The case in 54 I.A. 33[10] enunciated the following propositions. Under Shia law a deed of wakf is not valid unless possession has been given under it; the property must be entirely taken out of the wakif; where the wakif is to be the first mutwalli but there has been no mutation of the property into the name of wakif as e mutwalli, the wakf is void, a wakif cannot, under the guise of salary, reserve to himself, a life-interest in a portion of the income in excess of what is assigned to future mutwallis, and could reasonably have been assigned to them. As pointed out by my learned brother, the question whether the wakf was void by reason of the reservation in the wakif's favour was one upon which their Lordships of the Judicial Committee observed that they had not had the assistance of the judgment of the High Court. Their Lordships' advice to His Majesty was therefore not based on this ground. Although this f question was not decided, the observations of Sir John Wallis afford invaluable guidance. I would quote three passages. At page 39 of the report :

It seems clear in the present case that the settlor under colour of fixing her salary as mutwalli, was really reserving for her life-time a portion of the income or usufruct of the property far in excess of what was assigned in the deed to future mutawallis or could reasonably have been assigned to them. It was therefore in their Lordships' opinion a clear violation of the condition.

At page 41 :

As regards the supplementary deed of wakf of 7th December 1897, in which the settlor included her remaining lands stated to be worth Rs. 1500 and cancelled the salary she had fixed herself for g life in the former deed, adding 'that is I have given up the salary and included it in the wakf.' Their Lordships are of opinion that if the deed had stopped there it might possibly have been treated as a fresh dedication of all the properties free from any reservation in her own favour but after reciting her intention to go for haj and to make zearut (visit sacred places) the deed provides, cl. 17 : 'That the said manager shall from time to time send money for expenses from the income of the wakf estate to me either at Mecca or to the place to which I shall direct him to send.' This in their Lordships' opinion, amounts to a clear reservation of the right of wakif to draw money for the expenses of her pilgrimage in Mecca and to other non-wakf purposes, and therefore, also involve a breach of the fourth condition.

At page 40 : h

The rule that the settlor when mutwalli can take the salary fixed for mutwallis generally is really no exception, for in that case he takes in his capacity as mutwalli and not in his capacity as settlor, just as it is laid down a little further on (Baillie, Pt. 2, p. 218). 'But if one should make an appropriation for the poor and should himself become poor, or for lawyers and himself become a lawyer, there is no objection to his participating in its benefits'—that is to say as a poor man or a lawyer, not as a settlor. There is, in fact, in all these cases no reservation at all.

Ameer Ali in his Mahomedan Law, Edn. 4 Vol. 1, at 519 sets out a translation of a passage from the Jamaa-ush-Shittat the concluding portion of which it would be well to quote :

The result is that the legality of the mutwalli eating out of the wakf depends on his quality as mutwalli and not upon the fact of the wakif being the mutwalli. And the jurists are agreed that where anything has been fixed for mutwallis generally, it is lawful for the wakif when he happens to be the mutwalli to take so much as is fixed for the other mutwallis; but I have nowhere seen that it has been held that a wakif, whilst he is the mutwalli can lawfully take for himself anything he likes out of the wakf simply because he is the mutwalli. The meaning of this is, that the retention of such a general power which would authorise his taking the largest share for himself, leaving almost nothing for the beneficiaries, is contradictory to the condition which requires a complete divestment of all proprietary right on the part of the wakif. This, of course, does not apply to a person who has made a wakf for the indigent and has himself become poor, or where he has made a wakf for the learned and has himself become learned. In such cases the wakif would be entitled to participate in the benefits of the wakf, and it makes no difference whether at the time of wakf, he is a fakir or learned, or whether he becomes so afterwards. But if he makes it a condition that he as a fakir should participate in it, it would not be valid. The result is that where a wakf is made for a general purpose (Jihat-i-aamma), a wakif may lawfully participate in it.

As a translation of the entire passage from the Jamaa-ush-Shittat has been placed on the record, and as its effect, in so far as that is material for our present purposes, has been summarised by my learned brother, it is unnecessary for me to say anything about the criticism of Ameer Ali's translation advanced by Sir Wazir Hasan. The conclusion arrived at by Ameer Ali that the wakif can lawfully take the allowance fixed for the mutwallis generally when he himself holds the office, is, in my opinion, a correct deduction from the texts, and the authority of the Judicial Committee of the Privy Council contained in the cases cited at the hearing of these appeals is not at variance with such a conclusion. It has however been argued as an alternative to the first branch of the first argument, that in the present case the share reserved by the wakif as mutwalli's salary for himself violates the rule that the salary reserved by the wakif for himself as mutwalli must be that which has been reserved for mutwallis generally, and such as could reasonably be reserved for them. It has been contended that the salary reserved for mutwallis generally that is for mutwallis as a class, is provided for by Cl. 7 of the wakfnama, and is two out of the ten shares into which the income of the wakf is divided. By Cl. 6, however, as long as the towliat shall remain in the hands of the wakif or his descendants (which when read with Cl. 3 means his son and the latter's descendants), five out of the ten shares are to be set apart as the salary of the mutwalli. The argument has gone so far as to suggest that the wakif was in fact making a settlement for life upon himself in contravention of the Shia law and of S. 3 (b), Mussalman Wakf Validating Act, 1913. 54 I. A. 33[10] has already been noticed. It is sufficient to say here that in that case the wakif by the principal waqfnama reserved for herself a salary as mutwalli of Rs. 1500 a year for life out of the income of the wakf properties, valued in the deed at Rs. 19,000, and that after her death, each of two mutwallis was to receive no more than Rs. 180 per year. In 64 I.A. 158[1] the first clause of a wakfnama was in these terms :

During my life-time, the tauliat of the entire wakf properties, noted in Schs. 1 and 2, shall have concern with me personally. During my life-time, I shall keep the entire wakf properties in my possession and under my management as mutwalli and carry out the tauliat work. During my life-time no one shall have absolutely any power to interfere with and raise an objection regarding the right of tauliat or the management of the properties. I the mutwalli too shall spend (money) in whatever manner I would like.

With special reference to this clause, the Right Honourable Sir George Rankin expressing the judgment of their Lordships, said :

Agreeing as their Lordships do with the High Court that the powers given to the settlor by the wide language of the first clause, already quoted from the deed are not more than the powers of a mutwalli to be exercised free from control by a committee of management or other such body, they are of opinion that there is nothing contrary to Shia law in the terms of the deed, and that the wakf cannot be held to be invalid by reason of any failure to comply with the requirement that the settlor must divest himself of his proprietary right.

In addition to the reasons set out by my learned brother for holding that the wakf is not invalid by reason of the share—5/10ths of the income—reserved by the wakif for himself as mutwalli's remuneration, I would say that there is no absolute rule of law to indicate the maximum proportion of the total income of the wakf which it would be permissible for the wakif to reserve to himself as mutwalli's salary. Gross and glaring disproportion between the amount prescribed by the wakif as mutwalli's salary for himself and that prescribed for future mutwallis would be always bad. But in case where the disproportion is not of that kind, the dividing line must be to some extent a question of fact, and may depend upon a variety of circumstances. In 8 Luck. 246,[12] Sir Wazir Hasan C. J. and Kisch J. negatived the contention that the wakf was invalid because the mutwalli was reserving a benefit to her-

self in the garb of remuneration. In distinguishing the case in 54 I.A. 33[10] the learned Judges said :

> It seems to me that in deciding whether a wakf is invalid on account of reservation of benefit by the wakif the facts of the particular case must be taken into consideration. There are several points which distinguish the present case from the case that was under consideration by their Lordships. Firstly, in *Abadi Begum's case*[10] the wakf was not a wakf-alal-aulad, there were no beneficiaries and the wakf was made entirely for religious purposes. In the present case we are dealing with a wakf-alal-aulad created for the support of the members of the wakif's family. Secondly, in that case the wakif who appointed herself as the first mutwalli, reserved to herself a salary of Rs. 1500 per annum out of the income of the wakf property, the value of which was given in the deed as Rs. 19,000 only, whereas the future mutwallis (one for the mosque and one for the imambara) were to receive only Rs. 180 a year each. In the present case the property is valued at about one lakh, the annual net income is Rupees 7766 out of which the mutwalli has reserved to herself less than one-tenth. It is true that future mutwallis, who were to be the eldest of her male descendants from time to time were to receive only Rs. 300 per annum for discharging the duties of mutwalli, but it must be remembered that they would also be receiving a guzara under the deed of wakf. The scale of guzara fixed for the wakif's daughters was Rs. 300 per annum each, and the son's shares, namely equal shares in the residue left after paying the fixed allowances, charitable expenses etc. provided for in the deed, would be considerably more. In fact therefore the actual amount received by Mt. Azmatunnessa from the wakf property would be less than that received by subsequent mutwallis, at any rate for the first generation.

This case was carried in appeal to the Privy Council, and their Lordships of the Judicial Committee held that 54 I. A. 33[10] had been rightly distinguished by the Chief Court of Oudh: *see* 41 C.W.N. 933[13] at p. 940. In the present case I am satisfied that the reservation of 5/10ths of the income as mutwalli's salary for the wakif and his descendants (which when read with cl. 3 means his son and his son's descendants) was not a subterfuge designed to secure a life settlement on the wakif himself. This was the salary generally fixed for all mutwallis in the line of descent from the wakif through his son, and as my learned brother has pointed out, the fact that another scale of remuneration has been generally fixed for another class of mutwallis, upon failure of this line is beside the point. After all the wakif's line through his son might never become extinct. Moreover the wakif was not appointing himself irrevocably a mutwalli for life, because cl. 3 of the wakfnama provides that tauliat is to remain in the wakif during his life-time for so long as his health permits and he desires to remain mutwalli. Finally as regards this point, the status in society of the wakif, of his son and of his son's descendants is a circumstance which, in my opinion, should be taken into consideration. The wakif was the son of the ex-king of Oudh. His son and his son's descendants would be persons in the direct and senior line of royal descent. Their position in society would be invested with a dignity which it would be impossible to uphold upon an income which might be ample for a mutwalli of less exalted station. Ideas of *noblesse oblige* would be a very real factor in determining the mode of living and the scale of personal expenditure expected by the community in Princes and Princesses of this family.

Sir Wazir Hasan has asked us to indicate for the guidance of the Shia community, the general position under the Shia law of a wakf in which the wakif appoints himself the first mutwalli and reserves to himself a share of the profits of the dedicated property as mutwalli's remuneration. Generalisations about the law which tend to escape from the facts of a particular case are always hazardous. But I think I may say that upon this question there is authority both textual and judicial to warrant the following propositions: (1) A wakif may not reserve to himself any benefit under the wakf that is as a beneficiary. (2) When any benefit is given to a class of persons, and the wakif becomes adventitiously a member of that class, he may partake of the benefit. (3) He may appoint himself mutwalli and reserve to himself a remuneration as mutwalli provided that is the remuneration reserved for mutwallis generally, and such as could reasonably be reserved for them. (4) He may not make a settlement for life upon himself under the guise of mutwalli's remuneration. (5) Gross disproportion between the remuneration reserved by the wakif for himself as mutwalli and the remuneration provided for subsequent mutwallis would ordinarily be evidence of an intention to participate as a beneficiary under the wakf.

The second argument is that unless the provisions of Mussalman Wakf Validating Act 1913 can be invoked to save this wakf, it would be invalid under the Shia law by reason of the fact that it does not effect a substantial present or concurrent dedication to religious, pious or charitable purposes. Clause 6 of the waqfnama reserves 5/10ths of the income as mutwalli's salary for the wakif and his descendants (which when read with cl. 3 means his son, and the descendants of his son). The same clause provides that

out of the remainder only 2/5ths shall be c set apart immediately for the expenses of the mosque and Imambara and the expenses of Muharram, Chehellum and Nowchandi Majlises; that 2/5ths shall be divided amongst the wakif's heirs according to the Imamia law, and that 1/5th shall go to what may for the sake of convenience be called a reserve fund. It is contended that the only concurrent dedication to purposes of a religious, pious or charitable nature which is to be found in the deed is the setting apart of 2/10ths of the total income for the expenses of the mosque and Imambara and the Moharam Chehllum and Nowchandi Majlises. b This, it is said, is not a substantial dedication. As my learned brother has given sufficient reasons for rejecting this argument, I will confine myself here to a consideration of two cases upon which very strong reliance was placed by Sir Wazir Hasan. That the wakf in the present case was in the nature of a wakf-alal-aulad can hardly be questioned, and this circumstance has to be borne in mind when an examination is made of the facts in 17 I.A. 28[15] and 54 I.A. 372.[17] In the former case, which was decided before the passing of the Mussalman Wakf Validating Act, 1913, property bearing a considerable c income was made wakf by a deed which directed that a mosque in a dwelling house belonging to the wakif and two small Madrassahs also in the wakif's dwelling houses, were to be supported, and the expenses of travellers were to be met in the manner which had become customary. The rest of the income was to be divided as salary of mutwallis who were to be drawn from members of the family, and as maintenance of other members of the family generation after generation. It was further provided that persons entitled to allowances would have no power to assign or charge them, and that creditors should have no claim d against them.

It was held that the gift was not a bona fide dedication of the property, and was only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable. In my opinion, there is no real parallel between the facts of that case and the facts of this. There is in the wakfnama under consideration no attempt to place the income reserved for members of the family beyond the reach of the creditors, or to impose any restraint on the alienation of the right to receive that income. The dedication of 2/10ths of income to the expenses of the mosque and Imambara and the expenses of Muharram Chehllum and Now- a chandi Majlises and the provision of a reserve fund which would inure in great measure to the benefit of these objects, constitutes in my opinion a substantial dedication to purposes of a religious, pious and charitable character. Lord Hobhouse delivering the judgment of the board in 17 I. A. 28[15] said that their Lordships were not attempting

> to lay down any precise definition of what will constitute a valid wakf, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift.

The Mussalman Wakf Validating Act was f passed in 1913 for the purpose of declaring the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children and descendants. The preamble and some provisions of the Act require to be set out. The Act says :

> Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; it is hereby enacted as follows :
>
> * * * * *
>
> (3) It shall be lawful for any person professing the Mussalman faith to create a wakf which, in all g other respects, is in accordance with the provisions of Mussalman law, for the following among other purposes : (a) for the maintenance and support wholly or partially of his family, children or descendants, and where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support — during his life-time or for the payment of his debts out of the rents and profits of the property dedicated.
>
> Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.
>
> (4) No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the h extinction of the family, children or descendants of the person creating the wakf.

This Act came into force on 7th March 1913, but was held not to be retrospective, that is to say, it did not apply to wakfs created before that date. To give it retrospective effect, an Act was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (32 of 1930). It came into force on 25th July 1930. The effect of it was that the Wakf Validating Act of 1913 applies also, from and after 25th July 1930 to wakfs created before 7th March 1913. 54 I. A. 372[17] was decided in 1927, before the Act of 1913 was made retrospective. A glance of the provisions of the

wakfnama in that case would be sufficient to show how widely it differs from the deed under consideration in the present case. The wakfnama in 54 I. A. 372[17] provided inter alia: (1) That out of an annual expenditure of Rs. 1558, a sum of Rs. 1100 should be appropriated for the support of the settlor and his family and Rs. 312 for the support of needy dependants, and that Rs. 146 should be applied to purely charitable purposes. (2) That when the life annuities fell in the money allotted for them should be divided by the mutwalli among the surviving annuitants or be given in his discretion to some or one of them, or so much should be given by the mutwalli as he thought proper for purely charitable purposes. (3) That the office of mutwalli would devolve after the settlor's death on the settlor's descendants, and afterwards on his male agnates, and that while the office was so held the mutwalli was to get an annuity of Rs. 500 in addition to the mutwalli's salary of Rs. 240. That on failure of the settlor's descendants and male agnates an anjuman would become the mutwalli. (6) That upon the death of all the annuitants, the sums allotted to them would be spent on purely charitable purposes. It was held that the test of the validity of this wakf was, as laid down in 17 I. A. 28,[15] and other cases, whether it constituted a substantial dedication to charity. In disposing of the appeal their Lordships stated that

> the law as laid down by the Board is, that the properties must be substantially dedicated to charity, not as one of the learned Judges of the High Court has observed in passing orders on the application for leave to appeal, that the gift to charity should be substantial.

In my opinion this observation largely answers Sir Wazir Hasan's contention that 2/10ths of the income devoted to religious, pious and charitable purposes is too small to be substantial. It seems to me that looking at the provisions of the deed as a whole, it cannot be said that the settlor displayed an undue leaning towards himself and his family at the expense of the religious, pious and charitable purposes for which he was making provision. The third argument against the validity of the wakf calls for an examination of those provisions of the wakfnama by which, what has been called a reserve fund, has been set up. In cl. 2 the wakif, after stating that he has constituted a mosque and Imambara at Khusro Manzil, directs as follows:

> If at any time the Government purchases this building or for any reason this building falls down, then to the price of the land and the building should be added a further sum to the amount of five years income of the share which under cls. 6 and 7 of this wakfnama will be set apart for the improvement of this wakf and a magnificent mosque and imambara should be built together at a suitable and selected place.

The relevant words in cls. 6 and 7 are as follows:

> Clause (6) . . . . and the remaining one share out of the said ten shares shall be set apart for the extension and improvement of the wakf so that from time to time, in consultation with the trustees immovable properties may therewith be purchased and included in this wakf.
>
> Clause (7) . . . and the remaining two parts shall be reserved for the extension and improvement of the wakf properties and therewith immovable properties shall be purchased and included in this wakf.

It is contended that there would be no appropriation to the wakf of the money in the reserve fund until it was applied to the building of a new mosque and imambara, or the acquisition of other immovable properties, for so long as the money lay idle, it would remain the property of the wakif, and therefore the settlor did not divest himself of it completely and unconditionally. This argument was sought to be supported by reference to certain passages in Baillie (Edn. 2, Part 2). At p. 218 the learned author states the fourth condition of a valid wakf under the Shia law thus:

> It must be entirely taken out of the wakif or appropriator himself. So that, if the appropriation is restricted to a particular time, or made dependent on some quality of future occurrence, it is void.

At p. 220: "Appendages. First, the wakf or subject of appropriation is transferred so as to become the property of the mowkoof alehi . . ." Sir Wazir Hasan has contended that the provision creating the reserve fund is not only bad in itself, but destroys the validity of the entire wakf. For this proposition he has cited 60 I.A. 116.[38] In that case a wakf was executed in respect of the whole of certain properties transferred to the wakif by her son. It was subsequently found that the transfer was invalid, and that the wakif was entitled in her own right to a one-third share in those properties. On a construction of the wakfnama, it was held that the wakif had no intention of making a wakf of her own share, and that the wakf failed as a whole. In my opinion the argument is not justified by the passages cited from Baillie or by the case just referred to, and I know of no rule of the Mahomedan law which prohibits a wakif either expressly or by implication, from setting aside a portion

38. ('33) 20 A.I.R. 1933 P.C. 83 : 142 I.C. 217 : 55 All. 83 : 60 I.A. 116 (P.C.), Sahu Har Prasad v. Fazal Ahmad.

of the income of the wakf for the purpose of improving and enlarging the corpus. Such a provision stands on the same footing as a direction to accumulate for the purpose of protecting the wakf property against unforeseen contingencies, and to hold that this measure of prudence would invalidate the endowment, would be to destroy at a stroke the majority of wakfs created by provident and far-seeing settlors. The intention of the settlor is reflected in the preamble to the wakfnama :

> Having taken out the immovable properties mentioned in the schedule below from my ownership, I have for the sake of God included them in the wakf and I shall cause mutation of names to be effected in the records of the Government.

This is a declaration that the wakif is taking the property out of his own possession and making a change in the character of possession, a change such as to amount to a transfer of possession to himself as mutwalli. In 64 I.A. 158[1] it was laid down that a wakif can appoint himself the mutwalli of a wakf and in such a case change in the character of the possession amounts to transfer of the possession as required when the mutwalli appointed by the wakif is a person other than the wakif himself. In that case it was established that upon a true construction of the wakf the settlor had retained no interest to himself, and that on the evidence and by mutation of names he had before his death transferred the possession from himself as malik to himself and another as mutwallis and it was held that the wakf was valid under the Shia law.

The findings of fact expressed by my learned brother, in which I entirely concur, are that such a change in the character of possession was indeed made in the present case. The moment this was done the entire property, both corpus and income, became impressed with the trust. That share of the income which was to be accumulated was as much an asset of the wakf as was the corpus itself. The future application of this fund to the erection of a mosque and Imambara or its investment in other immovable properties would amount to no more than the conversion of one form of wealth, money into another form of wealth, land and buildings. It was not a future appropriation, but a present appropriation to future uses which would inure to the benefit of the wakf. Ameer Ali (Edn. 4 Vol. I at p. 481) says :

> Regarding erections on wakf lands, the following rules are applicable. If the mutwalli of the wakf erects the building, with the property of the wakf or the income of the trust property, the building becomes the property of the wakf, whether the erection be for the wakf or for himself, or whether it was erected generally without any specific purpose. . . .

I am satisfied that setting up of the reserve fund in no way affects the validity of the wakf.

The next argument is that if the wakf is invalid on the principles enunciated by the Privy Council in 17 I. A. 28,[15] 22 I. A. 76[16] and 54 I. A. 372,[17] then the Wakf Validating Act, 1913, would not save it because the proviso to S. 3 has not been satisfied. The proviso requires an ultimate gift over after the extinction of the family children or descendants of the wakif, expressly or impliedly for the poor or other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. It is contended that the ultimate gift over in the present case is (i) less than the entire available fund (ii) too remote, and (iii) too indefinite.

Under cl. 7 of the wakfnama the position as to allocation of the income upon failure of the wakif's descendants would be as follows: Mutwalli's salary 2/10ths; Mosque and Imambara 3/10ths; Reserve fund for the extension and improvement of the wakf properties 7/20ths; "Kar-i-khair" (translated as "proper charitable acts") 3/20ths. The result is that 9/20ths of the income would be absorbed by the mosque and Imambara and by proper charitable acts, and 7/20ths would go into the reserve fund, the ultimate benefit of which would inure to these self-same objects. The entire available fund is thus seen to be dedicated to "religious, pious or charitable purposes of a permanent nature." Section 4 expressly provides that a wakf will not be invalid by reason of this ultimate gift over being postponed until after the extinction of the "family, children or descendants" of the wakif. Now it has not been disputed that the word "children" in the phrase, "If no one of my children remains . . . . ." in cl. 7 means descendants entitled to inherit, and that being so it is clear, that the gift over is not too remote.

The next point taken was that "proper charitable acts" (Kar-i-khair) relates to an object which is too indefinite and in support of this contention a passage was cited from Baillie (Edn. 2) p. 217:

> If a man should make an appropriation without mentioning its objects the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, "For one of these two" or "for one of the two Musheds or two Fureeks, the whole would be void."

The principle has been in my opinion correctly interpreted by Sir Dinshah Mulla

in his "Principles of Mahomedan Law" (Edn. 11), Art. 146 at page 152 :

> The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty. But it is not necessary that the objects should be named.

This exposition is of the utmost importance; if the objects of the wakf are indicated with reasonable certainty it is not necessary that they should be named. The nearest English rendering of the expression "Kar-i-khair" would be "works of charity." The connotation of "Kar-i-khair" includes almsgiving, or liberality to the poor and as my learned brother has pointed out the prime concern of Muslim jurists when dealing with wakf is benefit to the poor. In this view of the matter the principle laid down in (1804-05) 10 Ves. 521[39] would not be attracted. In 26 I.A. 71[40] a devise by a Hindu to "dharam" was held to be void for uncertainty. Sir Richard Couch expressing the judgment of their Lordships of the Judicial Committee applied the principle laid down in (1804-05) 10 Ves. 521[39] and quoted the following passage from the judgment of Lord Eldon :

> As it is a maxim that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the Court, or if the trustee dies the Court itself can execute the trust — a trust therefore which in case of maladministration could be reformed and a due administration directed, and then, unless the subject and objects can be ascertained upon principles familiar in other cases, it must be decided that the Court can neither reform maladministration nor direct due administration.

In (1804-05) 10 Ves. 521[39] a bequest had been made in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, and it was held that the trust failed because it was too indefinite. In 26 I.A. 71[40] their Lordships pointed out that in Wilson's Dictionary "dharam" is defined to be law, virtue, legal or moral duty. It was accordingly held that the objects which would be considered to be meant by that word were too vague and uncertain for the administration of them to be under control. In my opinion it would not be right to condemn a gift for 'Kar-i-khair' in a deed of Mussalman wakf as being on the same footing as a gift for 'dharam.' The objects of the donor's bounty in the case of "dharam"—if by that expression is to be understood the meaning given to it in Wilson's Dictionary — are as vague and indeterminate as it is possible for such objects to be, whereas in the case of "Kar-i-khair" in a wakfnama they are possible of ascertainment by reference to the principles of Mahomedan law. In 7 Luck. 300[18] a deed of wakf contained the direction "religious and charitable objects shall continue to be performed permanently and in perpetuity so that they may benefit my soul." It was held that the wakf satisfied the requirements of the proviso to S. 3, Mussalman Wakf Validating Act, 1913, and that the fact that there was no specification in the deed itself of such religious and charitable objects did not render the dedication vague. Such objects could be ascertained by reference to the texts of Mahomedan law and the matter related to the administration and not to the construction of the wakf. This decision was in effect overruled by a Full Bench of the Oudh Court (Hamilton and Radha Krishna JJ., Ziaul Hasan J. dissenting) in 15 Luck. 586.[20] It was held by the majority of the Court that a wakf which described the ultimate object of the benefit as "charitable purposes highly commendable according to Hanafi School" was invalid on the ground of vagueness and uncertainty having regard to the decision of the Privy Council in 26 I. A. 71.[40]

In his dissenting judgment, Ziaul Hasan J. expressed the view that the objects of the wakf were easily ascertainable and there was no uncertainty about them. He pointed out that 26 I.A. 71[40] was a case which dealt with a Hindu disposition, and that there was not a word in their Lordships' judgment which could show that their Lordships were laying down a general principle applicable to Mussalman wakfs also. He also observed that the question would have to be decided in accordance with Muslim law which had not been altered by the Mussalman Wakf Validating Act or by any other legislative enactment. With great respect to the judgment of the majority in that case, I am constrained, after careful consideration, to adopt the reasoning of Ziaul Hasan J. Wakf postulates charity, and to hold that there is little or no difference between "Kar-i-khair" in a Mussalman deed of wakf and "dharam" in a Hindu will would be to lose sight of what Jessel, M. R. said in (1876) 1 C.P.D. 374[41] :

> There is no more vicious line of argument than ..... of comparing one contract with another, and saying it differs very little; you arrive ultimately at identifying wholly different contracts.

39. (1804-05) 10 Ves. 521 : 7 R. R. 232, Morice v. Bishop of Durham.

40. ('99) 23 Bom. 725 : 26 I. A. 71 : 7 Sar. 543 : 1 Bom.L.R. 607 (P.C.), Runchordas Vandrawandas v. Parvatibai.

41. (1876) 1 C. P. D. 374 : 35 L. T. 196 : 24 W.R. 838 : 45 L.J.C.P. 630, Southwell v. Bowditch.

Ameer Ali (Edn. 4, Vol. I at page 414) has stated the entire matter thus :

> Mere vagueness or uncertainty will not lead to the failure of a wakf, for, in such a case the law does itself supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the wakf; or even when that is not expressed, be applied to the support of the poor and needy. . .
>
> The poor form, by necessary implication of the law, the ultimate beneficiaries of every wakf created in favour of individuals or the descendants of the wakif. Where, therefore, the primary object fails, such failure instead of voiding the wakf 'only accelerates' the ultimate application.

I am of the opinion that if the expression "Kar-i-khair" does not indeed indicate the objects of bounty intended by the wakif with sufficient certainty, the doctrine of cypres could be invoked. As stated by my learned brother, there is in the present case an overriding intention in favour of charity on failure of the settlor's heirs. This is manifest in cl. 7 of the deed, the effect of which is to dedicate 9/20ths of the entire income to the religious, pious and charitable objects represented by the mosque and imambara, and implied in the expression, "Kar-i-khair" while deflecting 7/20ths into the reserve fund, which, it should be repeated, would again inure to the benefit of these self-same objects. Sir Dinshah Mulla in his "Principles of Mahomedan law" (Edn. 11) states the doctrine of cypres in Art. 146 H:

> Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed.

Mr. Tyabji in Edn. 3 of his "Muhammadan law," (published in 1940) has given close consideration to the texts of Mussalman law and to judicial decisions in his notes under Art. 481. I would conclude what I have to say on this topic by quoting the following from the learned author's discourse :

> The principle underlying the doctrine of cypres is deeply rooted in Muslim law.
>
> Under English law expressions which are too wide (such as 'philanthropic' or 'benevolent purposes') by their vagueness and uncertainty make the whole bequest invalid. Under Muslim law, if the wider expression includes purposes which are valid objects of wakf, the valid objects prevail, the rest are rejected : the wider expression is cut down and given effect to only to the extent to which it includes valid objects of wakf.

The last argument brought to bear against the validity of the wakf related to the prior lease of some of the wakf properties which had been granted by the settlor to Saheba Khatun. It was contended that the lease made the wakf void in Shia law, firstly, because the appropriation of a portion of the corpus was postponed until the expiry of the lease, and secondly because in any case the reversion remaining in the wakif and his right to receive rent from an intermediate lessee could not ever be mowkoof (thing appropriated). In support of this argument, the conditions of a wakf according to Shia law were adverted to, and reference was made to Baillie (Edn. 2) Part II at p. 213, where the four main conditions are set out :

> First, conditions that relate to the mowkoof, or thing appropriated, which are also of four kinds. It must be a substance, the property of the appropriator, capable of being delivered. Hence the wakf of anything which is not in ayn or distinctly specified, or deyn or indeterminate things is not valid.

The argument was carried to the length of maintaining that in Shia law there can be no wakf of anything which is not capable of physical possession. As this contention has been repelled in the judgment of my learned brother by reasons which do not require repetition, I need only refer to the case in 65 I. A. 198.[9] In that case a testator had by his will made certain property wakf for the purpose of a sarai but had directed that the income of two buildings included in the dedication should be given for life to a certain lady and her son, and to another person respectively. The language of the judgment of their Lordships, a portion of which has already been quoted by my learned brother, is of such importance to the present question that I would repeat it. The Right Honourable Sir George Rankin delivering the judgment of the Board said :

> If the will can be read as intending that on the death of the testator these two properties should become "wakf" it would be in no way unlawful that a life interest in the usufruct should be reserved for the beneficiaries abovenamed. On the other hand, a direction that property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedication inter vivos. "If one should say I have appropriated when the beginning of the month has come . . . . . the appropriation would not be valid." (Shuraya-ool-Islam. Baillie, Vol. II p. 218). Their Lordships recognise that the decision in 30 I.A. 94,[8] which permits a Shia to create a wakf by will, is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in 28 All. 633.[42] While not disposed to put a narrow or unduly technical construction of this will, upon a careful consideration of the language used by the

42. ('06) 28 All. 633 : 3 A.L.J. 387 : 1906 A.W.N. 146, Muhammad Ahsan v. Umardaraz.

testator and of the substance and effect of his dispositions, their Lordships find themselves unable to hold that he intended either of the two properties now in question to become wakf property until the tenant for life had died or there had been a sale under the powers conferred by the will.

This enunciation of the law brings into relief the extent to which an interest in remainder given by will may in Shia law be the subject of wakf. Be it remembered that in this case there was really no immediate appropriation of the corpus in question, since the gift was a testamentary one. In the present case we have an immediate appropriation of property in the actual possession, presumably, of tenants who were paying rent to a lessee from the settlor, the latter being at the time of the dedication under a contractual liability to pay rent to the wakif. What is immediately appropriated as corpus is the property, to which attaches the right to receive in the present a smaller rent from one person, the lessee, and to receive in the future a larger rent from other persons, the tenants who happen to be in actual or khas possession. The delivery of seisin is effected by vesting in the endowment the right to receive rent. The following passage from Ameer Ali (4th Ed.) Vol. I p. 499 which deals with iqbaz or delivery of possession is instructive :

It is only necessary to explain that under the condition of iqbaz actual delivery of possession is not requisite. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the wakf. If the property is immovable, delivery of the title deeds would satisfy the requirements of the law. If it is a house the delivery of the key, or if they are Government securities in deposit with any Bank, the delivery of the deposit receipt, or if it is a business, a transfer in the books, as in the case of a gift, would be a sufficient transmutation of possession.

No authority whatever has been cited to substantiate the contention that the reversion and the right to receive rent which were vested in the settlor at the time of the wakf could not constitute mowkoof. It is hardly necessary to observe that such a proposition would have the effect of invalidating all wakfs by Shias of immovable property in which an intermediate tenancy intervened between the proprietor and the tenant in actual physical possession. This disposes of all the arguments directed against the validity of the wakf.

G.N./R.K. *Appeals dismissed.*

C. P. C. —
(b) ('40) Chitaley, Ss. 100 & 101 N. 28 Pt. 3.
(r) ('40) Chitaley, O. 41 R. 1 N. 12 Pts. 1, 3.
('41) Mulla, Page 1155 Pts. (n), (m).
(t) ('40) Chitaley, O. 22 R. 3 N. 16.
('41) Mulla, Page 926 Pt. (o).
(u) ('40) Chitaley, O. 21 R. 58 N. 1.
(v) ('40) Chitaley, O. 21 R. 63 N. 1; N. 14, Pt. 3.
(w) ('40) Chitaley, O. 21 R. 63 N. 7, Pt. 6.
(x) ('40) Chitaley, O. 21 R. 63 N. 8, Pt. 9.
('41) Mulla, Page 845 Pt. (q).
(y) ('40) Chitaley, O. 21 R. 58, N. 13.
(z) ('40) Chitaley, S. 11 N. 98, Pt. 7.
('41) Mulla, Page 78, Pt. (k).
(aa) ('40) Chitaley, O. 21 R. 63, N. 25.

Lim. Act —
(p) ('42) Chitaley, Arts. 142 & 144 N.9, Pts. 1,2; N. 2 Pts. 3, 4.
('38) Rustomji, Page 1317 Pts. 1, 4; Page 1340 Pt. 4.
(q) ('42) Chitaley, Arts. 142 & 144 N. 46 Pt. 7.
('38) Rustomji, Page 1372, Pt. 9.

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* A. I. R. (29) 1942 Calcutta 214

BARTLEY AND MOHAMAD AKRAM JJ.

Kashi Nath Panday — Appellant

v.

Emperor.

Criminal Appeal No. 790 of 1940, Decided on 3rd April 1941.

*** Evidence—Hearsay—Child not being competent witness not examined—Statement made by child to other people is not admissible.**

A child aged 3½ years was raped about which she complained to her mother, sister and father. The child was not examined as she was not a competent witness. Evidence was given by her mother, father and sister of her statements and conduct and on that evidence accused was convicted :

Held that the evidence of statements made by the child to other people, or of conduct amounting to a statement, was not admissible against the accused as it was hearsay evidence : (1799) 168 E. R. 202 and (1808) 1 Phil. & Arn. Ev., 10th Edn. 10, *Foll.* [P 215c]

Carden Noad and Anil Chandra Roy Chaudhuri — for Appellant.

Nirmal Kumar Sen — for the Crown.

Bartley J. — Appellant in this case has been convicted, in accordance with the majority verdict of the jury, of an offence under S. 376, Penal Code. The case involves an unusual and interesting point of law. The facts are briefly, that about noon on 30th August last, Bansori, a child of 3½ years of age, complained to her mother of pain in her private parts. The same evening, the child's elder sister reported to her mother a statement, made by the child to her, suggesting the conclusion that the child had been raped by a man whose description she gave to her sister. The father who was present, overheard part of the story. Next morning when returning from a walk with Bansori, he found the appellant, a motor driver employed by the owner of the house, sitting on the stairs. He asked Bansori if the appellant was her assailant, and she nodded. He then informed the police. The child was medically examined and it was found that

a her hymen was ruptured, and the labia swollen and inflamed. In the opinion of the doctor, the injuries were due to rape. When the case came up for trial, the learned Judge, as he was empowered to do, directed the jury that the child Bansori was not a competent witness. She was not examined in the proceedings. Evidence was given by her mother, father and sister of her statements and conduct, and on that evidence, appellant has been convicted. On appeal the point taken is that there was no admissible evidence to prove the guilt of the appellant. She could not testify, and in the circumstances, no hearsay evidence could be given. We are of b opinion that this contention is a valid contention, and must prevail; indeed it was conceded on behalf of the Crown that no provision of the Evidence Act covered the reception of hearsay evidence in such a case. The evidence given was second hand evidence, with regard to which the English rule, as stated by Best in his treatise on Evidence, is that

> no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received.

The general rule is of course, qualified by statutory exceptions, but none of those c exceptions, as stated in the Evidence Act, appear to apply to the facts of the present case. In our opinion therefore evidence of statements made by the child to other people, or of conduct amounting to a statement, is not admissible against the appellant. We are fortified in this view by the decision in (1799) 168 E.R. 202.[1] While this case is more often referred to in the text books as an authority on the question of the competency of an infant witness to depose, and for the proposition that the testimony of such a witness must be given on oath, it went further and laid down, as the unanimous opinion of twelve Judges, that information d relative to an alleged assault given to other persons by a child who was not examined as a witness, was not receivable. The facts of that case were practically identical with those now in question. The case was proved by the mother of the child and another woman, to whom the child had told the circumstances of the injury done to her. The only corroborative evidence was that the prisoner lodged at the place she had described, that she had received some injury, and that when she saw him next day, she declared he was the man. It was held that evidence of her statements ought not to have been received, and this decision, given in e 1799, was followed in a subsequent case R. v. Tucker[2] decided in 1808. This appeal must accordingly be allowed. The conviction of the appellant and the sentence passed upon him are set aside, and he will be acquitted and discharged from his bail.

Mohamad Akram J. — I agree.

K.S./R.K. *Appeal allowed.*

1. (1799) 168 E.R. 202, R. v. Brasier.

2. (1808) 1 Phil. & Arn. Ev., 10th Edn. 10.

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B. K. MUKHERJEA AND BISWAS JJ.

Jwala Prosad Saha — Appellant f

v.

Bachu Lal Gupta — Respondent.

Appeals Nos. 164 of 1940, 23 and 219 of 1941 and Civil Revn. Case No. 781 of 1941, Decided on 10th July 1941, from original orders of District Judge, Birbhum, D/- 28th May 1940; 18th and 23rd December 1940 ; and 17th May 1941 (for first three Appeals) respectively.

(a) Guardian and Wards Act (1890), S. 25 — Custody explained.

The word "custody" as used in S. 25 refers not only to actual but also to constructive or legal custody. When the father of a child is alive and has not abandoned his right, the maternal grandfather or for the matter of that any other relation who has the actual custody of the boy must be deemed to have that custody with the knowledge g and consent of the father. Legally it is the father who has the custody of the child in such circumstances, and the child can be deemed, within the meaning of the section to be removed from such legal custody, when the person in whose actual possession he is, repudiates to the guardian's knowledge the right of the latter to the actual or legal custody of the minor: ('17) 4 A.I.R. 1917 Mad. 612 and ('15) 2 A.I.R. 1915 All. 199, *Rel. on.* [P 217*a*,*b*]

(b) Guardian and Wards Act (1890), S. 25 — Welfare of minor not guardian's interest is to be looked to — For health of minor, father's right of custody can be limited — Order of District Judge allowing child with maternal grand parents for some time held proper.

The rights of parents regarding the custody and control of their children are to be exercised, not in h the interest and for the benefit of the parents, but in the interest and for the welfare of the children themselves: 23 Cal. 290, *Rel. on.* [P 217*e*]

The Court would be perfectly justified in imposing limits upon the father's right of custody, if the exercise of such rights would materially interfere with the health and happiness of the minor. [P 217*e*,*f*]

A boy aged only eight years and a few months was born in the house of his maternal grandfather. His mother died only six days after his birth, and he had been in the house of his maternal grand parents since then and brought up by them as their own son. The father of the minor made an application as his natural guardian, under S. 25 praying that the child might be restored to his custody. It was contended that it would not be conducive to the welfare and happiness of the child if he was

removed at this age to new and unfamiliar surroundings and estrangement from the grandfather and his wife whom he looked upon as his own parents might seriously affect his health. As a sudden separation from his maternal grand parents might affect the health of the child, the District Judge directed that the boy should remain with them for about a year and a half. During this period the father was to be entitled to the company of his son during the holidays and on ceremonial occasions, and was to be at liberty to take him away at his expense:

Held that the direction given by the District Judge that the child should remain with the maternal grand parents for some time more and in the meantime he should be given opportunity of being familiar with his father was a very proper one. [P 217*g*]

(c) Practice—Judicial order cannot be passed behind back of party affected.

An order made by the Judge in his Chamber without notice to the parties is bad in law as the Judge is not justified in making a judicial order behind the back of the party affected thereby without giving him an opportunity to say what he had to say on the point. [P 217*h* ; P 218*a*]

(d) Guardian and Wards Act (1890), S. 25 — Conduct of guardian held not contumacious and order of fine was set aside.

The notice to produce the minor was not actually served upon the guardian. The minor himself was not at Suri (where the notice was issued) on that date, but was lying ill at Monghyr :

Held that the guardian could not be said to have deliberately flouted the orders of the Court and hence the order imposing a fine on the guardian should be set aside. [P 218*h* ; P 219*a*]

Gopendra Nath Das (in 164, 23, 219 and 781), Hari Prosanna Mukherjee (in 164) and Lala Hemanta Kumar (in 23, 219 and 781) — for Appellant.

Hira Lal Chakravarti; and Rabindra Nath Bhattacharji (in 164, 23, 219 and 781) and Arunendra Nath Tagore (in 164 and 23) — for Respondent.

B. K. Mukherjea J. *(F. M. A. No. 164 of 1940.)* — This appeal is directed against an order of the District Judge, Birbhum, dated 28th May 1940, passed under S. 25, Guardian and Wards Act, directing that the minor, Chittaranjan Gupta should be returned to the custody of his father Bechu Lal Gupta, the respondent-petitioner. The infant is a boy aged only eight years and a few months. He was born in December 1932 at Suri in the house of his maternal grandfather, Jwala Prosad Saha, who is the appellant before us. His mother died only six days after his birth, and it is not disputed that he has been in the house of his maternal grand parents since then and brought up by them as their own son. It was on 27th March 1940 that Bechu Lal Gupta, the father of the minor, made this application as his natural guardian, under S. 25, Guardian and Wards Act, praying that the child might be restored to his custody. The application was opposed by his maternal grandfather Jwala Prosad Saha on several grounds. It was said, in the first place, that the application was not a bona fide one and that the petitioner had never cared to look after his infant son ever since his birth, and neither he nor the other members of his family had paid any visit to the child except on rare occasions. The petitioner, it was said, made a proposal to marry the second daughter of the opposite party, and as the latter refused to accept his proposal, he became angry, and with a view to wreak vengeance on the opposite party and his wife who were very much attached to the child, sent a pleader's letter demanding that the child should be returned to him. It was contended further that it would not be conducive to the welfare and happiness of the child if he was removed at this age to new and unfamiliar surroundings and estrangement from the opposite party and his wife whom he looked upon as his own parents might seriously affect his health.

The District Judge considered all these matters and came to the conclusion that although the child was well looked after and tended by the maternal grand parents, it would be after all to his interest to return to his father and live with him. As a sudden separation from his maternal grand parents might affect the health of the child, the District Judge directed that the boy should remain with the opposite party till the Christmas holidays of 1941. During this period the father would be entitled to the company of his son during the holidays and on ceremonial occasions, and would be at liberty to take him away from Suri at his expense. From the Christmas holidays of 1941 the minor would remain permanently with his father. It was further directed that if the wife of the opposite party died within this period, the child should be returned to his father. It is the propriety of this order that has been challenged before us in this appeal. Mr. Das who appears for the appellant has contended in the first place, that the order of the District Judge is not warranted by law, inasmuch as S. 25, Guardian and Wards Act, has no application to the facts of this case. He has contended, in the second place, that in the circumstances of the present case the welfare and happiness of the child demand that the present custody and control should not be interfered with.

So far as the first point is concerned, Mr. Das argues that S. 25, Guardian and Wards Act, contemplates a case where a ward leaves

a or is removed from the custody of his guardian. As in the present case, the minor was never in the custody of his father and lived all along with his maternal grand parents, that section could not possibly apply. The language of the section is undoubtedly not very clear, but we think that the word "custody" as used in the section refers not only to actual but also to constructive or legal custody. When the father of a child is alive and has not abandoned his right, the maternal grand-father or for the matter of that any other relation who has the actual custody of the boy must be deemed to have that custody with the knowledge and con-
b sent of the father. Legally, it is the father who has the custody of the child in such circumstances, and the child can be deemed, within the meaning of the section to be removed from such legal custody, when the person in whose actual possession he is, repudiates to the guardian's knowledge the right of the latter to the actual or legal custody of the minor. This was the view taken by the Madras High Court in 39 Mad. 608,[1] and in our opinion it would be a sound view to take. To hold otherwise, would be to admit that there is no provision in the Guardian and Wards Act under which a guardian,
c even if he is appointed by a Court, can apply for having the custody of the minor who had never been in his custody before. As was pointed out by the Allahabad High Court in 37 ALL. 515,[2] a guardian may in such cases be said to have got legal custody from the very moment of his appointment as a guardian and can make an application under S. 25, Guardian and Wards Act. The first contention of Mr. Das is, therefore, overruled. Coming now to the merits of the case, it is not disputed that the father, as the natural guardian, has the legal right to the custody of his child and the Court would not inter-
d fere with his right, except when the safety or the welfare of the child requires such interference. It cannot be said in the present case that the father had abandoned the custody of his child to his maternal grand-father and is now capriciously reasserting his rights. The father could not reasonably have demanded the return of the child so long as it was very young and required the actual nursing of his grand-mother. There is no allegation of misconduct on the part of the father, or any moral unfitness which e would disentitle him to the custody of his son. We are not satisfied that the present case was the outcome of any bitterness of feeling that came into existence on account of the refusal of the opposite party to marry his second daughter to the petitioner.

It is perfectly true that the rights of parents regarding the custody and control of their children are to be exercised, not in the interest and for the benefit of the parents, but in the interest and for the welfare of the children themselves: *vide* 23 Cal. 290.[3] The Court would be perfectly justified in imposing limits upon the father's right of custody, f if the exercise of such rights would materially interfere with the health and happiness of the minor. In the present case the only thing that could be said on behalf of the opposite party is that the minor is still very young, that he has been born and brought up under particular environments, and it may tell upon his health if he is removed from his present surroundings and compelled to live amongst people whom he cannot but regard as strangers. We think that the direction given by the District Judge that the child should remain with the maternal grandparents for some time more and in the mean-
g time he should be given opportunity of being familiar with his father was a very proper one. Speaking for ourselves, we might be inclined to put off the time for final separation to a later date. But as we find the boy had stayed with the father during this as well as the previous summer vacation and has become familiar with his new surroundings, it will not be proper in our opinion to alter the directions given by the District Judge in this respect. The result is that this appeal is dismissed. We make no order as to costs.

Civil Revision Case No. 781 of 1941. —
h It is necessary now to refer to a subsequent order made by the District Judge in the course of the same proceeding on 10th June 1941, by which the previous order made on 28th May 1940 was modified. The modification was to the effect that the father would get immediate custody of the minor without waiting till the Christmas holidays of 1941. Against this order Civil Rule No. 781 of 1941 was issued by this Court, and it is necessary that this rule should be disposed of now. In our opinion, the order is bad in law inasmuch as it was made by the learned Judge in his Chamber without notice to the par-

1. ('17) 4 A. I. R. 1917 Mad. 612 : 33 I. C. 894 : 39 Mad. 608 : 30 M. L. J. 21, Mohideen Ibrahim Nachi v. L. Mahomed Ibrahim Sahib.
2. ('15) 2 A. I. R. 1915 All. 199 : 29 I. C. 416 : 37 All. 515 : 13 A. L. J. 742, Utma Kuar v. Bhagwant Kuar.
3. ('96) 23 Cal. 290, In the matter of Joshy Assam.

ties. However much reprehensible the conduct of Jwala Prosad might have been, we do not think that the Judge was justified in making a judicial order behind the back of the party affected thereby without giving him an opportunity to say what he had to say on the point. We should have been inclined, therefore, to set aside the order and send the case back in order that the matter might be reconsidered by the learned Judge after giving due notice to the parties. We are relieved, however, of taking this step by reason of certain events which happened in course of hearing of these appeals before us. We expressed our desire that the opposite party (the maternal grand-father) should have the custody of the child till the X'mas of 1941, in terms of the order of the District Judge dated 28th May 1940. We had the child actually brought before us, to be delivered over to the opposite party in our presence. We noticed that the child positively refused to leave his father, and go to his maternal grand-father. We are told that the opposite party subsequently met the child in the place of the petitioner's advocate, but even there all his persuasions failed, and the boy definitely refused to accompany him to Suri.

After hearing the parties further on this point, we are satisfied that the welfare of the child requires that he should be allowed to remain with his father permanently from now. We, therefore, affirm the order of the District Judge dated 10th June 1941, subject to this modification that the petitioner Bechu Lal should give all reasonable facilities to the opposite party and his wife to visit the child either in Calcutta or at Jaunpur, wherever the child might be at the time at such time as they consider proper, and that the opposite party Jwala Prosad will be at liberty to take the child down to his place and at his expense during the puja and summer vacations of the year 1942 and 1943, provided the child is willing to come and stay with him and his wife. Subject to these modifications the rule is discharged. There is no order as to costs.

F. M. Appeals Nos. 23 and 219 of 1941. —We now come to Appeals Nos. 23 and 219 of 1941. They arise out of two orders made by the District Judge on 18th December 1940 and 17th May 1941 in connexion with the same proceeding under the Guardians and Wards Act. In accordance with the order made on 28th May 1940, referred to above, the father was entitled to take back his child to his own place during the puja vacation of 1940. On the application of the father a notice was issued on 28th September 1940, asking the grand-father to produce the child in Court. As the child was not produced, another order was passed on the same day asking Jwala Prosad to show cause why he should not be fined Rs. 100 for non-compliance with the Court's order. As a result of the enquiry made by the District Judge, it was found that Jwala Prosad disobeyed the order of the Court, and by his order dated 18th December 1940, Jwala Prosad was fined Rs. 100 under S. 25, Guardians and Wards Act. It is against this order that Appeal No. 23 of 1941 is directed.

As the child was not produced till 10th May 1941, the Judge by his order dated 17th May 1941, imposed upon Jwala Prosad a further fine of Rs. 500 under S. 25, Guardian and Wards Act. It is against this order that Appeal No. 219 of 1941 is directed. It seems to us on hearing the learned advocates on both sides that the learned Judge was not justified in the circumstances of the case to impose these fines under S. 25, Guardian and Wards Act. In the first place, we have very grave doubts as to whether the notice dated 28th September 1940, was actually served upon the appellant. A large number of witnesses have been examined on his behalf to show that he was not at Suri on that date. We do not find any sufficient reason as to why these witnesses should be disbelieved. In the second place, the learned Judge has not come to any finding as to whether the minor himself was at Suri on that date. Quite apart from this, we think that it cannot be said that the appellant was guilty of contumacious disregard of the Court's order. It is not disputed that the child was lying ill at Monghyr. The officer who was deputed there to execute the search warrant actually bears witness to this fact. As to whether the illness was sufficiently serious to prevent the guardian from taking the child to the Court at Suri is a matter of opinion and the appellant can make a just grievance that he was not allowed to examine the Civil Surgeon of Monghyr and other persons whom he wanted to examine. We do not think that when the illness is not disputed it can be said that the maternal grand-father did deliberately flout the orders of the Court. As a matter of fact, the child was produced in May 1941 when he recovered from his illness. Taking all these facts into consideration, and Mr. Chakravarty who appears for the respondent has very frankly stated that he is not at all interested in these orders being upheld,—we are of opinion that these appeals should be

allowed and the orders of the District Judge dated 18th December 1940 and 17th May 1941 set aside. The fines, if paid by the appellant, should be refunded. We further order that the proceedings which have been started against the sureties in connexion with the non-production of the child in Court should be dropped. We make no order as to costs.

Biswas J. — I agree.

R.K. *Order accordingly.*

C. P. C. —
(c) ('40) Chitaley, S. 33 N. 2 Pt. 2.

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DERBYSHIRE C. J. AND BARTLEY J.

Emperor

v.

Md. Ebrahim and others — Accused.

Criminal Revn. No. 407 of 1941, Decided on 7th May 1941.

(a) Criminal P. C. (1898), S. 344 (1)—Adjournment sine die is illegal.

Section 344 does not provide for an indefinite adjournment of a case. The policy of the criminal law is to bring persons accused to justice as speedily as possible so that if they are found guilty they may be punished and if they are found innocent they may be acquitted and discharged. Hence an order adjourning a case *sine die* is illegal. [P 221*a*,*b*]

(b) Criminal trial — Government issuing instructions through District Magistrate and Sub-divisional Officer to public prosecutor — Latter reporting those instructions to trying Magistrate subordinate to District Magistrate and Sub-divisional Officer — Procedure is not contemplated by law—Persons issuing, forwarding and obeying instructions act not according to law.

Whenever the trying Magistrate is dealing with a criminal case he must deal with it according to law. In matters of procedure, he must follow the Criminal Procedure Code; in matters of evidence he must follow the Evidence Act, and when he has ascertained the facts according to the provisions of the Criminal Procedure Code and the Evidence Act, he must apply the provisions of the Penal Code to those facts and decide the case in accordance with law. Throughout, the Magistrate who is trying the case is to act judicially just as much as if he were a Judge in the High Court. He ought to be subjected to nothing which could savour of an instruction from an outside source. The procedure of sending instructions from the Government through the District Magistrate and the Sub-divisional Officer to the Public Prosecutor and having those instructions reported in the Court of the trying Magistrate who is subordinate to the District Magistrate and the Sub-divisional Officer is open to the gravest objection. It is not a procedure contemplated by the Criminal Procedure Code. Those who issue instructions in that way, those who forward those instructions, and those who obey them do not act according to law. [P 221*e*,*f*,*g*]

Hamidul Huq — for the Crown.

Derbyshire C. J. — On 5th April 1941, the District Magistrate of Burdwan rendered to this Court his monthly statement showing the state of the files in the Courts of the Magistrates of his district at the end of February 1941. In that statement Case No. G. R. 1091 of 1940, Emperor v. Ebrahim and 33 others, under Ss. 147, 333, 353 and 379, Penal Code, was shown as pending for over three months in the Court of Mr. P. L. Dhar, Deputy Magistrate, first class, Asansol. The explanation of the delay in disposing of the case concluded with the words:

The pleader for the Crown filed a remand petition on 6th March 1941 praying for an adjournment *sine die* on the ground that the Government wished that the case should not be taken up until further instructions were received from Government. The case was therefore adjourned *sine die*.

Upon that, the Registrar of the appellate side of this Court called for the record of that case from the District Magistrate of Burdwan. That record was received and examined and after an examination of it a rule was issued by this Court upon the District Magistrate of Burdwan to show cause why the order of Mr. P. L. Dhar, Deputy Magistrate, first class, Asansol, dated 5th March 1941, in Case No. G. R. 1091 of 1940 should not be set aside or such other or further order made as to this Court seemed fit and proper. A copy of that rule was served upon the Crown. The Crown, through the Deputy Legal Remembrancer, has appeared before us to-day.

The facts of the case are as follows: On 22nd September 1940, at a place about one mile north-west of Kulti police station in the Asansol sub-division, a body of Hindu processionists approached a certain place where there was a mosque. A body of police some of whom were armed took up a position with a view to preventing disturbances. A body of some three hundred Mahomedans took up another position close-by. The police after attempts to preserve order opened fire both upon the Mahomedans and upon the Hindus who both eventually dispersed. The police made certain arrests from both Mahomedans and Hindus amounting to 34 in all —about half of them being Hindus and half of them Mahomedans. The persons arrested were brought before the Magistrate concerned at Asansol. They were eventually, as far as one can ascertain, all granted bail. On 18th October 1940, charge sheets were received against each one of them alleging offences under Ss. 147, 353, 151, 148, 332, 341 and 107, Penal Code. On 23rd October 1940,

the Magistrate, Mr. P. L. Dhar, examined one prosecution witness for four hours and then adjourned the case to 15th November 1940 for further prosecution witnesses. On 15th November 1940, he records : "Examined one prosecution witness only when the Public Prosecutor files a remand as desired by Government for an adjournment till first week of December." He then adjourned the case to 6th December 1940 for further prosecution witnesses. The "remand" so called that was filed by the Public Prosecutor was as follows :

I have the honour to submit that I have been told by the Sub-divisional Officer, Asansol, that the benign Government wishes the case to be adjourned to some day in the first week of December next. I therefore pray that the case be accordingly adjourned.

It was upon that application that the case was adjourned, as stated, to 6th December 1940. On 6th December 1940, the trying Magistrate recorded : "Prosecution prays for time till middle of January 1941 as desired by Government. Adjourned to 14th January 1941." The application there was dated 6th December 1940, and was as follows :

I have the honour to submit that I have been instructed by the Sub-Divisional Officer, Asansol, to apply for another adjournment of the case till sometime in the middle of January 1941, as the Government desires so. I would therefore pray that the case may be adjourned to some day in the middle of January 1941.

On 14th January 1941, the Magistrate recorded : "Prosecution prays for three weeks' time as desired by the Government. Adjourned to 5th February 1941." The letter upon which that adjournment was obtained was as follows :

I have the honour to submit that as desired by the Government the Sub-Divisional Officer has advised me to apply for a further adjournment of the hearing of the case for three weeks. I would therefore pray that the case may be adjourned accordingly.

On 5th February 1941, the trying Magistrate recorded : "Prosecuting pleader prays for one more adjournment of one week. Adjourned to 12th February 1941." The letter by which the Public Prosecutor applies was as follows :

I have the honour to report that I have been advised by the Sub-Divisional Officer, Asansol, to obtain another adjournment in case for a week as Government wish so. I therefore pray that a week's adjournment may kindly be granted.

On 12th February 1941 there is this note : "Adjourned to 25th February 1941 for further prosecution witnesses as prayed for by the accused." The accused by that time had evidently got tired of repeated adjournments. Then on a date somewhere after that but before 25th February 1941, the High Court called for the records of this case. When the records were received by the High Court it was noticed that the accused had asked for the matter to be taken up on 25th February. The High Court directed the records to be returned forthwith so that the matter could be proceeded with. The records of the case, however, did not reach Asansol by 25th February and there is a note in the order sheet as follows :

The Hon'ble High Court has been pleased to call for the records of the case and they have been submitted to that Court : they have not yet been received back. The accused shall be on bail as before and shall appear at call.

On 5th March 1941, the Magistrate recorded :

The record is received. Prosecuting pleader filed a remand petition for a sine die adjournment as desired by the Government. Allowed. Accused to appear at call.

The request upon which that adjournment was granted was in the following terms :

I have the honour to submit that Sub-Divisional Officer has advised me that the Government wish that the case should not be taken up until further instructions are received from Government. As it is not known now when further instructions from the Government may be obtained I pray that the case may be adjourned sine die.

It was that order which came to the notice of the Registrar of this Court and as a consequence this rule was issued. In showing cause the District Magistrate of Burdwan wrote as follows to the Registrar :

With reference to your letter No. 3257 Cr. dated 23rd April 1941 regarding Criminal Revision No. 407 of 1941 in the matter of Emperor v. Ebrahim and 33 others I have the honour to state that I know of no grounds on which the rule should be opposed. In my executive capacity I have from time to time received orders from Government directing me to instruct the Public Prosecutor to seek adjournments. The final order received was to the effect that pending the receipt of further instructions from Government the case should not be taken up. These orders were duly conveyed to the Public Prosecutor. On no occasion have I been informed of the reason for seeking adjournments; so I am unable to suggest any ground on which the rule should be opposed.

The letter above is signed by the District Magistrate. It is clear that the District Magistrate regards the order that was made in this case as indefensible. The matter deserves a little closer consideration. Section 344 (1), Criminal P. C., provides :

If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers

reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing, signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appear likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Now, that is the section which deals with the power of a Court to postpone or adjourn proceedings in criminal cases. Nowhere does that provide for an indefinite adjournment of a case. An adjournment sine die means an indefinite adjournment. The policy of the criminal law is to bring persons accused to justice as speedily as possible so that if they are found guilty they may be punished and if they are found innocent they may be acquitted and discharged. I am quite clear that an order of this kind is impossible to uphold. So much for the illegality of the order. This order was made as a result of the letter of the Public Prosecutor dated 5th March 1941 which has been set out previously. Now, the manner in which this order has been procured is open to the gravest possible objection. It is clear from that letter and the letter of the District Magistrate that the Government requested the District Magistrate to obtain that order. The District Magistrate passed on the order of the Government to the Sub-divisional Officer who communicated it to the Public Prosecutor. The Public Prosecutor then requested the Magistrate to make this order, which is an illegal order, because the Government wished it and because the Sub-divisional Officer had advised him that the Government wished it.

The Government may have certain functions in connexion with prosecutions and for the purpose of the Government conducting prosecutions under S. 492, Criminal P. C., the office of Public Prosecutor was created. A Public Prosecutor represents the Crown in prosecutions. If the Government desire to put in a petition or request to the Court they can do so directly through the Public Prosecutor who is the proper officer to put the matter before the Court. But in this instance a request was made to the Court stating that the Sub-divisional Officer had advised the Public Prosecutor that the Government desired a certain thing. The Sub-divisional Officer had obviously acted upon instructions from the District Magistrate. Both the District Magistrate and the Sub-divisional Officer are superior officers of the Magistrate who was trying the case.

Under S. 528, Criminal P. C., it is competent for the Magistrate or the Sub-divisional Officer to withdraw a case from the officer trying it. The officer trying it is clearly subordinate to the Magistrate and the Sub-divisional Officer. But whenever the trying Magistrate is dealing with a criminal case he must deal with it according to law. In matters of procedure, he must follow the Criminal Procedure Code; in matters of evidence, he must follow the Evidence Act, and when he has ascertained the facts according to the provisions of the Criminal Procedure Code and the Evidence Act, he must apply the provisions of the Penal Code to those facts and decide the case in accordance with law. Throughout, the Magistrate who is trying the case is to act judicially just as much as if he were a Judge in the High Court. He ought to be subjected to nothing which could savour of an instruction from an outside source. When he is told that the Government wish a certain thing and express their wish through his superior officers, it is very difficult for him, unless he is a very strong minded person, to deal with the matter strictly in accordance with law.

The procedure which has been adopted in this case of sending instructions from the Government through the District Magistrate and the Sub-divisional Officer to the Public Prosecutor and having those instructions reported in the Court of the trying Magistrate who is subordinate to the District Magistrate and the Sub-divisional Officer is open to the gravest objection. It is not a procedure contemplated by the Criminal Procedure Code. In my view those who issue instructions in that way, those who forward those instructions, and those who obey them do not act according to law. I wish these remarks should be noted by those who are concerned in matters of this kind. For the reasons which I have stated, I am of the opinion that this rule must be made absolute. I understand from the Deputy Legal Remembrancer that this matter is now considered to be suitable to be dealt with in the Courts and that it will go before the Courts without any further delay. It has been represented that possibly public feeling was such that it was inadvisable to proceed with the case up to now. It will now be proceeded with. Under those circumstances the rule is made absolute, the order of the Deputy Magistrate dated 5th March 1941, is quashed and this case is sent back to the Magistrate

for him to hear and determine it according to law.

Bartley J. — I agree.

R.K. *Rule made absolute.*

Cr. P. C. —
(a) ('41) Chitaley, S. 344 N. 1 Pts. 2, 3, 4 and N. 4 Pt. 1.
('41) Mitra, Pages 1138 and 1139 N. 987.

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NASIM ALI AND PAL JJ.

Official Trustee of Bengal, Receiver to estate of Rai Ishan Chandra Mitra Bahadur — Defendant — Appellant

v.

Bijoy Chand Mahatab, Maharajadhiraj of Burdwan, Plaintiff and others — Respondents.

Appeal No. 153 of 1938, Decided on 16th May 1941, from original decree of Sub-Judge, First Court, Hooghly, D/- 25th February 1938.

(a) Limitation Act (1908), Art. 110 — Patni sold on 15th May 1933 for arrears of rent of 1339 B. S.—Sale set aside on 1st June 1936 and patnidar restored to possession immediately — Suit for arrears of rent for 1339 B. S. on 9th August 1937 held within time.

According to the terms of the kabuliat by which the patni was created the rent was payable by monthly instalments. The patni was sold on 15th May 1933 for arrears of rent for the year 1339 B.S. This sale however was set aside on 1st June 1936 and the patnidar obtained possession of the patni immediately after the sale was set aside on 1st June 1936. A suit for arrears of rent for the year 1339 B. S. was filed on 9th August 1937 against the patnidar :

Held that the suit having been brought within three years from the date when the patni sale was set aside and the patnidar was restored to possession, was not barred by limitation : 12 M.I.A. 244 (P.C.) and 9 Cal. 255 (P.C.), *Rel. on.* [P 223*f*]

(b) Landlord and tenant — Rent —Arrears of —Interest on — Stipulation to pay according to law — Rate contemplated is that laid down by S. 67, Ben. Ten. Act.

Where the stipulation in the patni kabuliat is that the patnidar shall pay interest on the arrears of rent according to law, the words "according to law" mean according to the law in force at the time when the default is made. In the absence of a provision in the Patni Regulation about the rate of interest payable by patnidars for arrears of rent, the rate of interest as laid down in S. 67, Ben. Ten. Act, must be taken as the rate of interest which was contemplated by the parties. [P 223*f*, *g*]

(c) Limitation Act (1908), Arts. 110 and 115 — Suit for rent based on kabuliat—Art. 110 and not Art. 115 applies.

Where the plaintiff's suit is based on a kabuliat and the claim is for arrears of rent the suit is governed by Art. 110 and therefore Art. 115 is not attracted. [P 223*c*]

Gopendra Nath Das and Kamalaksha Basu — for Appellant.

Dr. S. C. Basak, Sarat Ch. Mitter, Purusottam Chatterji and Prokash Ch. Bhose — for Respondents.

Judgment. — This appeal arises out of a suit for recovery of arrears of rent of a patni. This patni was held by late Rai Iswar Chandra Mitra Bahadur under the Maharajadhiraj of Burdwan at an annual rent of Rs. 13,008. The Official Trustee of Bengal is the receiver to the estate of the said Rai Bahadur. The patni in suit was sold under the Bengal Patni Taluk Regulation (Bengal Regulation, 8 of 1819) for arrears of 1339 B. S. (1932-33) on 1st Jaista 1340 B. S. (15th May 1933) and was purchased by one Haridas Roy. On 14th May 1934 the Patnidars instituted a suit in the Court of the Subordinate Judge at Hooghly (Title Suit No. 41 of 1934/60 of 1935) for setting aside this sale. On 1st Jaista 1345 B. S. (16th May 1936) the patni was again sold for arrears of 1342 B. S. and was purchased by Sm. Kamala Devi for Rs. 9930-14-6. The Subordinate Judge of Hooghly by his judgment in Title Suit No. 60 of 1935 dated 1st June 1936 set aside the sale of the patni at which Haridas Roy purchased the patni and directed the Maharajadhiraj to pay Rs. 61,405-10-9 as compensation to the auction purchaser, Haridas. On 9th September 1936 the Official Trustee of Bengal brought a suit in the Court of the Subordinate Judge at Hooghly (Title Suit No. 49 of 1936) for a declaration that the sale under the Patni Regulation held on 1st Jaista 1345 was illegal, null and void, stating inter alia that he obtained possession of the patni mahal immediately after the pronouncement of the judgment in Title Suit No. 60 of 1935 and that he had since then been in undisturbed possession of the patni. This suit, however, was dismissed for non-payment of court-fees. An appeal against the judgment in Title Suit No. 60 of 1935 (F. A. 13 of 1937) was filed by the Maharajadhiraj on 9th November 1936. In this appeal the zemindar questioned only the amount of damages awarded to the auction purchaser Haridas Roy.

On 9th August 1937 (24th Sravan 1344) the Maharajadhiraj of Burdwan instituted the present suit for recovery of (1) balance of arrears of rent and cess from Baisakh to Aswin 1339 B. S.; (2) arrears of rent and cess from Kartick to Chaitra 1339 B. S.; (3) arrears of rent and cess for the year 1340 and 1341 and (4) balance of arrears of rent and cess for 1342 B. S. in respect of the patni with interest at 12½ per cent. per annum against the Official Trustee of Bengal and the heirs of Rai Bahadur Isan Chandra Mitra on the basis of a kabuliat dated 19th Aswin 1251 (23rd September 1844). The Official

a Trustee of Bengal filed written statement on 23rd September 1937. His defences, so far as they are material for the purposes of the present appeal, are these: (1) that the plaintiff's suit is barred by limitation and (2) that the interest claimed by the plaintiff is illegal and excessive and that the plaintiff is not entitled to get a decree for interest. On 19th November 1937, the Official Trustee of Bengal instituted a suit against Haridas Roy for recovery of mesne profits and damages for all rents, landlord's fee and other profits realised by Haridas Roy from the patni mahal from 30th Aswin 1340 B. S. to 1st Aswar 1343 B. S. Thereafter the Subordinate b Judge heard the present rent suit and decreed it on 25th February 1938. The Official Trustee of Bengal presented this appeal on 11th June 1938. Three points were urged by Mr. Das on behalf of the appellant in this appeal: (1) that the claim for arrears of rent for the year 1339 B. S. is barred by limitation, (2) that interest on the arrears is payable at 6 per. cent. per annum from 1st June 1936.

As regards the first point the contention of Mr. Das is two-fold, viz., (a) that the suit is governed by Art. 115, Limitation Act, and (b) that in any view of the case, it is governed by Art. 110, Limitation Act. Article 115, c Limitation Act, provides for a suit for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for. Plaintiff's suit in the present case is based on a kabuliat and the claim is for arrears of rent, which is specially provided for in Art. 110, Limitation Act. Article 115 is therefore not attracted to the facts of the present case. Dr. Basak appearing on behalf of the respondents has conceded that the suit is governed by Art. 110, Limitation Act. That article lays down that suits for arrears of rent are to be instituted within three years from the time when the arrears become due. d The question is when did the arrear of 1339 B. S. become due? According to the terms of the kabuliat, by which the patni was created, the rent was payable by monthly instalments. Therefore the rent for each month becomes due on the 1st date of the succeeding month. It has been already stated that the patni was sold on 15th May 1933 for arrears of rent for the year 1339 B. S. The claim for arrears of rent for the year 1339 B. S. was therefore satisfied on 15th May 1933. This sale however was set aside on 1st June 1936. It has also been stated before that the appellant obtained possession of the patni immediately after the sale was set aside on 1st June 1936. The position therefore is that e after the setting aside of the sale the patnidar was restored to possession. He therefore "took back the patni subject to the obligation to pay the rent and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place" : 12 M.I.A. 244[1] at p. 253. In other words, the patnidar having recovered the patni with a right to get mesne profits from the auction purchaser at the patni sale it is but equitable that he should pay the amount of rent which was in arrears. The amount of rent did not accrue until the sale of the patni had been set aside and until that time f the statute should not run : 9 I.A. 82[2] at p. 85. The present suit is within three years from the date when the patni sale was set aside and the patnidar was restored to possession. Plaintiff's claim for arrears of rent of 1339 B. S. is therefore not barred by limitation. The first ground therefore fails.

As regards the second point the stipulation in the patni kabuliat is that the patnidar shall pay interest on the arrears of rent according to law. Evidently the words 'according to law' mean according to the law in force at the time when the default is made. There is no provision in the Patni Regulation g about the rate of interest payable by patnidars for arrears of rent. In the absence of any such provision, the rate of interest as laid down in S. 67, Ben. Ten. Act, must be taken as the rate of interest which was contemplated by the parties. In other words the rate of interest as laid down in the Bengal Tenancy Act for the time being in force must be taken as a part of the contract. According to S. 67, Ben. Ten. Act, interest is payable at the rate of 12½ per cent. per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the date of payment or of the institu- h tion of the suit whichever date is earlier. Plaintiff is therefore entitled to get simple interest at the rate of 12½ per cent. per annum from the expiration of each quarter of the agricultural year. This position was not contested by the learned advocate appearing on behalf of the plaintiff-respondent. We therefore hold that the plaintiff is entitled to get interest at the rate of 12½ per cent. per annum from the date of the expiration

1. (1867-69) 12 M.I.A. 244 : 11 W.R. 5 : 2 Beng. L.R. 10 : 2 Suther 73 : 2 Sar. 424 (P.C.), Ranee Surno Moyee v. Shooshee Mookhee Burmonia.

2. ('83) 9 Cal. 255 : 9 I.A. 82 : 12 C.L.R. 129 : 4 Sar. 363 (P.C.), Hurro Pershad v. Gopal Das Dutt.

of each quarter of the agricultural year. a The result therefore is that the plaintiff is entitled to get Rs. 39,286-12-4 as arrears of rent and cess and Rs. 16,575-4-1 as interest on the arrears of rent and cess up to date of the institution of the suit. The trial Judge has not decreed any interest after the institution of the suit. Plaintiff has not filed any cross-objection. In this view of the matter we do not allow any interest to the plaintiff after the institution of the suit. Let a decree be drawn up in this Court in accordance with our findings. The decree for costs by the trial Judge is affirmed. Plaintiff will get his costs in this Court—hearing fee being assessed b at ten gold mohurs.

R.K. *Order accordingly.*

Lim. Act —
(a) ('42) Chitaley, S. 9 N. 8, Pt. 13 and N. 11, Pt. 2; Art. 110, N. 11 Pt. 8.
('38) Rustomji, Page 967, Pt. 2.
(c) ('42) Chitaley, Art. 115 N. 1, Pt. 10.
('38) Rustomji, Page 986, Pt. 1.

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B. K. MUKHERJEA AND SEN JJ.

Samiruddin Maltey — *Judgment-debtor* — *Petitioner*

v.

Naba Kumar Saha — *Decree-holder* — *Opposite Party.* c

Civil Rule No. 66 of 1941, Decided on 16th December 1941, Application for setting aside order of Sub-Judge, Jessore, D/- 28th September 1940.

(a) Bengal Money-lenders Act (10 of 1940), S. 36 (6) — Execution pending on 1st January 1939 — Court which passed decree has jurisdiction to grant relief.

Where the execution proceedings in connexion with a decree are pending after 1st January 1939, the suit is one to which the Act applies and consequently the Court which passed the decree has jurisdiction to grant relief under S. 36, cl. (6).

[P 224*h*]

(b) Bengal Money-lenders Act (10 of 1940), S. 2 (22)—Suit for foreclosure—Act applies. d

A suit for foreclosure can be deemed to be a suit to which the Act applies within the meaning of S. 2, sub-s. (22). What the plaintiff wants in a foreclosure suit is not recovery of a certain amount of money and the only relief he prays for is to bar the mortgagor's right of redemption with regard to the mortgaged property, but the wording of cl. (6), S. 2, sub-s. (22) is sufficiently wide to include a foreclosure suit inasmuch as it is certainly a suit for the enforcement of a security taken in respect of a loan.

[P 224*h* ; P 225*a*]

(c) Bengal Money-lenders Act (10 of 1940), S. 36 — Satisfaction of decree — Compromise decree in foreclosure suit — Entire sum to be payable in instalments — On default of any instalment mortgagee entitled to recover possession by taking out execution—Decree held could not be said to be satisfied on default.

In a suit for foreclosure a compromise decree was passed under which the entire sum was to be paid e in certain instalments. On default of any one instalment, the mortgagee was entitled to recover possession by taking out execution of the decree. Default was committed in 1938 and execution proceedings were pending on 1st January 1939. It was contended that the decree could be said to have been satisfied as soon as default occurred in the year 1938 and as such S. 36 of the Act did not apply :

Held that S. 36 speaks of satisfaction of the decree prior to 1st January 1939. The liabilities of the mortgagor might have been at an end as soon as the decree had become final, but the decree itself was not satisfied unless execution proceedings were taken and the mortgagee decree-holder got possession of the mortgaged property. Therefore the Court had jurisdiction to grant relief under S. 36.

[P 225*b*] f

Amiruddin Ahmed and Khundkar Md. Hasan — for Petitioner.

Panchanan Ghose, Syamacharan Mitter and Sukumar Ghose (Jr.) — for Opposite Party.

Order.—After hearing the learned advocates on both sides we are of opinion that this rule should be made absolute. We think that the Court below was not right in holding that the suit was not one to which the Act applied and consequently the Court had no jurisdiction to reopen the decree under the provisions of S. 36, Bengal Money-lenders Act. The suit was one to enforce a mortgage by conditional sale and it was instituted sometime in the year 1933. It g culminated in a compromise decree passed in the same year and under the terms of the compromise the mortgage money was payable in certain instalments and the further provision was that in default in payment of any one of the instalments the entire sum would become due and the mortgagee would be entitled to recover possession of the mortgaged property by taking out execution. It is admitted that the judgment-debtor paid the first four instalments in proper time. There was default in the year 1938. After certain proceedings before the Debt Settlement Board with which we are not concerned, h the present execution proceedings were started in the year 1940. As the execution proceedings in connexion with the decree were pending after 1st January 1939, we must hold that the suit was one to which the Act applied and consequently the Court which passed the decree had jurisdiction to grant relief under S. 36, clause (6), Bengal Money-lenders Act. We are not impressed by the argument of Mr. Ghose that a suit for foreclosure cannot be deemed to be a suit to which this Act applies within the meaning of S. 2 sub-s. (22) of the Act. It is true that what the plaintiff wants in a foreclosure suit is not recovery of a certain

amount of money and the only relief he prays for is to bar the mortgagor's right of redemption with regard to the mortgaged property, but we think that the wording of cl. (6), S. 2, sub-s. (22) is sufficiently wide to include a foreclosure suit inasmuch as it is certainly a suit for the enforcement of a security taken in respect of a loan.

Mr. Ghose has argued in the last place that, at any rate, the decree in the foreclosure suit itself discharges the liability of the mortgagor irrespective of any execution proceedings under the provisions of O. 34, R. 3, Civil P. C., and, consequently, the decree can be said to have been satisfied as soon as default occurred in the year 1938. This contention also, in our opinion, has no substance. Section 36, Bengal Money-lenders Act, speaks of satisfaction of the decree prior to 1st January 1939. The liabilities of the mortgagor might have been at an end as soon as the decree had become final, but the decree itself was not satisfied unless execution proceedings were taken and the mortgagee decree-holder got possession of the mortgaged property. In our opinion, therefore, this rule should be made absolute. The order of the Court below is set aside and we send the case back to that Court in order that it may be disposed of in accordance with the provisions of the Bengal Money-lenders Act. We make no order for costs.

K.S./R.K. *Rule made absolute.*

C. P. C.—
(c) ('40) Chitaley, O. 34 R. 3, N. 9 Pt. 1.
('41) Mulla, Page 1074 N. : "Sub-rule (3) : Discharge of debt, etc., on foreclosure."

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HENDERSON J.

Surendra Nath Sarkar — Accused

v.

Emperor.

Criminal Revn. No. 650 of 1941, Decided on 1st August 1941.

(a) Companies Act (1913), Ss. 32 and 76 — Director convicted under S. 76 for being wilfully party to default—Further conviction under S. 32 may be dropped.

Where the director of a company is convicted under S. 76 for being wilfully a party to a default by which no general meeting was held as required by S. 76, his further conviction under S. 32 may very well be dropped. [P 225*e*,*f*]

(b) Companies Act (1913), S. 32—No finding that accused knowingly or wilfully authorised or permitted default — Conviction under S. 32 cannot be sustained.

A conviction under S. 32 cannot be sustained in the absence of a finding that the conduct of the accused amounted to knowingly or wilfully authorising or permitting the default : (1911) 1 K. B. 588, *Ref.* [P 225*g*]

S. K. Basu and Ajoy Kumar Basu — for Petitioner.

Jitendra Mohan Banerjee—for the Crown.

ORDER.—This rule raises an interesting point with regard to a prosecution under S. 32, Companies Act. It is said that the petitioner was the managing director. At any rate, he has been convicted and fined under S. 76 of the Act on an allegation that he was wilfully a party to a default by which no general meeting was held during the year which commenced on 14th February 1937. He was then further prosecuted under S. 32. I cannot help saying that this second prosecution seems rather pointless after the first. I can understand that if the defence of the petitioner had been that a general meeting was held and if it was found to be true, then there would be some point in prosecuting him under S. 32. But, in view of his conviction on the former charge, the latter might very well have been dropped. Now, the first ground upon which the rule was pressed was that the failure to hold a public meeting made it impossible to comply with this section. This section requires a list of persons and certain information to be submitted as to the affairs of the company on a certain day. The certain day is the day upon which the first or the annual general meeting is held. Now I asked Mr. Bannerjee to tell me out of the 365 available days which ought to have been selected by the petitioner for the purpose of submitting this report. He was unable to give any answer and, as far as I can see, the petitioner has been punished for his failure to do something which it was impossible, for him to do. In support of the conviction, Mr. Bannerjee relied upon the decision of the Court of appeal in (1911) 1 K B 588.[1] That case is concerned with the interpretation of a similar provision in the English Act. If I have understood it correctly, the decision amounts to this that a person cannot put forward the impossibility as a defence, if the impossibility has been due to his own default. If it had been necessary to decide whether in view of that decision the present conviction is proper, I should have most certainly sent the case to a Division Bench.

The rule, however, was also pressed with regard to a question of fact. On the principle of the English decision, it is doubtful whether the petitioner could be convicted without the Magistrate coming to an independant finding that he was responsible for the default in connexion with the failure to hold the meeting. But at any rate he had to decide whether the conduct of the petitioner amounted to knowingly or wilfully authorising or permitting the default. He approached the case as though it was one in which the meeting had been held and the petitioner wilfully or knowingly permitted the default under S. 32. But it was in fact impossible to comply with that section. The only way in which the conviction could be upheld is to accept the decision to which I have already referred and then carry back the default to the failure to call a general meeting. Now, that matter was not dealt with in this case and it raises a question of fact. The learned Magistrate delivered his judgment ten months after he had heard the evidence. Ordinarily a retrial might be directed in such circumstances. But, in view of the fact that the petitioner has already been convicted of something else, I do not think that it

1. (1911) 1 K.B. 588 : 80 L.J.K.B. 396 : 104 L. T. 184 : 75 J. P. 163 : 27 T. L. R. 192 : 18 Manson 151, Park v. Lawton.

would be worth putting the parties to the expense of a further trial. The rule is accordingly made absolute. The conviction and sentence are set aside and the fine, if paid, will be refunded.

G.N./R.K. *Rule made absolute.*

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B. K. MUKHERJEA AND ROXBURGH JJ.

Taran Roy Bain and others —
Decree-holders — Appellants
v.
Shyam Mondal and others —
Respondents.

Appeal No. 182 of 1936, Decided on 1st August 1941, from original order of Sub-Judge, Khulna, D/- 30th November 1935.

(a) Mortgage — Suit on — Some of persons interested in equity of redemption not impleaded or impleaded after limitation — Whole suit should not be dismissed—Plaintiff is entitled to proportionate share of mortgage money against persons on record *(Obiter)*.

If some of the persons interested in the equity of redemption had been left out in the original mortgage suit or if they had been made parties after the period of limitation had expired, the plaintiff is entitled in such cases to a decree for proportionate share of the mortgage money as against the defendants who are actually on the record or against whom the suit is not barred by limitation and the fact that all the mortgagors were not parties before the Court would not justify the dismissal of the whole suit : ('21) 8 A.I.R. 1921 Cal. 554 ; ('25) 12 A.I.R. 1925 Cal. 152 and 33 Cal. 613, *Rel. on.* [P 227*a*]

(b) Mortgage—Mortgage decree— Execution of—Execution held time-barred by trial Court—Appeal by decree-holder dismissed against some of judgment-debtors for non-payment of process fees—Whole appeal should not be dismissed—Execution against remaining judgment-debtors can be taken only for proportionate amount and not for entire decree amount.

Though the executing Court cannot go behind the decree, it can certainly decide that the decree is inexecutable on the ground of limitation against some of the judgment-debtors although it is executable against the rest. But, in such a case, what the Court should do is to allow the decree-holder to execute not the entire decree by sale of the interest of those judgment-debtors against whom the application was not time-barred but only a proportionate part of the decree by deducting the amount payable by the judgment-debtors against whom the decree has become inexecutable : 33 Cal. 613 and ('20) 7 A.I.R. 1920 Bom. 306, *Rel. on.* [P 227*c,d*]

Therefore where an appeal by a decree-holder from the dismissal of his execution application on the ground it is barred by time is dismissed against some of the judgment-debtors for non-payment of process fee, the whole appeal should not be dismissed and execution can be taken out against the remaining judgment-debtors not for the whole decree amount but only for the proportionate amount due from them. [P 227*d*]

Rajendra Nath Das — for Appellants.

Durga Charan Roy Chowdhury for Panchanan Ghosal and Pannalal Chatterjee (for Deputy Registrar) — for Respondents.

B. K. MUKHERJEA J. — This appeal is on behalf of the decree-holders and is directed against an order made by the Subordinate Judge, Khulna, dated 30th November 1935, dismissing the appellants' application for execution of a decree on the ground of limitation. The decree was an instalment mortgage decree passed on the basis of a compromise on 30th July 1929. Under the compromise the total amount declared to be due to the appellants was Rs. 3800. Out of this a sum of Rs. 500 had to be paid by the judgment-debtors within 14th April 1930 and the balance was payable in twenty-two annual instalments of Rs. 150 each. There was a provision in the compromise decree that in default of payment of any one of the instalments the entire sum would be recoverable at once. The present application for execution of the decree was presented on 26th March 1935. It was the case of the decree-holders that a sum of Rs. 500 was paid by the judgment-debtors in accordance with the compromise decree on 11th April 1930 and the first instalment of Rs. 150 was also paid on 11th April 1931. There was default in the payment of the second instalment which fell due on 14th April 1932 and within three years from that date the application for execution was filed. The learned Subordinate Judge did not disbelieve the first payment but held on evidence that there was no satisfactory evidence to prove that the sum of Rs. 150 was paid on 11th April 1931. On this finding the application for execution was held to be time-barred. It is against this order that the present appeal has been filed.

On hearing the learned advocates on both sides it seems to us that the view taken by the trial Court cannot be supported. Exs. A1 and A are the two petitions filed in Court on behalf of the decree-holders certifying payments of Rs. 500 and Rs. 150 respectively. They were filed on the dates when the payments were said to have been made and the pleader who filed it was the same pleader who appeared for the decree-holders in the original suit. This pleader has been examined in this case and he swears to having received the two payments on the two specified dates. We do not see any reason why this witness should be disbelieved. That the two applications for certifying payments were filed in Court on 11th April 1930 and 11th April 1931 respectively cannot be disputed and it is absolutely unbelievable that decree-holder could make untrue statements against his own interest at a time when no question of limitation could possibly arise. The learned Subordinate Judge laid stress on the fact that the pleader admitted in his evidence that none of the judgment-debtors came to him when the application was presented in Court. But that does not show, as the learned Subordinate Judge thinks, that he received payment from outsiders. The names of the judgment-debtors who paid the money were mentioned in the petition and it was not necessary that they should be present at the time when the petition was actually filed in Court. We hold therefore that the judgment-debtors really paid Rs. 150 on 11th April 1931, as alleged by the decree-holders and that the application for execution was not time-barred.

The learned advocate who appears for the respondents has contended that we cannot reverse the order of the learned Subordinate Judge in the present case inasmuch as the appeal has already been dismissed for non-prosecution against three of the substituted respondents who were the heirs of some of the judgment-debtors. It appears from the order sheet that as against respondent 1 (5), 10 (c) and

10 (d) the appeal was dismissed for non-payment of process fees and the Deputy Registrar's costs. So far as those respondents are concerned, the order of the trial Court which is in their favour must stand. The whole question now is whether we can reverse the order as against the other respondents who have been made parties to this appeal. The point is not altogether free from doubt. If some of the persons interested in the equity of redemption had been left out in the original mortgage suit or if they had been made parties after the period of limitation had expired, it is now settled by a series of decisions of this Court that the plaintiff is entitled in such cases to a decree for proportionate share of the mortgage money as against the defendants who are actually on the record or against whom the suit is not barred by limitation and the fact that all the mortgagors were not parties before the Court would not justify the dismissal of the whole suit : *vide* 25 C.W.N. 594;[1] 29 C.W.N. 51[2] and 33 Cal. 613.[3] It is argued by the learned advocate for the respondents that although it was possible to make a decree for proportionate amount against some of the mortgagors in the suit itself, it could not be done now by the executing Court which is bound to execute the decree as it stands. It is true that the executing Court cannot go behind the decree, but the executing Court can certainly decide that the decree is inexecutable on the ground of limitation against some of the judgment-debtors although it is executable against the rest. Thus, there may be acknowledgment by some of the judgment-debtors which would keep alive the decree against the acknowledging debtors and not against others. In such circumstances it cannot be said that the executing Court is reopening the decree although the effect of the decision, in substance, is to split up the decree and make it divisible. We do not agree with the learned advocate for the appellants that what the Court should do in such cases is to allow the decree-holder to execute the entire decree by sale of the interest of those judgment-debtors against whom the application was not time-barred. It would be manifestly contrary to all principles of equity that the entire burden of mortgage should be thrown upon some of the mortgagors when by his own laches or negligence the plaintiff lost his remedy against the rest: *vide* 33 Cal. 613[3] and 44 Bom. 223.[4]

In the present case the shares of these three respondents both in the mortgage debt as well as in the property can easily be ascertained with reference to the shares of the original mortgagors and in our opinion the proper course to follow in this case would be to send the case back and direct that execution should proceed against respondents other than respondents 1 (5), 10 (c) and 10 (d). Their shares in the mortgaged property would not be sold and the plaintiff decree-holders would be bound to reduce their claim in the execution petition by deducting the amount payable by these respondents. In case a dispute arises regarding the amount, the executing Court will decide the question on proper evidence. There will be no order for costs either of this Court or of the Court below. Further costs on remand will abide the result.

ROXBURGH J. — I agree.

K.S./R.K. *Case remanded.*

C. P. C. —
(a) ('40) Chitaley, O. 34 R. 1, N. 19 Pts. 3 and 10.
('41) Mulla, Page 1061 Pt. (w).
(b) ('40) Chitaley, S. 47, N. 30 Pt. 4.
('41) Mulla, Page 164 "Powers of executing Court — Court executing a decree cannot go behind the decree."

1. ('21) 8 A.I.R. 1921 Cal. 554 : 66 I.C. 312 : 25 C.W.N. 594, Har Chandra v. Mahumed Husein.
2. ('25) 12 A.I.R. 1925 Cal. 152 : 82 I.C. 638 : 29 C.W.N. 51, Kherodamoyi Dassi v. Habib Shaha.
3. ('06) 33 Cal. 613: 3 C.L.J. 576: 10 C.W.N. 551, Imam Ali v. Baij Nath.
4. ('20) 7 A.I.R. 1920 Bom. 306 : 55 I.C. 327 : 44 Bom. 223: 22 Bom.L.R. 68, Budhmal Kevalchand v. Rama Yesu.

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HENDERSON J.

Biraja Mohan Bhattacharjee — Judgment-debtor — Appellant

v.

Abaninath Pandit — Decree-holder — Respondent.

Appeal No. 170 of 1940 (S. M. A.), Decided on 28th May 1941, from appellate order of Dist. Judge, Rangpur, D/- 5th August 1940.

Bengal Agricultural Debtors Act (7 of 1936), Ss. 13 and 34—Creditor failing to comply with notice under S. 13 (1)—Proper order to make, stated—Order declaring debt to be nil is illegal and does not fall within S. 13—It cannot terminate proceedings before Board—Even proper order under S. 13 (2) has not that effect—Case must be deemed to be pending before Board until disposed of in some way—Notice under S. 34 remains good notice.

Under S. 13 (2) where a creditor fails to comply with the notice under S. 13 (1) the Board should make an order declaring that the amount of debt due to him shall be deemed to be amount stated in the statement of debt made by the applicant agriculturist. It is impossible for the Board in such a case to make an order that the debt is nil. Although such an order, when the debtor is an agriculturist and the debt due by him is a debt within S. 2 of the Act would not be without jurisdiction, it does not fall under S. 13 at all and has no legal effect of any sort and hence cannot terminate the proceedings before the Board inasmuch as even a proper order made under S. 13 (2) does not terminate proceedings before the Board. An illegal order which is not an order at all within the meaning of S. 13 cannot have that effect. Therefore the case must be deemed to be pending before the Board and until it is disposed of in some way or other notice under S. 34 remains a good notice and the proceedings before the civil Court must continue to be stayed until the case is disposed of by the Board. [P 228*b*,*c*,*d*]

Radhikaranjan Guha — for Appellant.

Surajit Chandra Lahiry — for Respondent.

JUDGMENT. — This appeal is by the judgment-debtor. He is a pleader. Some how or other he has managed to go before a Debt Settlement Board on the plea of being an agriculturist. The debt is for a sum of Rs. 287-14-6 which was awarded to the respondent as costs in a suit brought by the appellant. This was the only debt in the application and at any rate there is this to be said in favour of the appellant that he did not try to minimise it in his application to the Board. That being the position, the Board, because there was

apparently some confusion in filling up a form, reached the astounding decision that the debt was nil. This is supposed to have been an order passed under S. 13 (2) of the Act. Having got this decision for what it was worth, the appellant then returned to the executing Court and made an application under S. 47, Civil P. C. His contention was that the civil Court was debarred from questioning this decision and the delightful result was that there was nothing left to execute. The Munsif accepted this view and dismissed the respondent's execution case. The respondent appealed. The learned Judge held that the order of the Board was made without jurisdiction and directed that the execution case should go on. The judgment-debtor has now appealed to this Court. As a result of the arguments advanced, I have reached the conclusion that neither of these decisions is correct.

The first question is whether the learned Munsif was right when he decided that this debt ceased to exist. In my judgment the learned Judge went too far when he said that the Board had no jurisdiction to make an order. It is not disputed that the liability is a debt within the meaning of S. 2 of the Act. The appellant was therefore entitled to go before a Board and the Board had jurisdiction to deal with his case. The real point is not whether the order was without jurisdiction but whether it is an order under S. 13 of the Act at all. Sub-section (2) provides that if a creditor fails to comply with the notice, the Board may make an order declaring that the amount of any debt due to him shall be deemed to be the amount stated in the statement of the debt, that is to say, the Board could have made an order to the effect that the debt is rupees 287-14-6. The one thing that it is impossible for a Board to do is to make an order saying that the debt is nil. It is impossible for a debtor to file an application stating that one of his debts is nil. This particular order of the Board was therefore not an order under S. 13 at all and, in my judgment, it has no legal effect of any sort.

That, however, is not sufficient to dispose of the appeal. Another question arises which is taken in ground No. 11 attached to the petition which is to the effect that the Court is still bound to stay proceedings in accordance with the notice issued under S. 34. Now, I should find it extremely difficult to say that an order which has no legal effect could be said to terminate the proceedings before the Board. Mr. Lahiry first contended that a proper order made under the terms of the section disposes of the case. The only effect of a proper order would be that the respondent would be prevented from saying at some subsequent stage that the debt was more than Rs. 287-14-6. But the debt as settled by the Board under sub-s. (2) would still be before it and require to be dealt with either by an award or by an order of dismissal. I can see no escape from the conclusion that an order under S. 13 (2) does not terminate proceedings before the Board. When a proper order has not that effect, it would be quite idle to contend that an illegal order, which is not an order at all within the meaning of the section has such effect. The position therefore is that the appellant's case is still pending before the Board and until it is disposed of in some way or other, notice under S. 34 remains a good notice.

The question of costs presents some difficulty. The respondent is certainly entitled to his costs in the first Court. In the lower appellate Court each side put his case too high. In this Court, Mr. Lahiry finally abandoned his contention that he is entitled to go on with the execution and so has been substantially successful. The result is that the orders of both the Courts below are set aside and I direct the respondent's execution case be kept pending in pursuance of the notice under S. 34, Bengal Agricultural Debtors Act. The appellant will pay the costs of the respondent in the first Court and in this Court. I assess the hearing fee at two gold mohurs. Each side will bear his own costs in the lower appellate Court.

G.N./R.K. *Order accordingly.*

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B. K. MUKHERJEA AND SEN JJ.

Asrab Ali Sirkar and others—Judgment-debtors — Petitioners

v.

Pioneer Bank, Ltd., Decree-holder and another, Judgment-debtor — Opposite Party.

Civil Rule No. 1428 of 1941, Decided on 18th December 1941, for setting aside order of the Sub-Judge, First Court Tippera (Comilla), D/- 4th August 1941.

Bengal Money-lenders Act (10 of 1940), S. 30—Interest decreed in excess of limits prescribed by S. 30 — Court must grant relief even if excess is slight.

When the interest decreed is in excess of the limits prescribed by S. 30, the Court is bound to grant relief whether the excess is slight or not.

[P 228*h*]

Nripendra Ch. Das — for Petitioners.

Upendra Kr. Roy and Nani Gopal Das — for Opposite Party.

SEN J. — This rule arises out of an application under the Bengal Money-lenders Act. The petitioners were the executants of a promissory note for Rs. 1500. The interest payable on the promissory note was 10½ per cent. per annum with six monthly rests. A decree was passed against the petitioners for the amount of the hand note with interest as stipulated therein. The petitioners have now applied for relief under the Bengal Money-lenders Act on the ground that the interest decreed exceeds the limits prescribed by S. 30, Bengal Money-lenders Act. The Court below finds that the amount of interest is in excess of the limits prescribed by the Act. The learned Judge however said that as the difference was very negligible he refused to grant relief under the Act. This reason, in our opinion, is unsound. When the interest decreed is in excess of the limits prescribed by S. 30 of the Act, the Court is bound to grant relief whether the excess is slight or not. We accordingly set aside the order of the learned Judge and direct that he make a decree in accordance with the provisions of the Bengal Meney-lenders Act.

It is argued on behalf of the opposite party that the loan was a commercial loan. This question has not been dealt with at all by the learned Judge. It appears from the affidavit that the question was raised and that evidence was adduced on the point. The learned Judge will, therefore, consider the point as to whether the loan was a commercial loan or not. If he finds that it was a commercial loan, then he will not interfere with the decree passed. On the other hand, if he finds that the loan was not a commercial loan, he will grant relief to the

petitioners in the light of the observations made above. There will be no order for costs in the rule.

B. K. MUKHERJEA J. — I agree.

G.N./R.K. *Order accordingly.*

A. I. R. (29) 1942 Calcutta 229

BISWAS AND ROXBURGH JJ.

Sitaram Bhattacharjee — Petitioner

v.

Pancha Muchi — Opposite Party.

Civil Ref. No. 3 of 1941, Decided on 20th August 1941, made by Munsif, Bongaon (Jessore), in S. C. C. Suit No. 116 of 1941.

(a) Bengal Agricultural Debtors Act (7 of 1936 as amended by Act 8 of 1940), Ss. 2 (8), 20 and 34 —Application to Debt Settlement Board including liability incurred partly before and partly after 1st January 1940 —Board alone can decide whether any part of liability is debt or not—Notice to civil Court under S. 34 — Question of partial stay when arises.

Where rightly or wrongly, the debtor has chosen to include a liability incurred, partly before, and partly after, 1st January 1940, in his application to the Debt Settlement Board under S. 8 of the Act the Debt Settlement Board itself is the only authority which has jurisdiction to decide whether any part of the liability is a debt or not and, therefore, the civil Court is bound to stay the proceedings before it on receipt of notice under S. 34. A question of partial stay of suit pending in a civil Court on receipt of a notice under S. 34 can arise, only if the claim for the period subsequent to 1st January 1940 is not included in the application before the Debt Settlement Board, or if the Debt Settlement Board itself decides under S. 20 that this portion of the claim is not a debt and that the Board cannot, therefore, deal with it. Similarly, on receipt of a notice under S. 34 in a "barga" suit the civil Court is bound to stay the suit inasmuch as it is for the Board to decide whether a "barga" claim is or is not a debt within the meaning of the Act : ('41) 28 A. I. R. 1941 Cal. 658, *Rel. on.* [P 229*h*]

(b) Bengal Agricultural Debtors Act (7 of 1936), Ss. 34, 40 and 44 — Notice under S. 34— Person aggrieved should follow procedure under Act instead of applying to civil Court.

It is not intended that in respect of matters which have been expressly relegated to Debt Settlement Boards for adjudication, civil Courts should exercise a concurrent jurisdiction. Consequently, any party aggrieved by a stay notice under S. 34 must follow appropriately the procedure indicated by the Act itself instead of applying to the civil Courts for redress which they are powerless to give. [P 230*a*,*b*]

Abdul Ali and Purna Chandra Basu — In support of Reference.

BISWAS J. — This is a reference under O. 46, R. 1, Civil P. C., made by the Munsif of Bongaon in the district of Jessore in a suit which was filed in his Court on 21st April 1941 by one Sitaram Bhattacharyya against Panchu Muchi for recovery of a share of the produce of some agricultural land which the defendant held under the plaintiff under what is known as the barga system. The claim was in respect of two years 1346 and 1347 B. S., that is to say, from the middle of April 1939 to the middle of April 1941, and there was a prayer in the alternative for recovery of the price of the crops at the current market rates. The suit was duly registered by the learned Munsif as a Small Cause Court suit. It appears that the defendant thereafter approached a Debt Settlement Board at Khalishpore, and on 7th May 1941 the learned Munsif received a notice from that Board under S. 34, Bengal Agricultural Debtors Act, 1935, with the result that the proceedings in the suit were stayed. On 9th June following, however, the plaintiff made an application to the learned Munsif for vacating the stay order in part, namely, as regards that part of the claim which related to the period after 1st January 1940, and it is because the learned Munsif entertained a doubt as to how he should deal with this application that he made the present reference. Two questions have been formulated by him, and they are in these terms :

"(1) If a civil Court receives a notice under S. 34, Bengal Agricultural Debtors Act, in a barga suit, is it bound to stay the proceedings of that suit in view of the fact that a barga claim is not a "debt" within the meaning of the Begal Agricultural Debtors Act ? (2) If the above question be answered in the affirmative, is the civil Court entitled to proceed with the barga suit in so far as the claim falls after 1st January 1940 ?"

On the statement of facts submitted to us it does not appear that the first of these questions at all arises in the case. By his application of 9th June 1941 the plaintiff did not challenge the whole of the stay order, but merely asked that he might be allowed to proceed with the suit in so far as part of the claim was concerned. This is the subject-matter of the second question, and, in our opinion, an answer to this question should be sufficient to dispose of the reference. The question evidently arises because of the amendment introduced in 1940 in the definition of "debt" in S. 2, sub-s. (8), Bengal Agricultural Debtors Act, whereby a debt was limited to include only liabilities "incurred prior to 1st January 1940." From this point of view it may no doubt be contended that the claim in respect of the period subsequent to 1st January 1940 is not a debt within the meaning of the Act, and that the provisions of the Act cannot consequently operate on this part of the suit. The effect of S. 20 as last amended cannot, however, be ignored. The section as it now stands expressly provides that if any question arises in connexion with proceedings before a board under this Act, whether a person is a debtor or not, or whether a liability is a debt or not, the board shall decide the matter. It is not disputed that the amended section applies to the present suit, which was in fact instituted long after the amendment had come into force. Where therefore rightly or wrongly, the debtor has chosen to include a liability incurred, partly before, and partly after, 1st January 1940 in his application to the Debt Settlement Board under S. 8, it seems to us that the Debt Settlement Board itself is the only authority which has jurisdiction to decide whether any part of the liability is a debt or not. A question of partial stay of suit pending in a civil Court on receipt of a notice under S. 34 can arise, only if the claim for the period subsequent to 1st January 1940 is not included in the application before the Debt Settlement Board, or if the Debt Settlement Board, itself decides under S. 20 that this portion of the claim is not a debt and that the board cannot therefore deal with it. This was the view taken by this

Court in another reference which was disposed on 8th July last, Ref. No. 1 of 1941.[1]

We may add that though, as stated above, the first question raised by the learned Munsif in this reference does not properly arise, the answer to it must also be governed by the same considerations. As the learned Munsif correctly points out, it is not intended that in respect of matters which have been expressly relegated to Debt Settlement Boards for adjudication, civil Courts should exercise a concurrent jurisdiction. To hold otherwise would be to defeat the whole object of this special legislation as disclosed in its various provisions. The Act itself indicates the procedure which any party aggrieved by a stay notice under S. 34 may appropriately follow. Apart from the right of appeal which S. 40 confers against any decision or order of a board under the Act, S. 44 provides that any person interested may apply to the board to review any decision or order passed by it. We cannot help thinking that in most cases difficulties arise because the orders for issue of notices under S. 34 are made ex parte, but these difficulties could more often than not be removed by the boards themselves, if only the parties concerned properly represented the matter to them, instead of applying to the civil Courts for redress which they are powerless to give. The boards also might perhaps in many cases avoid creating unnecessary difficulties by the exercise of some care and attention in examining the nature of the claim before making an order for the issue of a notice under S. 34. Let this opinion be forwarded to the learned Munsif for necessary action.

ROXBURGH J. — I agree.

G.N./R.K. *Order accordingly.*

1. *Reported in* ('41) 28 A.I.R. 1941 Cal. 658 : 46 C.W.N. 12, Nator Raj Wards Estate v. Saber Sardar.

A. I. R. (29) 1942 Calcutta 230

HENDERSON J.

Sakkal Sardar — Judgment-debtor — Appellant

v.

Issurdas Thirani and others — Respondents.

Appeal No. 126 and Rule No. 1578 of 1940, Decided on 22nd May 1941, from appellate order of Dist. Judge, Darjeeling, D/- 26th February 1940.

(a) Bengal Rent Act (10 of 1859), Ss. 151 and 160—Rent decree — Execution proceedings before Deputy Collector—Reference to arbitration by agreement of parties — Award in decree-holder's favour—Objection by judgment-debtor as to arbitration being without jurisdiction overruled by Deputy Collector — District Judge holding appeal by judgment-debtor before him as incompetent — Appeal and revision to High Court by judgment-debtor both held incompetent.

In the course of proceedings in execution of a rent decree before the Deputy Collector, the parties by agreement went to arbitration before a certain person who made an award in favour of the decree-holder. The judgment-debtor contended subsequently that the submission to arbitration was without jurisdiction and that he was not bound by the award. The Deputy Collector overruled this objection. There was then an appeal to the District Judge who held that, although the objection was well founded, he had no jurisdiction in appeal and accordingly dismissed the appeal. The judgment-debtor then filed both a second appeal and a revision application before the High Court. It was not disputed that the judgment-debtor's objection was well founded and that the award was made without jurisdiction :

Held that (1) S. 151 clearly suggested that the word "suit" in S. 160 did not include execution proceedings and consequently no appeal lay to the District Judge : 7 W. R. 520 (F. B.), *Rel. on* ; [P 231*g*]

(2) Any right of appeal conferred by the Code of Civil Procedure, was expressly excluded by S. 151 of the Rent Act and the second appeal to the High Court was incompetent in view of the provisions of S. 160 : ('31) 18 A.I.R. 1931 Cal. 211 (judgment of Mukherji J.), *Rel. on* ; ('31) 18 A.I.R. 1931 Cal. 109, *Ref.* ; [P 231*f*]

(3) The High Court had no jurisdiction either under Ss. 223 and 224 or any other provision of the Government of India Act, 1935, to interfere with the order of the Collector enforcing the award which was made without jurisdiction : 7 W. R. 520 (F. B.), *Ref.* ; [P 232*b*]

(4) Section 47, Civil P. C., did not apply to the Court of the Deputy Collector under the Bengal Rent Act. Consequently, remedy by way of suit being open to the judgment-debtor there was no reason why the High Court should interfere in revision : 15 C. W. N. 78 and 15 Cal. 179, *Rel. on* ; [P 232*b*,*c*]

(5) As the revision petition under S. 115, Civil P. C., was directed solely against the order of the District Judge and the High Court was not even asked to interfere with the order of the Deputy Collector the High Court could not afford any relief to the judgment-debtor. [P 232*c*,*d*]

(b) Civil P. C. (1908), S. 115 — District Judge wrongly holding appeal before him as incompetent — High Court can direct him to hear same under S. 115.

Where the District Judge wrongly refuses to hear an appeal in the mistaken view that it was incompetent, the High Court has power under S. 115 to direct him to hear it. [P 231*h*]

(c) Civil P. C. (1908), Sch. 2, para. 15—Person party to arbitration challenging reference in appeal as without jurisdiction—Appellant even if successful is generally not entitled to costs—But in revision such person should be given no relief.

A person who was a party to arbitration even if successful in appeal in challenging the reference as being without jurisdiction is generally deprived of costs. But in revision such a person should not be given any relief. [P 232*c*]

Amalendu Sen — for Appellant.

Girija Prasanna Sanyal and Saurindra Narayan Ghose — for Respondents.

JUDGMENT. — This appeal and the rule are concerned with a matter which in itself is extremely simple but which raises highly technical questions. This will be apparent from the mere fact that Mr. Sen felt compelled to file both an appeal and an application in revision. The plaintiffs obtained a rent decree against the petitioner defendant under the provisions of the Rent Act (Act 10 of 1859) before the Deputy Collector in Siliguri. Execution proceedings followed. By agreement, the parties went to arbitration before a certain gentleman, Mr. Sen, who made an award in favour of the plaintiffs. The

judgment-debtor contended subsequently that the submission to arbitration was without jurisdiction and that he was not bound by the award. The Deputy Collector overruled this objection. There was then an appeal to the District Judge who held that, although the objection was well founded, he had no jurisdiction in appeal. He accordingly dismissed the appeal. It is now not disputed that the judgment-debtor's objection is well founded and that the award was made without jurisdiction. The only question, therefore, is whether I am able to give him any relief either in the appeal or in the rule. The main questions involved are whether there is a first appeal to the District Court, whether there is a second appeal to this Court and whether this Court has jurisdiction to interfere with the order of the Deputy Collector in revision. Mr. Sen's contention is that the Deputy Collector's order was made under S. 47, Civil P. C. For this purpose, he relies upon the wording of S. 4 of the Code and interprets it to mean that the Code will apply to the proceedings before the Deputy Collector unless there is something specific in the Rent Act to exclude it. This question really arises in connexion with the rule, and I shall for the present assume that S. 47 applies to the proceedings before the Deputy Collector. Now, S. 47 does not in itself confer any right of appeal. It simply provides that the present dispute as to the validity of the award must be decided by the Deputy Collector in execution instead of by means of a suit. Proceeding to S. 96 it can be said that, so far as the Code is concerned, there is an appeal but of course there is no provision as to what Court is to hear it. The matter is determined by S. 151, Rent Act. The relevant paragraph of the section is in these words :

"All orders passed by a Collector under this Act, not being judgments in suits or orders passed in the course of suits and relating to the trial thereof or orders passed after decree and relating to the execution thereof, shall be appealable to the Commissioner; and all such orders passed by a Deputy Collector shall be appealable to the Collector; but no judgment of a Collector or Deputy Collector in any suit, and no order of a Collector or Deputy Collector passed in any suit and relating to the trial thereof, or after decree and relating to the execution thereof, shall be open to revision or appeal otherwise than as expressly provided in this Act."

From this it is abundantly clear that if there is an appeal it is to be provided by the Rent Act. The only section which provides for such an appeal is S. 160. That, however, provides a first appeal only. It cannot therefore be disputed that no second appeal lies to this Court. Apart from the actual statutory provision Mr. Sen sought to find an appeal in certain decisions of this Court, with regard to arbitration matters. He particularly referred to the decision in 34 C. W. N. 813.[1] That decision is certainly to the effect that where there has been no valid submission to arbitration, an appeal does lie and the appellate Court has jurisdiction to set aside the proceedings. Now I am bound to say with all due respect that this is a kind of decision which I find it extremely difficult to appreciate. Ordinarily when one wishes to find out whether an appeal is competent, one has to examine the judgment and decree or order and then see whether it can be brought within the statutory provisions which allow an appeal. Now there can be no question that, if that procedure is followed in the present case, there is no appeal. But according to this decision that is not sufficient. One has to go further and discover whether the appeal is a good appeal or a bad appeal and, if it is the former, then the appeal is competent. Now the only question that arises for decision is whether the award was without jurisdiction or not and I cannot persuade myself that one has to decide the appeal on the merits before one is in a position to say whether the Court has jurisdiction to hear the appeal or not. The question arose for decision in a later case, 58 Cal. 628.[2] That case was heard by Mitter J. who was a party to the previous decision and Mukherji J. The latter dissented from this view and reached the conclusion after a very full discussion of the case that no appeal lies. All I need say is that I respectfully agree with his conclusion. Mr. Sen further pressed me that sitting alone I should accept the former decision. I shall feel bound to do so if it afforded any real help to the appellant in the present case. But the right of appeal conferred by this decision must be, if it is anything at all, a right of appeal conferred by the Code of Civil Procedure, and any such right is expressly excluded by S. 151, Rent Act. The result is that from whatever angle one views the matter, the second appeal to this Court is incompetent and I shall have to deal with the matter in revision. The next question for consideration, therefore, is whether the learned Judge was right when he held that no appeal lay to him. That question depends upon the meaning to be attributed to S. 160 which is in these terms :

"In all suits other than those, in which, when tried and decided by a Collector, the judgment of the Collector is declared to be final, or when tried and decided by a Deputy Collector an appeal is allowed to the Collector, an appeal from the judgment of the Collector or Deputy Collector shall lie to the Zilla Judge."

The result is that no appeal lay to the District Judge's Court unless it can be said that the word "suit" includes execution proceedings. There are grave difficulties in any such view. Section 151 which prescribes the limit with regard to appeals distinguishes between a suit and an order after decree relating to the execution thereof. It clearly suggests that the word "suit" does not include execution proceedings. The matter is however put beyond doubt by a very old decision of a Full Bench of this Court reported in 7 W.R. 520.[3] That was a case in which the Deputy Collector had refused to make an order in the nature of restitution. The question referred was whether the High Court had power to compel him to make an order. It is quite clear that the High Court would not have exercised such powers if there had been a right of appeal to the District Court and Loch J. in delivering judgment said as follows :

"I think that under the words 'shall have superintendence over all Courts' used in S. 15 of 24 and 25 Vic. Chap. 104, this Court has the power, in cases where no appeal lies to the Judge, of directing a lower Court to do that which is legal, and to correct that which is illegal in its proceedings."

Mr. Sanyal did not dispute that, if the District Judge wrongly refused to hear an appeal in the mistaken view that it was incompetent, this Court would have the power to direct him to hear it

1. ('31) 18 A.I.R. 1931 Cal. 109 : 130 I.C. 137 : 34 C.W.N. 813, Durga Charan v. Ganga Dhar.

2. ('31) 18 A.I.R. 1931 Cal. 211 : 130 I.C. 209 : 58 Cal. 628 : 52 C.L.J. 298 : 35 C.W.N. 238, Golnur Bibi v. Abdus Samad.

3. ('67) 7 W. R. 520 : Beng. L. R. Sup. Vol. 714 (F.B.), Gobind Coomar v. Kisto Coomar.

under S. 115. But inasmuch as the learned Judge was right in this view, it is impossible for me to set aside his order. The final questions therefore remain firstly, whether I have power and secondly, whether I ought to interfere with the order of the Deputy Collector enforcing an award which was made without jurisdiction. The question was considered in the Full Bench decision to which I have just referred for another purpose and it was there held that this Court had jurisdiction to interfere under S. 15, Charter Act. That section was succeeded by S. 107, Government of India Act of 1919 and as long as that section was in force there would have been no difficulty in dealing with the matter. That Act, however, has been repealed. The question is whether this Court has this power under the Government of India Act of 1935. Mr. Sen boldly argued that it has, in view of the provisions of Ss. 223 and 224. The former preserves the existing jurisdiction of the Court and the latter confers certain administrative powers upon the Court. The wider powers under S. 107 of the old Act have been deliberately cut down. Furthermore, sub-s. (2) emphasises in fact that the powers conferred are of an administrative character. I have, therefore, no hesitation in holding that the Court has no jurisdiction under the new Act to interfere with the orders of the Deputy Collector.

Then, in the second place, Mr. Sanyal contended that I ought to decline to interfere because the petitioner has another remedy. That raises the question whether S. 47, Civil P. C., applies to the Court of the Deputy Collector. I should have not been prepared to brush aside Mr. Sen's argument without careful consideration: but there are two decisions of Division Benches of this Court to the effect that S. 47 does not apply: *vide* 15 C.W.N. 78[4] and 15 Cal. 179.[5] Those decisions are binding on me. The result of them is that the petitioner has the remedy of a suit and therefore there is no reason why I should interfere in revision. There are also two other matters to which I shall refer in this connexion. The petitioner was himself a party to the arbitration. Now that it has gone against him he is trying to back out of it. Undoubtedly, in an appeal he would be successful although an appellant in his position is generally deprived of costs. But in a revision different considerations arise and I should not be prepared to give any help to a person in the position of the petitioner. Finally, the petition is not drawn in such a way that I could afford any relief to the petitioner on these lines. It is drawn under S. 115, Civil P. C., and is directed solely against the order of the District Judge. I was not even asked to interfere with the order of the Deputy Collector. The result is that the appeal is dismissed as incompetent without costs. The rule is discharged. As the plaintiffs refuse to return the money which has been improperly realised and force the petitioner into a suit, I make no order as to costs.

G.N./R.K. *Order accordingly.*

4. ('11) 15 C.W.N. 78: 7 I.C. 387, Damoodar Misra v. Iswar Chandra.
5. ('88) 15 Cal. 179, Brojo Gopal Sarkar v. Busirunnissa Bibi.

C. P. C.—
(a) (2) ('40) Chitaley, Ss. 100 and 101 N. 4.
(4) ('40) Chitaley, S. 47, N. 3 Pt. 3; S. 115, N. 8 Pt. 4.
('41) Mulla, Page 413 Pt. (u); Page 414 Pt. (v).
(5) ('40) Chitaley, S. 115, N. 16 Pt. 10.
('41) Mulla, Page 408, Exercise of revisional jurisdiction is discretionary.
(b) ('40) Chitaley, S. 115, N. 11 Pt. 1.
('41) Mulla, Page 418 Pt. (h).
(c) ('40) Chitaley, Sch. 2 Para. 15, N. 14 and N. 15.

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HENDERSON J.

Kashi Nath Sarkar and others — *Decree-holders* — *Appellants*

v.

Sonaulla Sheikh — *Judgment-debtor* — *Respondent.*

Appeal No. 187 of 1940, Decided on 19th June 1941, from appellate order of Dist. Judge, Rangpur, D/- 2nd July 1940.

(a) Bengal Agricultural Debtors Act (7 of 1936), S. 34 — Decree under S. 66, Ben. Ten. Act, for arrears of rent and ejectment — Period before which judgment-debtor can save himself from ejectment by paying decretal amount in Court not expired — Application by judgment-debtor to Debt Settlement Board — On notice under S. 34 executing Court must stay execution of whole decree and not part of it.

Where a judgment-debtor against whom a decree for rent and ejectment under S. 66, Ben. Ten. Act, has been passed, applies to the Debt Settlement Board before the expiry of the time within which he can save himself from ejectment by paying the decretal amount into Court the executing Court on a notice under S. 34, Bengal Agricultural Debtors Act, must stay the execution of the decree as a whole and not part of it only, it being impossible to divorce one part of the decree from the other in any practical sense. That is, the Court cannot stay the execution of the decree as to rent and proceed with the execution of the decree for ejectment. The execution case as a whole must be stayed : ('39) 26 A.I.R. 1939 Cal. 730, *Rel. on*; 44 C.W.N. 733 and ('40) 27 A.I.R. 1940 Cal. 523, *Disting.* [P 232*h* ; P 233*b*]

(b) Bengal Tenancy Act (8 of 1885), S. 66 (2) —Decree under.

A decree under S. 66 (2) is similar to a decree in a suit for redemption. [P 233*c*]

Jitendra Kumar Sen Gupta — for Appellants.

Shyamapada Majumdar — for Respondent.

JUDGMENT. — This appeal is by the decree-holders. They obtained a decree under S. 66, Ben. Ten. Act. Under that decree the respondent could have saved himself from ejectment by paying the decretal amount into Court. He did not pay but went to a Debt Settlement Board. Notice under S. 34 of the Act was sent to the Court. The Munsif decided that he would stay the execution of the actual decree for rent but proceed with the execution of the decree for ejectment. The respondent appealed and the District Judge directed that the whole execution case should be stayed. The question for determination is whether the Munsif was entitled to stay a part of the decree only. In support of the appeal, Mr. Sen Gupta attempted to cut the decree into two separate portions. In this connexion it is necessary to point out that the time specified in that decree had not elapsed and that when the respondent applied to the Board, he had still time to save himself from ejectment. Had the period

of 30 days elapsed, other considerations of course would arise. In support of his appeal, Mr. Sen Gupta relied upon the decisions of myself and of my learned brother Biswas in 44 C.W.N. 733[1] and 44 C.W.N. 1113.[2] The learned Judge dealt with the matter and, in my view, rightly distinguished those cases from the present. In those cases the question was whether a mere suit for ejectment could be stayed by a notice under S. 34. The decisions cannot throw any light on the present question.

The present case will really depend upon whether it is possible to divide the decree into two absolutely distinct parts. Under the substantive law the respondent is not liable to be ejected if he pays the arrears. Now supposing the Board did make an order for instalments in his favour, it would be quite useless from his point of view, if he were to be ejected as long as he did not default in the payment of an instalment. Whatever may be the legal aspect of the matter, it is really impossible to divorce one part of the decree from the other in any practical sense. A very similar question arose for decision before a Division Bench of this Court in 43 C.W.N. 1221.[3] A similar decision was given by my learned brother Mukherjea in the case, as far as I remember of a decree for redemption of a simple mortgage. The question turns upon the definition of a debt in S. 2 of the Act, and the reasoning of Nasim Ali J. applies equally to a case such as the present. The right to redeem really implies the existence of a debt. Otherwise, it would be a quite gratuitous payment of any sum at the option of the payer. A decree under S. 66 (2), Ben. Ten. Act is similar to a decree in a suit for redemption. I will just refer to one other argument made by Mr. Sen Gupta which was to the effect that, even if the Board makes an award in favour of the respondent, any payment in consequence of the award would be too late to save him. Now that is a question which cannot be decided now. If S. 34 applies the Court is debarred from deciding anything. I therefore express no opinion on that point. Mr. Sen Gupta also stated that he would be willing to waive his claim to ejectment if the arrears of rent were paid. This offer however was not accepted. The appeal is accordingly dismissed, but in the circumstances of the case I make no order as to costs.

G.N./R.K. *Appeal dismissed.*

1. ('40) 44 C.W.N. 733, Bijoli Bhusan Ghose v. Madhusudhan Ghose.
2. ('40) 27 A.I.R. 1940 Cal. 523 : 191 I.C. 225 : 44 C.W.N. 1113, Mymensingh Loan Office Ltd. v. Basir Sheikh.
3. ('39) 26 A.I.R. 1939 Cal 730 : 185 I.C. 393 : 43 C. W. N. 1221 : I. L. R. (1940) 1 Cal. 133, Abdul Latif v. Abdul Gani Serang.

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NASIM ALI AND PAL JJ.

Hemanta Kumari Debi and others — *Plaintiffs* — *Appellants*

v.

Midnapore Zemindary Co., Ltd. — *Defendant* — *Respondent.*

First Appeals Nos. 87 and 221 of 1938, Decided on 6th and 7th May 1941 respectively, from decrees of Sub-Judge, Murshidabad, D/- 30th November 1937.

(a) Adverse possession—Defendant claiming limited interest does not extinguish plaintiff's title.

When the defendant in possession sets up a title only to a limited interest which even if completed would not extinguish the title of the plaintiff, it is for the defendant to establish his title in order to defeat the claim of the plaintiff. [P 234*d*,*e*]

(b) Adverse possession—Extent of, explained.

The extent of the title acquired by adverse possession depends on the extent of the claim or right under which possession is obtained and kept. If claim is restricted to a limited interest in the property, e.g., tenancy right in the property, possession is adverse to the extent of that limited interest only. There can be no question of absolute title by adverse possession when only a limited interest has been asserted. [P 234*e*,*f*]

(c) Adverse possession—Dispossession by vis major.

Dispossession of a trespasser by vis major has the same effect as voluntary abandonment of possession by him. [P 235*a*]

(d) Adverse possession—Constructive possession—Trespasser cannot claim — Essentials of, explained—Lands flooded every year capable of yielding two crops—Possessor's tenants raising both crops — Possessor is not dispossessed by vis major.

'Constructive possession' is only the right to take physical possession and is the *jus possidendi*. Such a right does not exist in a trespasser. He has only the *jus possessionis* and this is a distinct right dependent for its existence on a certain relation between a person and thing. In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as the Court likes and to exclude others, but also the determination to exercise that physical power on the Court's own behalf. It thus involves a physical fact (corpus) and a mental state (animus). To constitute possession the claim of the possessor must be effectively realized in the facts. Absolute security for the future is not requisite, for, it cannot be had. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing. In order to prove the continuance of possession, it is not necessary to prove an actual bodily continuous possession. Possession may be continuous even though the actual acts of possession are at considerable intervals. How many acts of possession will lead to the inference of continuity of possession would depend upon the nature of the subject possessed. Where the lands are capable of yielding only two crops and the tenants of the possessor have been raising these two crops every year in spite of the annual flooding during the rainy season, it cannot be held that the possession of the possessor's tenants was not continuous throughout the year, as the extent of the flooding did not, at any point of time, place the land beyond the power or control of the possessor's tenants and the possessor was never dispossessed by the vis major. [P 235*b*,*c*,*d*,*e*]

(e) Adverse possession—Cosharer—Person in possession not as cosharer but as tenure-holder acquires tenancy interest by adverse possession.

No doubt the cosharer may exclusively possess joint lands and his exclusive possession is not necessarily adverse, but where the defendant is in possession of the disputed land not as a cosharer of the plaintiffs but as tenure-holder the defendant acquires the limited interest of tenant in the disputed land by adverse possession for more than twelve years. [P 235*f*]

(f) Landlord and tenant—Fair rent.

a The average rate of rent per bigha paid to defendant by the actual cultivators was Re. 1-4-0. Deducting 10 per cent. as collection charge the net profit per bigha was Re. 1-2-0 :

Held that plaintiffs should get half of the net profit, viz., 9 annas per bigha as the fair rent of the disputed land. [P 235*g*]

Bansari Lal Sarkar — for Appellants.

Gopendra Nath Das and Manmatha Nath Das Gupta — for Respondent.

JUDGMENT. *(F. A. No. 87 of 1938)* — This appeal arises out of a suit for recovery of khas possession with mesne profits of certain lands . . . or in the alternative for assessment and recovery of fair rent from the beginning of 1339 B.S. (1932-33 A.D.) to the Pous kist of 1342. The disputed lands appertain to permanently settled mouza Sibnagar diar
b otherwise known as Araji Sibnagar. Plaintiffs are owners of 12 as. 9 gds. 2 krs. and 2 krant share in zamindari and mourashi jote right. The remaining share of the mouza belongs to the defendant in putni right. The plaint lands have been surveyed by a Commissioner and have been shown in his map as part of plot C, the whole of plots D and E. At the time of the trial in the lower Court plaintiffs withdrew their claim in respect of plot E. Plaintiffs' claim for possession of plot D was not opposed before us by the defendant. Plaintiffs are therefore entitled to get khas possession of that land to the extent of their share, viz., 12 as. 9gds. 2krs. and 2 krants. The lands being admittedly sandy, plaintiffs' claim for mesne profits in respect of this land does arise. The dispute in this appeal is confined to 396 bighas of land in plot C (hereinafter referred to as the disputed land) to the immediate
c east of a jote held by the defendant under the plaintiffs at an annual rent of Rs. 76-8-0.

The case of the plaintiffs is that the defendant is in possession of this disputed land as a trespasser and that they came to know of this trespass on 23rd January 1924 and consequently they are entitled to recover khas possession with mesne profits of the disputed land to the extent of their share. They also claim Rs. 1-8-0 per bigha as fair rent for their share of the disputed land in the alternative. The defence of the defendant so far as it is relevant for the purpose of the present appeal is that they have acquired a tenancy right in the whole of the disputed land by adverse possession for more than 12 years. As regards the rate of fair rent, the defendants allege that 4 as. per bigha is the fair rent. The trial Judge has accepted the defence of the
d defendant. He has accordingly dismissed the plaintiffs' claim for khas possession of the disputed land but has decreed fair rent at the rate admitted by the defendant. Hence this appeal by the plaintiffs. The first point for determination in this appeal is whether the defendant has acquired tenancy right to the whole of the disputed land by adverse possession for more than 12 years.

No doubt the case of the plaintiffs as made in the plaint is one of dispossession by the defendant after they had been in possession, at least constructively, of the disputed land. But the defendant admits that the plaintiffs have title to these lands. It is also admitted that before the defendant went into possession as a tenure-holder the lands were under water. The defendant does not claim to have been in possession in assertion of any title other than that of a tenant under the plaintiffs. In our opinion when the defendant in possession sets up a title only to a limited interest which even if completed would not extinguish the title of the plaintiff, it is e for the defendant to establish his title in order to defeat the claim of the plaintiff. The claim of the defendant is now confined to the interest acquired by adverse possession. Adverse possession—the temporary and abnormal separation of the enjoyment of property from the title to it—is a "jus possessionis" in a person having no 'jus possidendi' and means possession which is hostile under a claim or colour to title. The possession must be actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for 12 years it confers an indefeasible title upon the possessor.

The extent of the title acquired by adverse possession depends on the extent of the claim or right under which possession is obtained and kept. If claim is restricted to a limited interest in the property, e. g., tenancy right in the property, f possession is adverse to the extent of that limited interest only. There can be no question of absolute title by adverse possession when only a limited interest has been asserted. It is not disputed that the lands in suit appertain to the permanently settled mouja Sibnagar. The case of the plaintiffs is that the disputed lands are the lands reformed in situ within the permanently settled area of the said mahal. Neither in the plaint nor in their evidence the plaintiffs make it clear when this reformation took place. The plaint is that after this reformation in situ the defendant company came into the exclusive possession of the disputed land in sixteen annas as a trespasser, without any right, and was realising rents from the tenants.

The evidence of P. W. 19 shows that in the record of rights of mouja Araji Sibnagar which was prepared under Ch. 10, Bengal Tenancy Act, in g 1913-14, the disputed land was recorded in the possession of the defendant in the right of a tenure-holder, the lands being recorded partly in the khas possession of the defendant company and partly in its possession through the tenants. The reformation in situ as alleged by the plaintiffs admittedly took place prior to this date. There were dearah proceedings for resumption of the disputed land along with other lands in the year 1918. From the dearah khatian (Ex. 12), it appears that the defendant was assessed to rent in respect of the disputed land as tenure-holder. The documentary evidence on the side of the defendant (Ex. A series, Ex. G series, Ex. E series, Ex. F series, Exs. C and C-1) support the entries in the cadastral survey record and the dearah khatian. They prove defendant's possession of the disputed land from 1910-1924 partly in khas and partly through tenants under the Udbandi h system. They also show possession of the defendant through rayats and in khas from 1925 to 1934. The contention of the appellants is that the possession of the defendant from 1910 to 1934 was not continuous inasmuch as (a) the disputed land remained completely under water in 1931 and 1932 and (b) the disputed land goes under water every year in the rainy season and remains under water from Asar to Aswin.

Plaintiffs examined some witnesses to prove that five or six years prior to 1937 the disputed land remained under water for 2 or 3 years. The trial Judge has not believed this evidence. Their evidence has been placed before us and we are of opinion that the trial Judge was right in disbelieving this. Again even if the disputed land remained completely under water in 1931 and 1932 the defendant completed their adverse possession for the

statutory period before 1931. The evidence on the
a side of the plaintiffs to show that the disputed land remains under water every year, from Asar to Aswin, is not at all satisfactory, but the evidence of defendant's witness 5 before the Commissioner is that the disputed land gets flooded during the rainy season every year and remains under water for two or three months. There cannot be any doubt therefore that the disputed land gets flooded during the rainy season and remains under water for 2 or 3 months. The question then is whether this annual flooding is of such a nature as to place the disputed land out of the control of the defendant company and thus to disturb the continuity of its possession, whether the defendant company on its part became dispossessed by the vis major of the floods. Dispossession of a trespasser by vis major has the same effect as voluntary abandonment of possession by him.

b It is true that the doctrine of constructive possession is not available to a trespasser. In fact 'constructive possession' is only the right to take physical possession and is the 'jus possidendi.' Such a right does not exist in a trespasser. He has only the 'jus possessionis' and this is a distinct right dependent for its existence on a certain relation between a person and thing. "Possession," as has been pointed out by Markby, "originally expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else." In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power on our own behalf. It thus involves a physical fact (corpus) and a mental state (animus). To constitute possession the claim of the possessor must be effec-
c tively realised in the facts. To gain possession there must thus be certain physical relations and a certain intent. The question is how far these facts must continue to be presently true of a person in order that he may continue in the rights which follow from their presence. Absolute security for the future is not requisite, for it cannot be had. All that is necessary is that according to the ordinary course of affairs one is able to count on the continuing enjoyment of the thing. (Salmond—Jurisprudence, Edn. 9, p. 378, footnote (1)). In order to prove the continuance of possession, it is not necessary to prove an actual bodily continuous possession. Possession may be continuous even though the actual acts of possession are at considerable intervals. How many acts of possession will lead to the inference of continuity of possession would depend upon the nature of the subject possessed. The will itself may
d be sufficient if manifested in an appropriate environment of facts.

The evidence on the plaintiffs' side (P. Ws. 1, 3, 11 and 18) is that the disputed land yields two crops and that its flooding during the rainy season does not interfere in any way with the raising of these two crops. It may be that in some years the crops raised before the rainy season were destroyed by floods but as soon as the time for raising the second crop came the land was cultivated and crop was grown. The lands being capable of yielding only two crops and the tenants of the defendant having raised these two crops every year in spite of the annual flooding during the rainy season, it cannot be held that the possession of the defendant's tenants was not continuous throughout the year. In fact their possession is not in dispute in this case. There is no evidence that they could not use the lands even if they wanted to do so. The evidence is that they did not use these lands during these months and that from the very character of the e
land nothing active was required to be done in respect of them. It is not the evidence that the land was not capable of any use or enjoyment during this period; only nothing active was required of the occupier to do. The defendant has realized rent from the tenants year after year from the year 1910 to 1934, and the tenants raised the usual crops year after year during all these years. In our opinion the nature and the extent of the flooding established in this case did not, at any point of time, place the land beyond the power or control of the defendant's tenants and the defendant was never dispossessed by the vis major. We, therefore, hold that the defendant had been in continuous possession of the disputed land for more than 12 years before the institution of the present suit.

It was contended on behalf of the plaintiffs that f
even if the defendant was in possession for more than 12 years it was not necessarily adverse possession inasmuch as the defendant is also a cosharer of the plaintiffs in the disputed land. It is true that the cosharer may exclusively possess joint lands and his exclusive possession is not necessarily adverse. In the present case, however, plaintiffs' case in the plaint is that the defendant entered into the disputed land as a trespasser and was in possession of the land as a trespasser. Further, the counterfoils (Ex. E series) of the rent receipts granted by the defendant to their tenants and the dearah khatian (Ex. 12) clearly show that the defendant was in possession of the disputed land not as a cosharer of the plaintiffs but as tenure-holder. The trial Judge was, therefore, right in holding that the defendant has acquired the limited interest of tenant in the disputed land by adverse possession for more than g
twelve years.

The next contention on behalf of the appellants is that the trial Judge should have assessed fair and equitable rent in accordance with the principle laid down in S. 52, cl. (3), Ben. Ten. Act. The case of the defendant in the written statement is that they were in possession of the disputed land as part of their jote of Rs. 76-8-0. The trial Judge found that the disputed land is outside their jote. The defendant is therefore in possession of excess lands. The defendant is a tenure-holder in respect of the disputed land. The evidence in this case shows that the average rate of rent per bigha paid to defendant by the actual cultivators is Re. 1-4-0. Deducting 10 per cent. as collection charge the net profit per bigha is Re. 1-2-0. We are of opinion that plaintiffs should get half of the net profit, viz., 9 annas per bigha. We accordingly assess the fair rent at h
9 annas per bigha of the disputed land. The result therefore is that this appeal is allowed in part. Plaintiffs' claim for khas possession in respect of plot D mentioned in Commissioner's map is decreed. Their claim for mesne profits in respect of that plot is dismissed. Plaintiffs' claim for khas possession of 396 bighas in plot C of the Commissioner's map is dismissed. They will get from the defendant Rs. 630-13-0 as fair rent for their share of the disputed land from 1339 B. S. to Pous 1342 B. S. at the rate of Rs. 168-3-6 per year with interest at 6 per cent. per annum from this date until realization. Parties will bear their own costs throughout this litigation.

F. A. No. 221 of 1938 with cross-objection.

7th May 1941. — In course of the hearing of this appeal, the learned advocate for the appellants stated that his clients were not willing to proceed

with the appeal and the learned advocate for the respondent company also stated before us that his clients were not willing to proceed with the cross-objection. The appeal and the cross-objection are accordingly dismissed. There will be no order for costs either in the appeal or in the cross-objection.

R.K. *Order accordingly.*

Lim. Act —

(b) ('42) Chitaley, Arts. 142 and 144, N. 59a Pt. 3; N. 95 Pts. 1, 3.
('38) Rustomji, Page 1448 Pts. 5, 6.
(c) ('42) Chitaley, Arts. 142 and 144, N. 64 Pts. 6-8.
('38) Rustomji, Page 1329 Pt. 8.
(d) ('42) Chitaley, Arts. 142 and 144, Notes 11, 62.
('38) Rustomji, Page 1357 Pt. 1.
(e) ('42) Chitaley, Arts. 142 and 144, N. 35 Pt. 1.
('38) Rustomji, Page 1466 Note "Co-sharers: Adverse title inter se."

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NASIM ALI AND MOHAMAD AKRAM JJ.

Pashupati Sadukhan — Plaintiff — Appellant

v.

Janaki Nath Mukherjee and others — Respondents.

Appeal No. 67 of 1939, Decided on 5th December 1940, from original decree of Dist .Judge, Howrah, D/- 30th January 1939.

(a) Civil P. C. (1908), O. 32, R. 4 (3)—Applicability—Non-contentious probate proceedings.

A non-contentious proceeding for probate is not a suit. Consequently O. 32, R. 4 (3) does not in terms apply to a non-contentious probate proceeding : ('20) 7 A. I. R. 1920 Cal. 630 and ('31) 18 A. I. R. 1931 Cal. 713, *Ref.* [P 237*b*]

(b) Succession Act (1925), S. 263—Proceedings for probate held not defective in substance.

When an application is made for revocation of a grant on the ground that the proceedings are defective in substance, the Court on a consideration of all the facts of the case will have to consider whether the proceedings are substantially defective. [P 237*e*]

The natural guardian and father of the minor was appointed guardian ad litem. He himself received the notice. There was no evidence to show that he was not looking after the interest of his own minor son. The mother of the minor was also served with a citation. She did not oppose the grant. The father who was a resident son-in-law and knew everything about the will and was one of the attesting witnesses to the will thought that he should not waste the minor's money in opposing the grant :

Held that the proceedings for obtaining probate were not defective in substance. [P 237*e*]

A. N. Basu and Chandra Sekhar Sen — for Appellant.

Jatindra Mohan Chowdhury, Apurba Charan Mukherjee, Bhupendra Narain Bera and Mohimamoy Mitra — for Respondents.

NASIM ALI J. — This is an appeal against an order of the District Judge of Howrah dismissing the appellant's application for revocation of the probate of a will. One Suroth Chandra Sadhu Khan of village Salikha in the District of Howrah died on 28th November 1922, leaving a widow Radharani, a daughter Panchumoni by his pre-deceased wife, a minor daughter's son Pasupati and four brothers. On 15th December 1922, three persons Surendra Mukherjee, Kalipada Bhattacharjee and Janaki Nath Mukherji filed an application in the Court of the Additional District Judge of Howrah for probate of a will of Suroth stating inter alia that the will was the last will of Suroth, that it was executed by him on 20th November 1922, and that by the will they were appointed executors. Thereupon special citation was issued to the widow, to the daughter and to the minor daughter's son through his father Kalipada Sadhukhan. There was no opposition to this application for probate, and probate was granted by the District Judge to the executors on 9th January 1923. On 12th March 1923, three of the four brothers of Suroth filed an application for revocation of this probate. On 22nd March 1923, one of the brothers filed an application before the Additional District Judge stating that he had come to learn that Suroth had duly executed the will and that he would not proceed with the application for revocation. On 9th May 1923, the other two brothers also stated before the District Judge that they would not proceed with the revocation case. The petition for revocation was accordingly dismissed on 12th May 1923. On 5th August 1924, Suroth's daughter Panchumoni for self and as guardian of her minor son Pashupati filed an application for revocation of the probate.

On 3rd November 1924, the said Panchumoni for self and as guardian of her minor son filed a petition before the District Judge stating that she did not want to proceed with the application for revocation. The revocation case was accordingly dismissed for non-prosecution on that date. On 6th July 1925, Radharani, the widow, brought a suit (Title Suit No. 138 of 1926) in the first Court of the Subordinate Judge at Howrah for the construction of her husband's will and for administration of the estate left by him against the executors, Panchumoni and certain other persons. In that suit a receiver to the estate left by Suroth was appointed on the application of the executors. On 20th July 1928, a preliminary decree in this suit was made and the executors were directed to render accounts. A commissioner was also appointed to ascertain the liabilities and assets of the estate. An appeal to this Court was preferred by the executors against this preliminary decree. During the pendency of this appeal, Radharani died and Panchumoni, her stepdaughter who was one of the defendants in this suit was substituted in her place. This appeal was dismissed. On 20th September 1932, this suit was finally decreed. There was an appeal (F.A. No. 163 of 1933) against this final decree to this Court. This appeal was compromised. In the year 1934, one Haradhon Dutt brought a suit in the first Court of the Subordinate Judge of Howrah against the executors, Panchumoni and the receiver appointed in the administration suit for enforcement of a mortgage bond executed by the executors in respect of some of the properties left by Suroth. On 1st February 1936, Pashupati filed an application in the Court of the Additional District Judge for revocation of the probate of the will left by Suroth. The grounds of revocation urged before the District Judge are these : (1) That the proceedings were defective in substance inasmuch as the guardian ad litem of Pashupati did not give his consent to his appointment as guardian ad litem. (2) That the will was a forged one. (3) That the executors omitted to exhibit inventory and accounts without reasonable

cause. The learned District Judge has arrived at the following findings :

(i) That in the probate proceedings the father and natural guardian of the applicant Pashupati who was a minor at the time was appointed guardian ad litem and that he consented to act as guardian of the minor and consequently the applicant was properly represented in the probate proceedings; (ii) that the applicant has failed to prove that the will is not genuine; and (iii) that no inventory and accounts were filed by the executors as required by law but this was not due to any wilful neglect on their part.

On these findings, the learned Judge has dismissed the application for revocation. Hence this appeal by Pashupati. The first point urged on behalf of the appellant in this appeal is that the proceedings for the grant of probate were defective in substance. The only ground on which the proceedings are attacked by the appellant is that his father did not give his consent to act as his guardian in the proceedings and consequently some other persons should have been appointed guardian to represent him in the proceedings. The provisions of O. 32, R. 4 (3), Civil P. C., are in these terms : "No person shall without his consent be appointed guardian for the suit." A non-contentious proceeding for probate is not a suit. Consequently, O. 32, R. 4 (3) does not in terms apply to a non-contentious probate proceeding. Mr. Bose appearing on behalf of the appellant relied on the following observations of Greaves and Newbould JJ. in 24 C. W. N. 538[1]:

"I am prepared to accept the contention of the learned vakil who appeared for the appellant that O. 32, R. 4 does not apply as the proceedings had not arrived at the contentious stage, but even so I think that it was for the person who got the guardian appointed to show the Court that that person assented to the guardianship and took upon himself the burden thereof. It seems to me that it is a necessary protection in the interest of an infant that not only should the Court be satisfied that a guardian has been appointed but that a guardian has been appointed who has consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the infant."

The learned advocate appearing for the respondents drew our attention to the following observations of Mukherji and Mitter JJ. in 35 C. W. N. 387[2]:

"In the Mofussil under the discretion which is vested by S. 283, Succession Act, citation is issued on an application for probate being filed, but the proceedings do not become contentious until they are opposed (S. 286 of this Act) and when there is contention the proceedings take the form of a regular suit to which the provisions of the Code of Civil Procedure apply. The case relied upon by the appellant therefore does not apply to non-contentious proceedings in this country and, as was pointed out by my learned brother in the course of argument, if this contention were accepted, it would revolutionize the law of procedure in probate proceedings in India and would convert every non-contentious proceeding into a contentious proceeding whenever one of the parties to be cited happens to be an infant."

1. ('20) 7 A. I. R. 1920 Cal. 630 : 59 I. C. 435 : 24 C. W. N. 538, Sachindra Narain Shah v. Hironmoyee Dassi.
2. ('31) 18 A. I. R. 1931 Cal. 713: 135 I. C. 282: 35 C. W. N. 387, Haimabati Mitra v. Kunja Mohan Das.

Under S. 263, Succession Act, the grant of a probate may be revoked if the proceedings to obtain a grant were defective in substance. When an application is made for revocation of a grant on the ground that the proceedings are defective in substance, the Court on a consideration of all the facts of the case will have to consider whether the proceedings are substantially defective. In this case, the natural guardian and father of the minor was appointed guardian ad litem. He himself received the notice. There is no evidence in this case to show that at that time, he was not looking after the interest of his own minor son. The mother of the minor was also served with a citation. She did not oppose the grant. Apparently, the father who was a resident son-in-law and knew everything about the will and was one of the attesting witnesses to the will thought that he should not waste the minor's money in opposing the grant. In view of the facts and circumstances of the case, I am not prepared to hold that the proceedings for obtaining probate were defective in substance. The only other point urged by Mr. Bose on behalf of the appellant is that grant ought to be revoked inasmuch as the executors did not file the inventory and accounts as required by law. The trial Judge has found that there was reasonable cause for their not filing the inventory and accounts. In view of the facts and circumstances disclosed in this case, we are not prepared to say that the view taken by the District Judge is wrong. The appeal accordingly fails and is dismissed with costs hearing fee two gold mohurs, to be divided equally between the two sets of respondents.

MOHAMAD AKRAM J. — I agree.

R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, O. 32 R. 3 N. 14 Pt. 2.
('41) Mulla, Page 1022 Pt. (k).

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LODGE AND PAL JJ.

Jugal Krishna Dey Sarkar—*Accused*—*Petitioner*

v.

Messrs. B. Wilcox Ltd. — *Complainant* — *Opposite Party.*

Criminal Revn. No. 628 of 1941, Decided on 24th July 1941.

Criminal P. C. (1898), Ss. 235, 233 — Three offences under S. 468, Penal Code, and one under S. 408, Penal Code, cannot be joined together.

Forging a document with the intention that the document so forged shall be used for the purpose of deceiving somebody and thereby inducing that person to part with property cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant. Therefore, the joinder of three charges under S. 468 with a charge under S. 408, Penal Code, cannot come within the provisions of S. 235, Criminal P. C., and is contrary to the direct provisions of S. 233, Criminal P. C. [P 238*h*; P 239*a*]

Suresh Ch. Talukdar — for Petitioner.

Probodh Chandra Chatterji and Mohendra Banerjee — for Opposite Party.

Hamidul Huq and Nirmal Kumar Sen — for the Crown.

LODGE J. — This rule was issued upon the Chief Presidency Magistrate and upon the complainant opposite party to show cause why the conviction and the sentence under S. 408, Penal Code, passed upon the petitioner should not be set aside. The case for the prosecution was as follows : The present petitioner was the chief shipping clerk of the complainant company. Under him were four jetty Sarkars. These jetty Sarkars were employed in clearing goods at the port. The petitioner used to advance money to the jetty Sarkars to enable them to clear the goods. For this purpose he used to draw money from time to time from the cashier of the complainant company on slips signed by him and countersigned by the Chief Accountant. At the end of each day, the jetty Sarkars would produce before the petitioner, the Port Commissioners' receipts for the money expended by them and slips containing an account of the day's expenditure. The jetty Sarkars used to enter their expenditure in a book known as Landing Register. At the end of each day, they made over to the petitioner the slips and the Port Commissioners' receipts, Landing Register and the balance of the money advanced to them. The accused prepared vouchers and at the end of each month submitted to the Chief Accountant the Port Commissioners' receipts and the vouchers prepared and had his accounts passed. The case for the prosecution is that in the month of December 1940 on different occasions, the details of which will be given later, the jetty Sarkars expended certain sums of money and obtained the Port Commissioners' receipts for that expenditure. They made over the receipts to the petitioner. The petitioner without interfering in any way with the statement in words of the amounts in the receipts added the figure 1 before the statement in figures of the amount in the receipts and then in his accounts showed the amount expended as the amount so altered by him. It is further alleged that during the month of December the sum of Rs. 8067 was drawn by the petitioner from the cashier for the purpose of expenditure on behalf of the firm and that out of this sum he misappropriated the sum of Rs. 400 during the month. The actual details of the alleged forgeries are as follows: On 18th December 1940 the amount actually spent by the jetty Sarkar and the amount for which Port Commissioner's receipt was obtained was Rupees 23-5-6. The accused forged this receipt by adding the figure 1 in front of Rs. 23-5-6 making the total in figure read Rs. 123-5-6. On 20th December 1940 the amount spent by the jetty Sarkar was Rupees 52-6-9 and the receipt obtained from the Port Commissioners was a receipt for this amount. The accused forged this receipt by making the amount in figures read Rupees 152-6-9. On 28th December 1940 the amount spent was Rs. 35. The accused forged the receipt in the same manner as in other cases making the amount in figures in the receipts read Rs. 135.

On these allegations the following charges were drawn up against the accused : (1) That you, on or about the 18th, 20th and 28th days respectively of December 1940 at Calcutta forged three documents to wit, three Port Commissioners' receipts of those dates intending that they should be used for the purpose of cheating and thereby committed three offences punishable under S. 468, Penal Code, and within my cognizance. (2) That you, between 2nd December 1940 to 30th December 1940 being a servant in the employment of Messrs. Babcock Wilcox Ltd., and in such capacity entrusted with certain property, to wit, Rs. 8067 committed criminal breach of trust with respect to Rs. 400 out of the said property entrusted to you and thereby committed an offence punishable under S. 408, Penal Code, and within my cognizance."

The petitioner was tried by a Presidency Magistrate of Calcutta. The learned Presidency Magistrate found that there was no sufficient evidence to prove that it was the petitioner who committed the forgery and he accordingly acquitted the petitioner of the charges under S. 468, Penal Code. He found the petitioner guilty on the charge under S. 408, Penal Code, and sentenced him under that section to undergo five months rigorous imprisonment and to pay a fine of Rs. 100 and in default to undergo further rigorous imprisonment of one month. The amount of fine, if realised, was to be paid to the complainant company as compensation. This rule was issued on two grounds only. The chief ground is as follows:—"For that the trial has been vitiated by misjoinder of charges. The conviction and sentences are accordingly illegal."

It was conceded during the argument before us that the first of the charges set out above really amounts to three separate charges and must be treated for our present purposes as though three separate charges under S. 468, Penal Code, had been framed. It is clear that the joinder of three charges under S. 468 is permitted by S. 234, Criminal P. C., if no other charges are also joined with those charges. The question before us is whether the joinder of three separate charges under S. 468, Penal Code, with the charge under S. 408, Penal Code, is sanctioned by S. 235, Criminal P. C. Before dealing with this question, it is necessary to refer to an argument which was placed before us regarding the charges under S. 468, Penal Code. It was urged on behalf of the Crown that the charges under S. 468, Penal Code, were mistaken, that in fact the forgery was not committed for the purpose of cheating but it was committed for the purpose of facilitating the commission of the offence under S. 408, Penal Code, or covering up that offence after it had been committed. We were asked to treat the charges as charges which were understood by the parties to be charges not of forgery with intent to cheat but of forgery to facilitate or cover up the offence of breach of trust by a servant. In our opinion, we are not entitled to accept this view. It is not merely a case in which the section has been wrongly entered in the charge but the whole description of the offence given in the charge is a description of an offence under S. 468, Penal Code. The allegations are that on three separate dates three separate documents were forged with the intention that they should be used for the purpose of cheating. By no stretch of imagination can it be held that these are proper charges in a case either of falsification of accounts or of forgery to cover up a case of criminal breach of trust. In our opinion, we must take the charges as they were framed and consider the legality of trying in one trial a person on three charges under S. 468 and one charge under S. 408, Penal Code. It is at once obvious that the offence of forging a document for the purpose of cheating, that is to say, forging a document with the intention that the document so forged shall be used for the purpose of deceiving somebody and thereby inducing that person to part with property cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant. On the face of it therefore, the joinder of three charges under S. 468 with a charge under S. 408, Penal Code, cannot come within the provisions of S. 235, Criminal P. C. It may be noted

that the Crown does not urge that the cheating a contemplated in S. 468, Penal Code, consisted in inducing anybody to do or omit to do some thing which he would not do or omit if he were not so deceived; i. e., cheating as contemplated by the second half of the definition of S. 415, Penal Code. Since the joinder of charges in this case is not sanctioned by S. 235, Criminal P. C.—and it is not suggested that it was sanctioned by any other section of that Code—the joinder is contrary to the direct provisions of S. 233 of that Code.

In the circumstances we must hold that the trial was vitiated by misjoinder of charges and consequently the conviction and the sentence cannot be upheld. The rule is accordingly made absolute, the conviction and the sentence passed upon the petitioner are set aside and the case is remanded to the lower Court for disposal according to law on charges properly framed. The re-trial will be held by some b Magistrate other than the Magistrate against whose order this rule was issued. The petitioner will be released on bail, pending the re-trial of his case before the lower Court, to the satisfaction of that Court.

PAL J. — I agree.

R.K. *Rule made absolute.*

Cr. P. C. —
('41) Chitaley, S. 235, N. 2 Pt. 25.
('41) Mitra, Page 825 Para. 758.

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BARTLEY AND LODGE JJ.

Abu Pramanik and others — Appellants

c v.

Emperor.

Criminal Appeal No. 529 of 1940, Decided on 3rd January 1941.

(a) Criminal P. C. (1898), S. 297 — Jury trial — Question whether case was of suicide or homicide — Law applicable—Charge to jury — Explanation of Ss. 299, 300 and 34, Penal Code — Charge held sufficient and proper.

The question before the jury was whether the injury to the deceased was homicidal or suicidal and whether if it was homicidal the accused or any of them were guilty of murder. In dealing with the charge so far as the law applicable was concerned, the Judge explained Ss. 299 and 300, Penal Code, to the jury and pointed out that although there was d a keen contest as to whether the case was one of suicide or homicide it had not been disputed that the intention was to cause death and that if it was a case of homicide undoubtedly murder had been committed. With regard to S. 34, Penal Code, he said that that section prescribed the principle of joint liability. He then adverted to the evidence which was that three of the accused had held the woman while the fourth man cut her throat and he said that if a criminal act was done by several persons in furtherance of the common intention of all, each of those persons was liable for that act in the same manner as if it was done by him alone. As the purpose is common so must be the responsibility :

Held that the explanation of the law, on the evidence in the particular case, was a sufficient and proper direction to the jury and that the direction with regard to the essential elements of S. 34, Penal Code, was both correct and sufficient. [P 240*e*]

(b) Criminal P. C. (1898), S. 297 — Jury trial — Injury whether suicidal or homicidal — In e **explaining question to jury Judge can refer to standard book — Such reference does not amount to misdirection.**

Where in a jury trial the question before the jury is whether the injury caused to the deceased is suicidal or homicidal, it is competent for the Judge while explaining the circumstances which militate against both the theories, to refer to a standard book on Medical Jurisprudence. Such reference does not amount to misdirection. [P 240*e*,*g*]

(c) Criminal trial—Evidence—Expert witness — Weight to be attached to testimony of.

Great weight should undoubtedly be attached to the testimony of an expert witness such as a doctor but his opinion may be discarded if there are good grounds for doing so. [P 240*f*]

(d) Criminal P. C. (1898), S. 297 — Question f **before jury whether case suicidal or homicidal — While dealing with approver's evidence Judge pointing out that if dao found in deceased's hut belonged to accused and not to deceased, approver's evidence was amply corroborated — Direction held perfectly correct.**

The question before the jury was whether the case before it was of suicide or homicide. While dealing with the approver's evidence, the Judge referred to the important fact that according to the prosecution case the dao which was found in the hut of the deceased actually belonged to the accused while the dao produced by the approver and which according to him had been taken away by the murderers after the occurrence belonged to the deceased. The charge to the jury on this point was criticised on the ground that the Judge told the jury that if they believed that the dao belonged to g the accused the approver's evidence was amply corroborated :

Held that there was nothing inappropriate in the use of the adjective "corroborated" in the charge. If the jury did accept the prosecution case that the dao found near the deceased belonged to the accused and not to the deceased it was certainly very strong evidence that the death was homicidal and not suicidal and the Judge was perfectly correct when he stressed its importance before the jury. [P 241*a*]

Jitendra Nath Banerji and Nirmal Kumar Sen — for Appellants.

Bireswar Chatterji — for the Crown.

BARTLEY J. — The appellants in this case were tried by the learned Sessions Judge of Pabna and Bogra on a charge framed under S. 302/34, Penal Code. The jury by a majority of 5/4 found h them all guilty under that section and the learned Judge in accordance with that verdict sentenced them to transportation for life. The case for the prosecution briefly was that these four appellants and another man Mahiruddin Fakir who has been examined as an approver in the case murdered one Kusumbala wife of Sasadhar Das on the night of 31st January 1940. It was the case for the prosecution that the appellant Abu was on bad terms with Sasadhar Das and that at the time of the occurrence there was a criminal case pending against Abu which Sasadhar Das was conducting on behalf of the prosecution. This case was actually fixed for 1st February 1940 and Sasadhar Das left home in connection with it on the afternoon of the murder. The story is that on that night the deceased woman was sleeping in a hut with a girl called Nanibala who was about eight years of age. The four appel-

lants and the approver came into the hut that night and three of them seized the woman and held her down while the appellant Abu slashed her across the neck with a dao. The deceased woman attempted to resist and produced a dao from under her pillow with which she cut the appellant Arikulla on the left thumb. The appellants then removed her body from the chouki on which she was lying, laid her on the ground on her back, covered her with a quilt and ran away. Nanibala raised an alarm and her father, Sasadhar's mother and other witnesses came up.

Information was lodged to the thana on the next day at 12 o'clock. The body was sent for post mortem examination and the Civil Surgeon found two injuries on the neck. One of these was a superficial wound in front of pomum adami vertical in character and about 1″ long and joining the oblique wound. The other which was the fatal injury was an incised wound running from below the lobe of left ear and extending obliquely down and forwards to about ½″ below and to the right of pomum adami cutting lower edge of Hyoid bone and thyroid cartilage and the left juglar vein was severed. The lower end of the wound is bifurcated. The opinion of the doctor was that both these injuries were suicidal and to that opinion he adhered when giving evidence in Court. He admitted however that it was possible that the fatal injury might have been homicidal injury.

The appellants Abu and Abbas were arrested on 4th February and the approver on the 6th. The latter produced a dao from his house. The prosecution case was that this was the dao which belonged to the deceased woman and which the appellants had taken away from her house in mistake for the dao which belonged to Abu. There was a test identification held in Bogra jail at which the appellants Abbas and Arikulla were identified by the witness Nanibala. The defence of the accused was that the deceased woman had actually committed suicide and it was suggested that Sasadhar Das her husband took advantage of it to implicate the accused because they were his enemies. In addition to the evidence of the approver, there was the direct testimony of the girl Nanibala who said that there was a lantern burning in the room and that she saw five men there among whom she named two and subsequently identified Abbas and Arikulla. It is not of course disputed that the death of Kusumbala was due to the injury to the throat and the neck and the two main questions before the jury were, first, as to whether that injury was homicidal or suicidal and secondly whether if it was homicidal the appellants or any of them were guilty of murder.

Various criticisms have been levelled at the charge delivered to the jury by the learned Judge. It is contended in the first place that his directions on the law applicable to the case were insufficient. Now, in dealing with the charge, he explained Ss. 299 and 300, Penal Code, to the jury. He said quite correctly that although there was a keen contest as to whether this was a case of suicide or homicide it has not been disputed that the intention was to cause death. He went on quite correctly to say that if it was a case of homicide undoubtedly murder had been committed. There is nothing inadequate or incorrect in this explanation of the law and it was on the evidence in the particular case a sufficient and proper direction to the jury. With regard to S. 34, Penal Code, he said that that section prescribed the principle of joint liability. He then adverted to the evidence which was that three of the accused had held the woman while the fourth man cut her throat and he said that if a criminal act was done by several persons in furtherance of the common intention of all each of these persons was liable for that act in the same manner as if it was done by him alone. As the purpose is common so must be the responsibility. We are quite satisfied that upon the evidence in the case this direction with regard to the essential elements of S. 34, Penal Code, was both correct and sufficient.

The charge of the learned Judge has further been criticised on the ground that it was incorrect for him to refer as he did do to Lyon's Medical Jurisprudence when dealing with the question whether the injury was homicidal or suicidal. In the first place it was certainly competent for the learned Judge to refer to a standard text book when a question such as that which had to be decided by the jury in the present case was being discussed. Secondly, we have considered carefully the charge actually delivered by the learned Judge on this aspect of the case and we are satisfied that it was full and fair and that the evidence in support of both the theories was placed before the jury completely and impartially. The learned Judge began by pointing out that in the opinion of the doctor the injuries were suicidal and he then summarized the reasons which the doctor gave for that opinion. He told the jury that the testimony of the doctor was that of an expert and that great weight should undoubtedly be attached to it. He went on to say quite correctly that they might discard that opinion if they found that there were good grounds for doing so. He then put in detail to the jury the points in the evidence which were consistent with the theory of suicide and his comment on that aspect of the case further was that the doctor did not have before him the entire evidence adduced in the case and that it was the duty of the jury to consider that entire evidence and then decide which theory they should accept. He made it perfectly clear to the jury that if they found that it was a case of suicide the accused must be acquitted or that if there was reasonable doubt as to whether it was suicide or homicide the duty of the jury was also to acquit them. He then went on to point out the circumstances which militate against both the theories and in doing so he made certain references to Lyon's Medical Jurisprudence. As has already been said he was certainly entitled to refer to this book and we are unable to hold that in so doing he can be held to have misdirected the jury. The charge contains a very full and complete summary of all the evidence on the question whether the injury was homicidal or suicidal and we are satisfied that that aspect of the case was put to the jury correctly and completely. The learned Judge went on to say that if the jury found that the injury was not suicidal but homicidal the crucial point for determination was whether it was the accused who participated in the act of killing. He then discussed the evidence of the solitary eye-witness the girl Nanibala who was about 10 years of age. He warned the jury that young girls were impressionable and liable to be easily tutored and that therefore they should treat her evidence with extreme caution. He pointed out the discrepancies in her various statements and emphasized that she did not disclose at once either the details of the assault or that she had recognized any of the assailants.

The learned Judge then dealt with the evidence of the approver. He gave all the necessary warnings to the jury as to the manner in which they should treat this evidence and he pointed out that there

were certain aspects of the story told by him which a it was very difficult to accept. He then went on to deal with the question of corroboration of the approver and in this connexion referred to the evidence of the other witnesses and to the injury on the left thumb of the appellant Arikulla and to the important fact that according to the prosecution case the dao which was found in the hut of the woman actually belonged to the appellant Abu while the dao produced by the approver and which according to him had been taken away by the murderers after the occurrence belonged to the deceased woman Kusumbala. His charge on this point was criticized on the ground that he told the jury that if they believed that the dao belonged to Abu the approver's evidence was amply corroborated. We are quite unable to say that there was anything inappropriate in the use of this adjective. If the jury did accept the prosecution case that the dao b found near the deceased woman belonged to the appellant Abu and not to her it was certainly very strong evidence that the death was homicidal and not suicidal and the Judge was perfectly correct when he stressed its importance before the jury.

On careful consideration of the whole charge delivered by the learned Judge and of the argument advanced on behalf of the appellants, we are satisfied that in the present case there is no misdirection and no material non-direction which could possibly warrant any interference with the majority verdict of the jury. In our opinion that verdict must be sustained and this appeal must be dismissed.

LODGE J. — I agree.

G.N./R.K. *Appeal dismissed.*

Cr. P. C. — c
(a) ('41) Chitaley, S. 297, N. 9 Pts. 3, 7, 9, 10.
('41) Mitra, Page 1017 N. 914.
(b) ('41) Chitaley, S 297, N. 11 Pt. 28.
('41) Mitra, Page 1018 N. 914 and N. 915.
(c) ('41) Chitaley, S. 367, Note 6 Pts. 16, 17.
('41) Mitra, Page 1646 N. 1327.
(d) ('41) Chitaley, S. 297, N. 9 Pt. 27.
('41) Mitra, Pages 1021-24 N. 915.

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B. K. MUKHERJEA AND ROXBURGH JJ.

Aniruddha Mitra — Insolvent
— Appellant

v.

Official Receiver, Alipur Judge's Court, d
24-Parganas, and others —
Respondents.

Appeal No. 317 of 1939 (F. M. A.), Decided on 27th August 1941, from original order of Dist. Judge, 24-Parganas at Alipur, D/- 4th July 1939.

(a) Provincial Insolvency Act (1920), S. 75 (2) — "Person aggrieved"—Meaning explained — Person given maintenance under his father's will — Mortgage of such rights and insolvency — Official Receiver challenging mortgages — Decision of lower Court that mortgages not invalid — Debtor held "aggrieved person" and entitled to appeal.

Section 75 expressly mentions the 'debtor' as a person competent to appeal but he can appeal only if he is aggrieved by the order of the District Judge and not otherwise. A person aggrieved must be a person who had suffered a legal grievance ; the act or decision complained of must have deprived him of something to which he was lawfully entitled or e he must be refused something which he had a right to demand. The words do not mean a man who is disappointed of a benefit, which he might have received if some other order had been passed: (1880) 14 Ch. D. 458; (1879) 10 Ch. D. 434; (1879) 10 Ch. D. 388 ; ('26) 13 A. I. R. 1926 Mad. 556 (F. B.) and ('19) 6 A. I. R. 1919 All. 284, *Rel. on.* [P 242*d*,*e*]

A person who had a right to receive monthly maintenance allowance, which was provided by his father in a will, mortgaged that right. He was later adjudicated an insolvent. The Official Receiver started proceedings under S. 53 for declaration that the mortgages were illegal. The Court decided the point in favour of the mortgagee. The debtor sought to appeal from that order :

Held that a question was raised which was of vital importance to the insolvent, viz., to what f extent the monthly allowances, to which he was entitled under his father's will would vest in the receiver under S. 28, Provincial Insolvency Act, and that the insolvent could be said to be a party aggrieved by the order of the District Judge and was entitled to appeal. In any event an appeal would lie with the leave of the High Court ; and the Court would be prepared to grant such leave, if it was necessary. [P 243*a*]

(b) Transfer of Property Act (1882), S. 6 (dd) — Annuity or future maintenance — Person disinherited by his father but given monthly maintenance allowance by will of his father — It is right to maintenance and monies not accrued due cannot be transferred.

There is a distinction between a maintenance allowance and an annuity ; and whether an allowance is the one or the other may depend upon the g facts of each case : ('24) 11 A. I. R. 1924 Mad. 22 (F. B.) ; ('29) 16 A. I. R. 1929 All. 281 and 12 C. L. J. 146, *Rel. on.* [P 243*e*,*f*]

The testator had vast properties and he practically disinherited his son, giving him only so much as was necessary for his maintenance :

Held that it was a maintenance grant and the monies not accrued due could not be transferred. [P 243*f*,*g*]

(c) Provincial Insolvency Act (1920), S. 28 — Insolvent's right to receive maintenance under will — Monies accrued due vest in receiver — Insolvent can apply to Court for giving him allowance out of such money.

Where the insolvent has a right to receive maintenance allowance under a will the monies as they accrued due would undoubtedly come to the receiver till the insolvent gets his discharge. It would be certainly open to the insolvency Court to attach a condition to the order of discharge that the insolvent would subscribe some part of his allowance for the benefit of his creditors. It will be open to the insolvent to apply to the insolvency Court for giving him such allowance for the support of himself or his family as the Court considers proper. [P 243*g*]

Sitaram Banerjee, Diptendra Mohan Ghose and M. M. Asir — for Appellant.

Amarendra Nath Bose, S. N. Banerjee (Sr.), Radhika Ranjan Guha, S. Banerji (Jr.), Hemanta Kr. Bose and Amiya Ranjan Roy Choudhury — for Respondents.

B. K. MUKHERJEA J.—This appeal is directed against a judgment of the District Judge, 24 Par-

ganas dated 4th July 1939 passed in exercise of insolvency jurisdiction, in a proceeding under Ss. 4 and 53, Provincial Insolvency Act. The material facts are not in controversy and may be shortly stated as follows : Rai Behari Lal Mitter Bahadur, the father of the appellant, was a wealthy resident of this city, and he died on 7th February 1933 leaving behind him a will which was executed on 5th July 1932. Under this will, the appellant Aniruddha, who was the only son of the testator, was given nothing else, but an allowance of Rs. 700 per month for his maintenance during the period of his natural life. Similar allowances were given to the wife and daughter-in-law of the testator, and after giving a large annuity to the University of Calcutta, the will directed that the residue of the estate was to go to the son or sons of Aniruddha, either natural born or adopted when they would arrive at the age of 21. Failing such sons, the entire estate would go to the University of Calcutta, to be applied for certain purposes specified in the will. Aniruddha, it appears, led a very fast life, and incurred debts to a considerable extent soon after his father's death. On 5th May 1934, he executed a mortgage in favour of respondent 3 by which he hypothecated his right to a portion of his maintenance allowance given to him by his father's will amounting to Rs. 450 a month as security for an advance of Rs. 17,000 only. On 12th September 1934 he created another mortgage in favour of respondent 2 by which, to secure a loan of Rs 28,000, he mortgaged, amongst other properties, his right to the balance of the maintenance allowance.

On 11th May 1936, he filed a petition for insolvency, and the adjudication order was made on 24th of August following. On 20th February 1939, the Official Receiver in whom the estate of the insolvent vested, started a proceeding under Ss. 4 and 53, Provincial Insolvency Act, for a declaration that the two mortgages mentioned above were illegal and void and were liable to be annulled inter alia on the ground that a right to future maintenance was not alienable in law under S. 6 (dd), T. P. Act. An issue was raised on this point, which was heard as a preliminary issue by a District Judge and by his order dated 4th July 1931, the learned Judge decided this point in favour of the mortgagees and held that the transfers in dispute did not come within the mischief of S. 6 (dd), T. P. Act. This order was not challenged by the receiver, but the insolvent has come up against it by way of appeal to this Court. A preliminary objection has been raised on behalf of respondents 2 and 3, that no appeal lies against the order of the District Judge at the instance of the insolvent who can have no locus standi in a proceeding under S. 4 or S. 53, Provincial Insolvency Act. Under S. 75 (2), Provincial Insolvency Act, the debtor, any creditor, the receiver or any other person aggrieved by a decision or order of a District Court as is specified in Schedule 1, come to or made otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court. The order complained of, undoubtedly decided a question of title under S. 4, Provincial Insolvency Act, and hence comes within the category of appealable orders, as enumerated in Sch. 1 to the Act. Section 75 expressly mentions the 'debtor' as a person competent to appeal, though it is well settled that he can appeal only if he is aggrieved by the order of the District Judge and not otherwise.

The whole point for our consideration, therefore, is whether the insolvent can be said to be lawfully aggrieved by the order of the District Judge against which this appeal is directed. The meaning to be given to the words "person aggrieved" in connexion with administration of Bankruptcy laws has been discussed in several cases both in England and India. One of the leading cases on this point is (1880) 14 Ch. D. 458.[1] It was held there by James L. J. that a person aggrieved must be a person who had suffered a legal grievance; the act or decision complained of must have deprived him of something to which he was lawfully entitled or he must be refused something which he had a right to demand. The words do not mean a man who is disappointed of a benefit, which he might have received if some other order had been passed. Thus, although an insolvent is entitled to the surplus that remains after the sale of his properties, yet it is not a legal right but a mere hope or expectation; and enormous mischief would result if a bankrupt was allowed to interfere with the administration of his estate on the contingent chance of acquiring more surplus : *vide* (1879) 10 Ch. D. 434;[2] (1879) 10 Ch. D. 388.[3] In the last-mentioned case the bankrupt after his discharge applied under S. 39, Solicitor's Act, for taxation of a bill of costs to be paid by the trustee in bankruptcy to the solicitor of a mortgagee of the bankrupt. It was held by Sir George Jessel that the bankrupt was not a person interested in the property within the meaning of S. 39, Solicitor's Act. These cases have been followed in India, and reference may be made amongst others to the decisions in 49 Mad. 461[4] and 41 All. 243.[5]

It has been argued by the mortgagees in the present case, that as under S. 28, Provincial Insolvency Act, all the properties of the insolvent vested in the receiver, the insolvent could not be said to be legally interested in the result of a proceeding under S. 4, Provincial Insolvency Act. The argument indeed is perfectly sound, for the insolvent cannot have any locus standi in a dispute between the receiver on the one hand, and the transferees on the other, and he cannot be heard to say that if the transfers were annulled and the properties applied for the benefit of the general creditors, he would have had a chance of obtaining a larger surplus, after the insolvency proceedings were at an end. The position which the insolvent takes up in the present case is, however, entirely different. What he says is this: that if the decision of the Court below had been otherwise and the right to the monthly allowances, that had not accrued due already was held to be inassignable in law, then not only would the mortgages be rendered inoperative but all future allowances as would be payable to him after he obtains his discharge would not vest in the receiver at all under S. 28 (5), Provincial Insolvency Act. The receiver himself would not be entitled to sell the insolvent's right to future maintenance for the benefit of his creditors, such rights being unattachable under S. 60 (1) (n), Civil P.C. This is not really hampering the administration of his estate on the off-chance of obtaining a

1. (1880) 14 Ch. D. 458 : 49 L.J.Bk. 41 : 42 L.T. 783 : 28 W. R. 715, Ex parte Sidebotham; In re Sidebotham.
2. (1879) 10 Ch. D. 434 : 40 L. T. 15 : 27 W. R. 622, Ex parte Sheffield; In re Austin.
3. (1879) 10 Ch. D. 388 : 48 L.J.Ch. 242 : 39 L.T. 286 : 27 W.R. 267, In re Leadbitter.
4. ('26) 13 A.I.R. 1926 Mad. 556 : 94 I.C. 642 : 49 Mad. 461 : 50 M. L. J. 359 (F.B.), Hari Rao v. Official Assignee of Madras.
5. ('19) 6 A. I. R. 1919 All. 284 : 49 I. C. 816 : 41 All. 243 : 17 A. L. J. 229, Sakhawat Ali v. Radha Mohan.

surplus. A question is raised which is of vital importance to the insolvent, viz., to what extent the monthly allowances, to which he is entitled under his father's will would vest in the receiver under S. 28, Provincial Insolvency Act. We think that in these circumstances the insolvent can be said to be a party aggrieved by the order of the District Judge, and this appeal cannot be thrown out on the preliminary point. In any event, an appeal would lie with the leave of this Court; and we would be prepared to grant such leave, if it was necessary.

Coming now to the merits of the appeal, the question that requires consideration is as to whether the insolvent's right to the monthly allowance of Rs. 700 under the will of his father as had not accrued due already, could be assigned by way of mortgage, in view of the provisions of S. 6 (dd), T. P. Act. The Court below is of opinion that the amount payable to the insolvent under his father's will was in the nature of an annuity, not of future maintenance, within the meaning of S. 6 (dd), T. P. Act, and in support of this reliance has been placed on a decision of Sale J. in 10 C. W. N. 1102.[6] In that case a question arose as to whether a certain sum of money payable to the applicants as monthly allowances under the will of their maternal grand father could be attached under a prohibitory order. Sale J. answered this question in the affirmative and held that Section 266, Civil Procedure Code, (which corresponds to S. 60 (1) (n) of the present Code) was not applicable to a grant of this description. "The gift in question" so runs the judgment "was a gift to the sons of the daughter of the testator and is described in the will as a monthly allowance, and is treated as such in the proceedings in suit. They are not in any sense monies given to the applicants by virtue of any right to maintenance the applicant possessed. It was simply a gift made by the testator in their favour from the testator's bounty and therefore they must be taken as annuities which the applicants are entitled to deal with by way of charge, transfer or assignment and as such are attachable under S. 266."

According to this view, the right to maintenance in order to be unassignable in law must be based on the personal law of the parties, or the relationship between the grantor and the grantee; and unless the grantee has a legal right to be maintained by the grantor according to the personal law by which they are governed, right to such maintenance can be transferred. The result is that where the allowance is given as a matter of favour out of the bounty of the grantor, or is the result of a contractual agreement between the parties, the provision of S. 6 (dd) T. P. Act, would not apply. In our opinion, this would be attaching a very much restricted meaning to the plain words of the section. The policy of the law undoubtedly is to interdict alienation, of what is intended to be given for the personal enjoyment of the grantee. It is not proper that in such cases the grantee should starve whereas the property which was intended to be enjoyed by him personally should be held by a stranger.

But we cannot say that there could not be a maintenance grant unless there was an antecedent obligation on the grantor to maintain the grantee under the personal law of the parties. Whatever doubts might have existed on this point are now removed by the clear words of S. 6 (dd), T. P. Act, (which was introduced by the amending Act of 1929) which says that a right to future maintenance in whatsoever manner arising, secured or determined cannot be transferred. If the right is only to arise under settled personal laws, these words would be altogether unnecessary. The expression "in whatsoever manner arising" certainly refers to the way in which the right is created and not merely evidenced. This view is supported by the decision of the Privy Council in 41 C.L.J. 383.[7] In this case certain villages had been conveyed to a judgment-debtor without power of transfer during the life-time of the grantor in order that he should possess and enjoy the same thereof in lieu of maintenance. It was held by their Lordships of the Judicial Committee that the debtors' interest was neither attachable nor saleable under S. 60 (1) (n), Civil P. C. This decision was in 1925 and cl. (dd) of S. 6, T. P. Act, which was introduced in 1929 was quite in conformity with this decision. It is true that there is a distinction between a maintenance allowance and an annuity; and whether an allowance is the one or the other may depend upon the facts of each case : *vide* 46 Mad. 659;[8] 51 All. 612;[9] 12 C. L. J. 146.[10] In the present case, we have no doubt that the sum of Rs. 700 a month which was given to the appellant was nothing else but a maintenance grant. The testator had vast properties and he practically disinherited his son, giving him only so much as was necessary for his maintenance. The provisions for maintenance of the testator's wife and daughter-in-law occur in the same paragraph, and are couched in identical language. The appellant, it appears, was an adopted son of the testator, and the testator might have thought that even though he was disinheriting his adopted son he had a moral duty to maintain him.

Our conclusion therefore is that the right of the insolvent to the allowance of Rs. 700 a month was a right to maintenance, and the monies that had not accrued due at the date of transfer, were not assignable in law. The mortgages therefore must be held to be inoperative. The monies as they accrued due would undoubtedly come to the receiver till the insolvent gets his discharge. It would be certainly open to the insolvency Court to attach a condition to the order of discharge that the insolvent would subscribe some part of his allowance for the benefit of his creditors. The appeal is thus allowed and the order of the District Judge is set aside. There will be no order as to costs. It will be open to the insolvent, if he is so advised, to apply to the Insolvency Court for giving him such allowance for the support of himself or his family as the Court considers proper. It will also be open to the mortgagees to surrender their securities and rank as ordinary creditors.

ROXBURGH J. — I agree.

K.S./R.K. *Appeal allowed.*

6. ('06) 10 C. W. N. 1102, Gopal Lal Seal v. F. J. Marsden.

7. ('25) 12 A. I. R. 1925 P. C. 176: 87 I. C. 295: 47 All. 385: 52 I. A. 262: 41 C. L. J. 383 (P.C.), Rajendra Narain Singh v. Mt. Sundar Bibi.

8. ('24) 11 A. I. R 1924 Mad. 22: 73 I. C. 584: 46 Mad. 659: 45 M. L. J. 533 (F.B.), Subraya v. Krishna.

9. ('29) 16 A. I. R. 1929 All. 281: 116 I. C. 855: 51 All. 612: 1929 A. L. J. 367, Altap Begam v. Brij Narain.

10. ('10) 12 C. L. J. 146: 7 I. C. 80, Tara Sundari Debi v. Sarada Charan.

T. P. Act —

(b) ('36) Mulla, Page 61 Pt. (v).
('34) Mitra, Page 50 Note 53.

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** A. I. R. (29) 1942 Calcutta 244
FULL BENCH

DERBYSHIRE C. J., BARTLEY, NASIM ALI, LODGE AND PAL JJ.

Hem Chandra Banerji — *Second Party* —*Petitioner*

v.

Abdur Rahaman — *First Party*— *Opposite Party.*

Full Bench Reference No. 1 in Criminal Revn. Case No. 763 of 1941, Decided on 16th January 1942.

** Criminal P. C. (1898, after amendment of 1923), S. 147 (2) — Scope — Magistrate has no power to pass order directing removal of existing obstruction: ('33) 20 A.I.R. 1933 Cal. 752=146 I. C. 223 and I. L. R. (1940) 1 Cal. 468=('40) 27 A.I.R. 1940 Cal. 545=191 I.C. 171, *OVERRULED.*

It is one thing to make an order prohibiting the doing of an act; it is another to order the doing of an act. Sub-section (2) of S. 147 allows the former, but it does not allow the latter. Therefore, a Magistrate, acting under the powers conferred by sub-s. (2) of S. 147 has no power to issue a mandatory injunction directing the removal of an existing obstruction: ('25) 12 A.I.R. 1925 Cal. 991; ('34) 21 A.I.R. 1934 Cal 556 and ('37) 24 A. I. R. 1937 Cal. 513, *Approved;* ('33) 20 A. I. R. 1933 Cal. 752=146 I. C. 223 and I. L. R. (1940) 1 Cal. 468=('40) 27 A.I.R. 1940 Cal. 545=191 I. C. 171, *OVERRULED.*

[P 245*a*,*b*]

Nirmal Chandra Chakravarti and Rama Prasanna Bagchi — for Petitioner.

Suresh Chandra Taluqdar, Biswa Nath Dhur, N. C. Taluqdar and S. C. Majumdar— for Opposite Party.

DERBYSHIRE C. J.—This matter was referred for the decision of the Full Bench by a Division Bench consisting of Bartley, J., and Lodge, J. in these terms:

"This rule was issued on the District Magistrate of Faridpur and the opposite party to show cause why an order made under S. 147 (2), Criminal P. C., should not be set aside. The facts are that a path leading from the house of Abdur Rahaman Mulla, the opposite party, to the public road passed over the lands of the petitioner, Hem Ch. Banerji. The opposite party claimed a right of public user over this path; petitioner objected, and finally closed the path by erecting a stable on it. Proceedings were taken under S. 147, Criminal P. C., with the result that the Magistrate made the following order:

"Thus I order that Abdur Rahaman and his family may use the path, and Hem Ch. Banerji is prohibited to make any interference with the exercise of a right of way of Abdur Rahaman and his family. He is further ordered to remove the stable from the path."

It is to the last sentence of the order that exception has been taken, and the point argued in connexion with it is that no such mandatory order can be made under S. 147 (2), Criminal P. C. The wording of that section is "if it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

The question for decision is whether these words can be construed as empowering a Magistrate to order the removal of an existing interference with the right in question. Reported decisions of this Court on the point are in direct conflict. "Under the law as it was before the amendment of the Code of Criminal Procedure, a Magistrate was empowered to make an order permitting such thing to be done, or directing that such thing shall not be done."

It was held in three cases decided before the amendment, 5 C. W. N. 67,[1] 5 C. W. N. 335[2] and 39 Cal. 560,[3] that these words covered an order to remove an existing obstruction. After the amendment of the Procedure Code in 1923, however, it was held, in 30 C.W.N. 238,[4] that the change in the language of S. 147 resulted in the position that the Magistrate no longer had any power to direct one of the parties to do a positive act, which was in the particular case, to demolish a wall. The Hon'ble Judges, Newbould and B. B. Ghose, held that the power given to a Magistrate under S. 147 (2), Criminal P. C., as amended, was analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but did not authorise an order in the nature of a mandatory injunction directing a party to perform a certain act.

This interpretation of the section was adopted by another Division Bench of the Court in 38 C.W.N. 476.[5] In a later case, 41 C. W. N. 900,[6] the point was tersely settled in two sentences:

"The first objection taken is to this mandatory injunction. There is nothing in S. 147 which would entitle the Magistrate to direct the petitioner to pull down this wall."

The contrary view has, however, been taken in at least two cases decided by Division Benches of the Court. The earlier is 146 I.C. 223,[7] in which it was held that an order directing the removal of an obstruction was within the scope of S. 147 (2), Criminal P. C., though it was there pointed out that such an order was not strictly in the terms of the section. The later case, which also appears to be the last reported decision on the point, is 44 C. W. N. 368.[8] In that case the Bench approved of the decision of a single Judge of the Madras High Court, in which he held that the amendment of S. 147 had no effect on the powers of a Magistrate to direct the removal of an obstruction, and said that they "prefer to follow the decisions in which it has been held that S. 147 does, in a proper case, empower a Magistrate to order a person to do something, or in other words, to direct a mandatory injunction."

We find it difficult to hold that the words "prohibit" and "remove" can be construed to mean the same thing, and incline to the view that if the Legislature had intended to give powers to direct

1. ('01) 28 Cal. 734 : 5 C. W. N. 67, Pasupati Nath Bose v. Nando Lal Bose.
2. (1900) 5 C. W. N. 335, Lalit Chandra Neogi v. Tarini Prosad Gupta.
3. ('12) 39 Cal. 560 : 18 I. C. 1000 : 13 Cr. L. J. 184, Ambica Prosad Singh v. Gur Sahay Singh.
4. ('25) 12 A. I. R. 1925 Cal. 991 : 88 I. C. 1041 : 26 Cr. L. J. 1265 : 41 C. L. J. 568 : 30 C. W. N. 238, Hari Mati Dasi v. Hari Dasi Dasi.
5. ('34) 21 A.I.R. 1934 Cal. 556 : 150 I.C. 600 : 35 Cr.L. J. 1093 : 38 C. W. N. 476, Tarini Mohan De v. Dwarka Nath.
6. ('37) 24 A.I.R. 1937 Cal. 513 : 171 I. C. 268 : 38 Cr. L. J. 1071 : 41 C. W. N. 900, Haradhone Mukherji v. Brojendra Nath Rai.
7. ('33) 20 A.I.R. 1933 Cal. 752 : 146 I.C. 223 : 34 Cr.L.J. 1230, Khajer Naskar v. Tabrez Ali Naskar.
8. ('40) 27 A.I.R. 1940 Cal. 545 : 191 I.C. 171 : 42 Cr.L.J. 94 : I.L.R. (1940) 1 Cal. 468 : 44 C.W.N. 368, Badridas Agarwala v. Sohan Lal Oswal.

the removal of an obstruction, the Legislature would have said so in unambiguous language such as is used in S. 133, Criminal P. C. We are therefore of the opinion that it is more correct to follow the decisions in 30 C. W. N. 238,[4] 38 C. W. N. 476[5] and 41 C. W. N. 900[6] previously referred to, but as this view involves a difference on a point of law from the decisions in 146 I. C. 223[7] and 44 C. W. N. 368,[8] we refer the following question for decision to a Full Bench. 'Whether a Magistrate acting under the powers conferred by sub-s. (2) of S. 147, Criminal P. C., has the power to issue a mandatory injunction directing the removal of an existing obstruction.' As the point is one which frequently comes up for decision, it is very desirable that the question should be finally settled so far as this Court is concerned."

I am of the opinion that that part of the order which provides as follows, "I order that Abdur Rahaman and his family may use the path and Hem Chandra Banerjee is prohibited to make any interference with the exercise of the right of way of Abdur Rahaman and his family" is correct in law, if not in grammar. I am further of the opinion that the following part of the order "He (i. e. Hem Chandra Banerjee) is further ordered to remove the stable from the path" is beyond the powers of the Magistrate under S. 147(2), Criminal P. C. It is one thing to make an order prohibiting the doing of an act, it is another to order the doing of an act. The sub-section allows the former, but it does not allow the latter. The position seems to be somewhat similar to that dealt with by Rankin C. J. in 58 Cal. 1037.[9] With regard to the cases that have taken the contrary view it is sufficient, in my opinion, to say that what the sub-section allows, the Magistrate may do and nothing else. If the aggrieved party wishes any fuller or further relief from the Courts the civil Courts are open to him and the remedy is a mandatory injunction.

I am, therefore, of the opinion that that part of the order which reads : "He is further ordered to remove the stable from the path" should be struck out. To that extent the rule is made absolute.

BARTLEY J. — I agree.

NASIM ALI J. — I agree.

LODGE J. — I agree.

PAL J. — I agree.

K.S./R.K. *Question answered.*

9. ('31) 18 A.I.R. 1931 Cal. 263 : 130 I.C. 872 : 32 Cr. L. J. 592 : 58 Cal. 1037 : 53 C. L. J. 175, Emperor v. B. N. Sasmal.'

Cr. P. C. —
('41) Chitaley, S. 147, N. 14 Pt. 3.
('41) Mitra, Page 448, N. 474.

A. I. R. (29) 1942 Calcutta 245

R. C. MITTER AND KHUNDKAR JJ.

Anila Bala Devi — Defendant — Appellant

v.

Madhabendu Narain Roy, Plaintiff and another, Defendant 2 — Respondents.

Appeal No. 81 of 1939, Decided on 18th July 1941, from original decree of Sub-Judge, Murshidabad at Berhampore, D/-27th February 1939.

(a) Hindu law—Marriage—Eligibility — Girl removed by three gotras from bridegroom is not unmarriageable even though related within prohibited degrees — Trigotra rule—Method of computation of gotras—Bridegroom's gotra has to be reckoned — Same rule applies even if connexion between boy and girl is through Bandhu.

A girl who is removed by three gotras from the bridegroom is not unmarriageable even though related within the prohibited degrees. In the matter of computation of the gotras in applying the trigotra rule in regard to eligibility for marriage and finding out whether the bride is removed by three gotras from the bridegroom though falling within the prohibited degrees, the bridegroom's gotra has to be reckoned. This rule applies even where the connexion between the boy and the girl is through a Bandhu. [P 248*d*,*g*,*h*]

(b) Deed—Construction — Compromise deed —*N* Hindu widow adopting *D*—Under compromise *N* entitled to probate her husband's second will—Under will *N* to get life estate and not to be divested of same on adoption—Compromise not conferring on *D* any right of immediate enjoyment or enjoyment on attaining majority —Compromise held did not take away *N's* life estate on adoption or on adoptee attaining majority.

After the adoption of *D* by *N*, a Hindu widow, a compromise deed was executed. The deed recited the fact of adoption and stated that the adoption had been made in the interest of a natural born son. What the rights of the adopted boy would be vis a vis the property rights of *N* was not defined either in the deed of adoption or in the compromise deed. The former deed of adoption only stated that boy *D* had been taken in adoption by *N* and so had become the son of her husband and all rights of his natural mother over him had ceased. The effective and operative part of the deed of compromise did not confer on *D* any right of immediate enjoyment or enjoyment on attaining majority by destroying or curtailing the life estate conferred on *N* by her husband's will which according to the terms of that will (which was to be probated by *N* according to the terms of the compromise) was not to be divested on adoption. The will had provided also that in the event of the testator having aurasa son *N's* life estate would cease on his attaining majority :

Held that on the construction of the deed of compromise, *N's* life estate was not taken away either on adoption or on the adopted son attaining majority, and that the phrase that the adoption had been made in the interest of a natural born son, did not necessarily imply that the adopted boy was to have the same right as had been conferred on a natural born son of the testator by his second will. [P 250*c*,*e*]

(c) Specific Relief Act (1877), S. 42 Proviso —Words "further relief" in S. 42 Proviso—Meaning—Plaintiff out of possession suing for declaration of his title—Defendant in possession and denying plaintiff's title—Recovery of possession is "further relief"—Plaintiff out of possession—Defendant not in possession or in position to give possession — Injunction is "further relief."

The words "further relief" in the proviso to

S. 42 mean relief in relation to the legal character or right as to property to which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested to deny and that relief must also be appropriate to and necessarily consequent on the right of title asserted: ('22) 9 A. I. R. 1922 Cal. 8, *Rel. on.* [P 250*h*]

Consequently, where the plaintiff whose title is denied by the defendant is out of possession and the defendant is in possession, the "further relief" would be recovery of possession and a suit for declaration of title will not be maintainable unless the plaintiff prays for possession also. If, however, the plaintiff is out of possession but the defendant is not in possession or is not in a position to deliver possession to the successful plaintiff injunction would be the further relief within the meaning of the proviso to S. 42 : ('38) 25 A. I. R. 1938 P. C. 73, *Rel. on.* [P 250*h*;P 251*a*]

(d) Specific Relief Act (1877), S. 42—Injunction is discretionary—Plaintiff out of possession not asking for possession against defendant in possession—Injunction will not be granted.

An injunction is a discretionary relief and will not be granted to a plaintiff out of possession when he does not ask for possession against defendant who is actually in possession : 33 Mad. 452, *Rel. on.* [P 251*a*]

S. C. Bose, Rash Behari Mukherjee and C. F. Ali — for Appellant.

Dr. Basak, A. C. Gupta, G. N. Das, Bijan Behari Das Gupta, Chandi Prosad Sen, Nripal Chandra Roy Chowdhury and Binode Behari Haldar — for Respondents.

JUDGMENT. — In the course of time the Jemo Raj family had divided itself into five branches called the Bara-taraf, Madhyam Taraf, Na-taraf, Ful-taraf and Chota-taraf. In this appeal we are concerned with the Madhyam and the Na-tarafs only. Raja Saradindu Narayan Roy (called hereafter the Na Raja) was the proprietor of the Na-taraf. He had two sons Sibendu and Ardhendu. The proprietor of the Madhyam Taraf, Raja Purnendu Narayan had no male issue. He adopted Ardhendu, the youngest son of Raja Saradindu, and named him Rajendu, whose widow Anila Bala, is the appellant before us. Sibendu's wife is Santi Devi. Sibendu predeceased his father, the Na Raja, leaving two sons Amarendu and Dibyendu, who is the principal respondent in this appeal and was the plaintiff in the suit. It is his case that after the death of Rajendu he was adopted by Anila Bala and named Madhabendu. Rajendu and the Na Raja lived as members of a joint family till about 1926 when there was separation. While living jointly with the Na Raja Rajendu executed a will (Ex. O) on 16th May 1919. Amarendu and Dibyendu were appointed executors, and Anila Bala was to be the executrix during their minority. A maintenance allowance of Rs. 100 per month was provided for Anila Bala. She was given the power to adopt a son, but that power was limited both in regard to time and choice. If Dibyendu was alive she was to adopt him and no one else. If he and other sons of the Na Raja were dead then she could adopt from outside the Jemo family. On adoption the adopted son was to get his estate and would be entitled to possession from the date of adoption. Anila Bala was directed to adopt Dibyendu within eighteen months of the testator's death. If she failed to do so his estate would vest in Amarendu and Dibyendu in equal shares, and Anila Bala was to get the monthly allowance of Rs. 100 only. Other provisions of this will are not material to this appeal.

After separation from the Na Raja, Rajendu executed his second will (Ex. O-1) on 11th August 1926. By it he revoked his earlier will, Ex. O. He appointed Anila Bala as executrix and his brother-in-law (sister's husband) Bejoy Gopal Roy as executor. He gave a life estate in the whole of his estate to Anila Bala. She was given authority to adopt but her power was not limited. She could exercise it at any time and could adopt anybody she pleased. If Rajendu had a natural born son (aurasa son) that son was to get the estate in possession on attaining majority, but the enjoyment of the estate by the adopted son was to be postponed till the death of Anila Bala. The net effect is that Anila Bala's life estate was to cease on the natural born son attaining majority but was to continue till her death when an adopted son only entered the field. We do not set out the effect of the will where a natural born son came into existence after a boy had been taken in adoption, as that contingency has not happened. Rajendu died on 23rd December 1927 without leaving any issue. It appears from the evidence that before his death he was not on good terms with the Na Raja and after his death the relations between his widow Anila Bala and the Na Raja did not improve.

Shortly after the death of Rajendu, Anila Bala expressed her intention of adopting a son from the Chota Taraf. That brought matters to head. Amarendu made an application before the District Judge on 30th April 1928 for probate of Rajendu's first will, Ex. O (Case No. 18 of 1928). Dibyendu, then a minor filed a suit against Anila Bala and others through his mother and next friend, Santi Debi, for restraining Anila Bala from adopting the son of the Chota Taraf. In that plaint it was alleged that Anila Bala was stating that the will Ex. O had been revoked by Rajendu by a later will which she was attempting to set up. Anila Bala in her turn opposed the application for probate of the will Ex. O. filed by Amarendu and on 25th August 1928 made an application before the District Judge for probate of Rajendu's second will Ex. O-1 (Case No. 23 of 1928). Amarendu opposed this application and on 3rd April 1929 made an application in this case, case No. 23 of 1928, for the appointment of an administrator pendente lite. Patit Paban Chowdhury, the father of Anila Bala, who had shortly after the death of Rajendu, taken service under the Na Raja at the latter's request and who had leanings towards the Na Raja was appointed administrator pendente lite by an ex parte order dated 25th May 1929. He was ordered to give security to the extent of one lac of rupees and the Na Raja stood security for him for that amount.

Anila Bala's application for probate was postponed from time to time, from 19th June 1929 to 2nd January 1930 on her applications. The ground stated in those applications was that negotiations for compromise were proceeding. On 2nd January 1930 a joint application for postponement of the case to 6th January 1930 was made by Anila Bala and Amarendu in which it was stated that almost all the terms of the compromise had been settled between the parties and if the short adjournment prayed for were granted there was every chance of the case being settled. On 4th January 1930 Anila Bala signed three documents : (1) An arpannama by which some items of immovable property were dedicated to the idols Sri Sri Radha Krishna Jius (Ex. 3-II 173). This document was executed in the morning according to the version of both sides. By

it Anila Bala became the shebait. (2) A deed of adoption (Ex. 4-II 178) in which it was admitted that Anila Bala had taken in adoption Dibyendu and had named Madhabendu. There is difference between the parties as to the time of execution. Anila Bala's case is that it was executed in the morning while the case of the other side is that it was executed at about 2 P. M. (3) A petition of compromise (I-85) intended for being filed in probate case No. 23 of 1928.

There were seven terms in it. The fact of adoption of Dibyendu was admitted in para. 1. Amarendu undertook to withdraw his application for probate of the first will of Rajendu. Anila Bala was to get probate of the second will, her father Patit Paban was to remain as manager of the estate till Madhabendu attained majority. Anila Bala would be bound to bring up, educate and marry the minor Madhabendu, and in case the latter died without leaving an heir Anila Bala bound herself to adopt another descendant of the Na Raja. The parties were to bear their respective costs. There is a similar difference between the parties as to the time of the execution of this document as in the case of the deed of adoption. This document was filed in the probate cases on 6th January 1930. Amarendu's application for probate of the first will was withdrawn. On 13th January 1930, an affidavit in proof of the second will was filed and an order for the issue of probate of that will to Anila Bala was made on that date. Temporary probate was issued to her on 2nd April 1931 and on her paying the full probate duty later on probate was issued to her on 18th May 1932. On 18th February 1933, Santi Debi acting on behalf of Madhabendu made an application for revocation of the probate granted to Anila Bala. This application was not eventually pressed and was dismissed on 21st March 1934. Madhabendu attained majority in October 1935. Patit Paban ceased to be the administrator pendente lite in August 1930 but continued to be the manager till 1932. From that time Anila Bala was in charge of the management. Within a year of his attaining majority, Madhabendu tried to take forcible possession from Anila Bala. Those acts of his resulted in criminal proceedings. Having been baffled in his attempt to take forcible possession he filed this suit on 21st May 1937, wherein he prayed for (a) a declaration that he was the adopted son of Rajendu (b) for a declaration that he was the full owner of the whole estate as left by Rajendu, and as the life estate given to Anila Bala by the second will of Rajendu had been completely destroyed by the compromise effected on 4th January 1930 he was entitled to possess and enjoy the estate, and (c) for an injunction restraining Anila Bala from exercising acts of management over the estate left by Rajendu and from interfering with his management of the same.

In the plaint no mention is made of the Arpannama. The effect of the compromise is stated in para. 16 in a manner which does not indicate that the Arpannama was in any way connected with or was a material part of the compromise as pleaded in that paragraph. No schedule of properties was appended to the plaint. The plaintiff being later on required by the Court to file a valuation statement of the properties in suit under the provisions of S. 8A, Court-fees Act, filed a statement in which he included the properties dedicated by the Arpannama to the said idols, as being properties in suit also. In her written statement Anila Bala pleaded inter alia (i) that she never adopted Dibyendu (ii) that she put her signature on the Arpannama, on the deed of adoption and on the petition of compromise at the same time under undue influence and coercion (iii) that no proposal was ever made to her, not even a hint uttered, that she was to give up the life-estate conferred on her by the second will of her husband. By an additional written statement, she pleaded that the alleged adoption of Dibyendu was invalid in law. On this state of the pleadings the parties went to trial.

At the trial, the case of the plaintiff as finally developed can be stated in the following manner : Negotiations for compromise between Anila Bala and the Nataraf started about May 1929. Anila Bala's maternal grandfather Sarada Prosanna Roy, and her maternal uncle, Kali Prosanna Roy were not then on the scene. They appeared in the scene later on towards the fag-end of December 1929. During the period May to December 1929, her father Patit Paban and her brother Shiba Prosad were there, Sabitri Debi was there as also other members of the Na-taraf. By the end of December 1929, the negotiations had reached this stage, namely that Anila Bala agreed to take Dibyendu in adoption. The difference between the parties at that stage was only on the point as to whether the first or the second will of Rajendu was to be probated. Anila Bala insisted on the probate of the second will but Amarendu insisted on the probate of the first will of Rajendu. To compose this difference between them the services of Sarada Prosanna were requisitioned. He came accompanied by his son Kali Prosanna to the Jemo Rajbati on 30th or 31st December 1929 and saw Anila Bala. Anila Bala wanted to have the probate of the second will, as, according to her, her consent to the probate of the first will would imply an admission on her part that her husband was a drunkard and a fickle-minded man. Sarada Prosanna thereupon pointed out the unfairness towards the adopted son in case the second will was probated without any modification of its terms. He pointed out that Dibyendu would lose his rights in his natural family on adoption and that he would get nothing from the estate of Rajendu on account of the life estate of Anila Bala. He suggested a *via media*. The second will would be probated provided she gave up the life estate conferred on her by the said will on taking a maintenance of Rs. 300 to Rs. 400 a month. Anila Bala in reply said that she would not want maintenance, but would be satisfied if properties yielding rupees 5000 a year were dedicated to the idols and she made the shebait, the underlying idea being that the surplus of income from the debutter properties after meeting the costs of worship would be sufficient to enable her to maintain herself. That proposal of Anila Bala was accepted (*see* Kali Prosonno I 381, Sabitri Debi I 217-18, Santi Devi I 241). The Arpannama was drawn up and it was arranged that it would be executed first. It was to have been executed on the evening of 3rd January 1930, but as at the last moment Anila Bala objected to some items of property to be included therein, it was not executed on that date, but was executed in the morning of 4th January 1930. The adoption ceremony was then begun at about 8 o'clock in the morning and concluded at about 1 P. M. or so and immediately thereafter Anila Bala signed the adoption deed and the petition of compromise at the same sitting. Many witnesses who were then present attested the adoption deed and some witnesses who came later on attested the same on Anila Bala acknowledging execution. According to this version the Arpannama was an essential part of the compromise.

The learned Subordinate Judge has held that the adoption was in fact made, that it is valid in law, that Anila Bala had failed to prove her case of undue influence and coercion, that the compromise was on the terms as stated by the plaintiff's witnesses, that the Arpannama, the deed of adoption and the petition of compromise had been adequately explained to her and she had signed them after knowing fully their effect. According to him by the petition of compromise, Madhabendu got on adoption the rights of a natural born son as defined in Rajendu's second will. He accordingly made a decree in favour of the plaintiff on 27th February 1939.

Anila Bala has preferred this appeal against this decree. Mr. Sarat Bose appearing on her behalf has not challenged the fact of adoption and has not pressed the case of undue influence and coercion. He has urged the following points only : (1) the adoption is invalid in law; (2) the effect of the compromise has only to be gathered from the terms of the petition of compromise; no oral evidence being admissible to supplement or vary its terms; (3) that on a construction of the said petition of compromise, it must be held that Anila Bala had not given up the life estate conferred on her by paras. 3 and 4 of the will, Ex. O-1; (4) that the compromise as set up by the plaintiff is not binding on her, a pardanashin lady; (5) that at any rate it was not a term of settlement that Anila Bala was to give up her life-estate on the adoption or on the adopted son attaining majority, and (6) that the suit as framed is not maintainable in law.

The validity of the adoption depends solely upon the question as to whether Shanti Debi, the natural mother of Dibyendu could have been married in her maiden state by Rajendu. The parties are Brahmins. Special custom is not alleged. The parties being of the twice born class, the following rules are applicable : (1) The bridegroom and the bride must not be of the same gotra and pravara. (2) The bride must not be a descendant within the seventh degree from the bridegroom's father and of the latter's six male ancestors. (3) She must not be a descendant within the fifth degree from the bridegroom's maternal grandfather and of the latter's four male ancestors. (4) She must not be a descendant within seven degrees of the bridegroom's father's bandhus, and of the latter's six male ancestors, and (5) she must not be a descendant within five degrees of the bridegroom's mother's bandus and of the latter's four male ancestors.

To these rules there is an important exception. It is that if the bride is removed by three gotras, she would be eligible for marriage even if she falls within the prohibited degrees as defined in rules Nos. II to V. The admitted pedigree is as follows:

RAJA MOHANANDA (Gautam Gotra)
(2)

Raja Narendra Narayan = Bhaba Tarini | Son—S1 | Daughter, Anna Purna (Sankrit Gotra) (3)

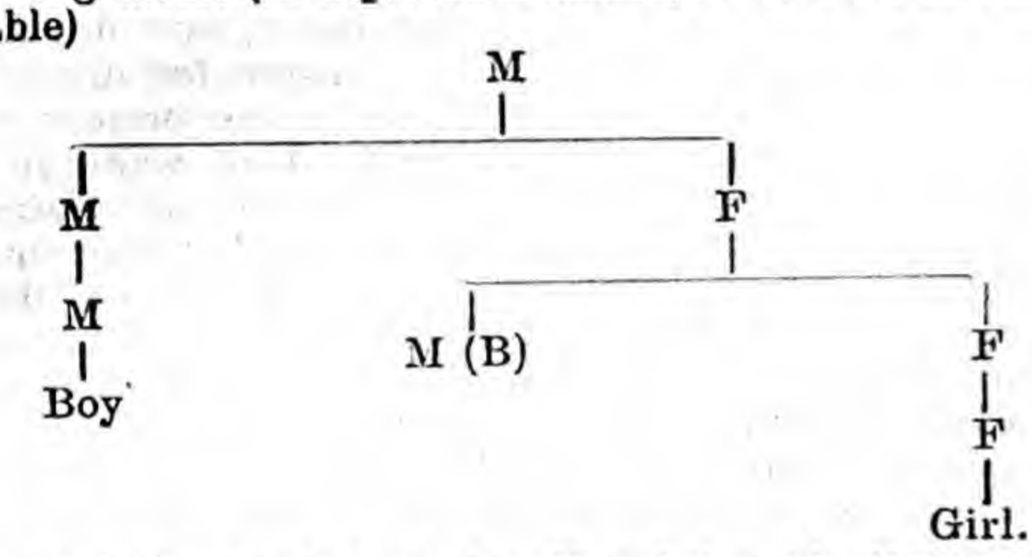
Sarajendu | Purnendu (Pundarik Gotra) (1) | Son—S2 | Daughter, Jatindra Mohini (Kasyap Gotra) (4)

Rajendu | Do. | daughter, Santi Debi

S2 is Rajendu's pitri bandhu, being the maternal uncle's son of his father, Purnendu. Santi Debi is the third in descent from the paternal grandfather of S2. She accordingly comes within the prohibition of rule No. IV and unless she comes within the exception, the trigotra rule as it is called, she would not have been eligible for Rajendu. Rajendu's gotra was Pundarik, the gotra of S2, S1 and Raja Mahananda was Gautam. Anna Purna on marriage adopted her husband's gotra which was Sankrit, Jotir Mohini on her marriage got her husband's gotra which was Kasyap and Santi Debi in her maiden state had the same gotra, namely Kasyap, the gotra of her father. Counting Rajendu's gotra as the first, there are four gotras altogether and so she was removed from Rajendu's gotra by three gotras. If, therefore, Rajendu's gotra be taken into the computation for the trigotra rule, Santi Debi would have been eligible for Rajendu in spite of the fact that she fell within the prohibition of rule No. IV. Whether that gotra can be taken into consideration or not is therefore the vital question. If it can be Santi Debi would have been eligible, if not, she would not be eligible for Rajendu. Both Guru Das Bannerjee and Mr. Shyama Charan Sarkar have expressed the opinion that in the matter of computation for the trigotra rule the bridegroom's gotra has to be reckoned. Both state the scope of the exception in the following manner : "A girl who is removed by three gotras from the bridegroom is not unmarriageable, though related within seven or five-degrees as above described." (Tagore Law Lectures on Marriage and Stridhan, page 64, Edn. 4 and Vyavastha Darpana, page 662, Edn. 2). The illustration given at the top of p. 65 of the said Tagore Law Lectures and that given at the foot-note of page 662 of the Vyavastha Darpana (Edn. 2) make it clear that if on proceeding from the boy's gotra to that of the girl's there are four gotras in all the girl would be regarded as being removed by three gotras from the boy and would be eligible for marriage. Those illustrations make it clear that it will be legitimate to take into account the boy's gotra in the matter of calculation. It has, however, been contended by the learned advocates for the appellant that the trigotra rule as expressed in general terms by Sir Gurudas Bannerjee and by Mr. Shyama Charan Sarkar is not what has been understood and defined by Raghunandan, where the connexion between the boy and the girl is through a bandhu. In that case it is said that the counting of gotras must commence from the Bandhu's gotra, or the Bandhu's maternal grandfather's gotra as the case may be, and not from the gotra of the boy or of his father (which is the same). It is further said that Sir Gurudas Bannerjee in a way recognized this at the passage at the bottom of p. 64 of his Tagore Law Lectures (Edn. 2). In support of his contention the appellant's advocate has placed reliance upon the twenty-first stanza of Raghunandan's Udbahatattwa, the material portion of which as translated in this Court at page 512, Part 1 of the paper books is as follows :

"In counting the three gotras with respect to the descendants of a Bandhu it should be commenced from the Bandhus own gotra but in counting the three gotras with respect of the male ancestors of the Bandhu the three gotras should be counted commencing from the Bandhu's gotra, where such Bandhu is the father's maternal uncle's son or the mother's maternal uncle's son and that in case of other Bandhus the counting should commence from the Bandhus maternal grandfather's gotra."

In our judgment the illustrations given by Raghunandan immediately after this passage bring out the meaning of this passage. The starting point is only indicated, but the passage does not prohibit that in the course of counting from that starting point the counting should proceed from the Bandhu only towards the girl's family and not towards the boy's. The boy's gotras may not be taken into account, but we do not understand why on this passage the boy's father's gotra which is the same as that of the boy, should not be reckoned. The first illustration of Raghunandan is represented by the following table: (M represents males, F females in the table)



M (B) is the father's bandhu, being his (father's) paternal aunt's son. Raghunandan says that the girl would have been eligible for the boy if the counting commenced from M(B)'s gotra, but as the counting has to be made from M(B)'s maternal grandfather's gotra according to the rule formulated, because, the bandhu is not the father's maternal uncle's son, she is not eligible as she falls within three gotras. In the illustration the girl would not be beyond three gotras on a counting being made from M(B)'s gotra unless the gotra of the boy or of his father, (which is the same) were taken into consideration. We accordingly hold that the rule as formulated in Exception No. 1 in Sir Gurudas Banerjee's Tagore Law Lectures at p. 64 (Edn. 2) is a correct interpretation of Raghunandan and as in the case before us there are four gotras in all in proceeding from the gotra of Rajendu's father to the gotra of Santi Debi's father, the marriage between Santi Debi and Rajendu would have been valid. The adoption of Dibyendu by Anilabala is accordingly valid in law. The most important question in this case is what were the terms of the compromise. We have set out the plaintiff's version of it in the earlier part of our judgment and we have to determine whether that version is true. (After going through the evidence their Lordships proceeded.) In our judgment it has been established that four of the terms of the compromise were (1) that Dibyendu was to be adopted, (2) the second will of Rajendu, Ex. O-1, was to be probated, (3) Patitpaban was to continue in management under Anilabala, as executrix, and (4) Anilabala was to be the shebait of the deities to whom certain properties were to be dedicated.

The material question on which there is a difference is whether Anilabala also agreed to give up her life estate on the adoption being made or on the adopted son attaining majority. The plaintiff's version is that at the last moment Mr. Saradaprasanna Roy induced Anilabala to agree to that term. It is also the plaintiff's case as developed in the evidence that as the surrender of Anilabala's life estate on adoption required a provision for maintenance for her Saradaprosanna proposed to her a monthly maintenance of Rs. 300 to Rs. 400 but Anilabala said that a debutter yielding Rs. 5000 a year with her as the shebait would suffice for her maintenance. There are inherent improbabilities in this version which we now proceed to notice.

According to plaintiff's witness, Santi Debi, Saradaprosanna Roy and all present there suggested that it should be clearly mentioned in all the proposed documents,—in the arpannama, in the deed of adoption and in the petition of compromise,—that Anilabala was to give up the life estate as soon as the adopted boy would attain majority (I—289-290). It is further in evidence that the drafts of the solenamah and the deed of adoption were prepared from the dictation of Sarada Prosanna Babu himself (Ashutosh Chowdhury I 317). The arpannama only was drafted by Rakhal Babu. None of the drafts have been produced. In the arpannama and the deed of adoption there is no reference even by implication to Anilabala's life estate and its surrender. In the petition of compromise there is no mention of it in clear terms. That is one reason which weighs with us in not accepting the plaintiff's versions on this question. The second reason which weighs with us is that nobody on behalf of the plaintiff says that in his explanation to Anilabala Rakhal Babu drew the lady's attention to the terms of Rajendu's will, that she had a life estate under it and under the terms of the will she was to have the life estate even on an adoption being made. The third and the most convincing reason is that if the surrender of the life estate was an essential term, as is the case of the plaintiff now, it would have been mentioned separately as an express term or mentioned clearly in one of the seven terms of the petition of compromise. A little addition to the first or fourth term of the petition of compromise as drafted would have been sufficient. The fourth reason is that nothing is stated in the arpannama about the personal allowance that the lady was to receive as shebait. The case that the surplus profits of the debutter after meeting the debsheba expenses was intended to provide maintenance of Anilabala is not made in the plaint. The arpannama is not even mentioned there. That that was not the case of the plaintiff is apparent from the way in which he conducted his case in Court. The first witness examined on his behalf was Sabitri Debi. In her examination-in-chief she stated nothing about this aspect of the arpannama. The learned pleader for the defendant wanted to rely in his argument upon the fact that the story of the surrender of the life estate by Anilabala was highly improbable as no provision for her maintenance had been made in the compromise petition. He accordingly put questions to Sabitri Debi in cross-examination on that aspect of the case on 3rd May 1938. In answer, she stated that Sarada Prosanna proposed to Anilabala a monthly maintenance of Rs 300 to Rs. 400 but Anilabala preferred to have a debutter. All the witnesses of the plaintiff who were examined after Sabitri Debi then gave this version about the Arpannama in their examination-in-chief, which Sabitri Debi had given only in her cross examination. The Arpannama was an important document according to the plaintiff's case as developed in Court. His case about it was not only not pleaded

in the plaint, but what is more he wanted by his suit to get the properties dedicated to the deities by the Arpannama out of the possession and control of Anilabala. He included them in the valuation statement that he gave of the properties in suit. The Arpannama properties are items 3, 11, 13, 16, 17 and 18 of that valuation statement which has been printed at pp. 111 to 128 of Vol. 1 of the paper book. It is only when in the course of the argument the learned pleader for Anilabala pointed out that the plaint taken with that valuation statement destroyed the plaintiff's case that the debutter properties included in the Arpannama were intended to provide maintenance to Anilabala for her life that the plaintiff made an application for excluding the said properties from the suit, ascribing their inclusions in the valuation statement to the mistake of unnamed officers of his. That application made on 21st January 1939 (I 506) was not supported by an affidavit. The reason for inclusion in the valuation statement given in that application appears to us to be false. We accordingly hold that it has not been established by the plaintiff that in her talks with Sarada Prosanna Babu or with others Anilabala had agreed to give up her life-estate either on adoption or on the adopted son attaining majority resting herself satisfied with Arpannama properties only. It seems to us to be probable that the suggestion of the Arpannama came from the Na Taraf in order to induce Anilabala, a Hindu widow who had just then returned from pilgrimage to holy places with thoughts more directed to the next world, to a reasonable frame of mind, so that she may consider the proposal for adopting Dibyendu and not spurn at and summarily reject any offer for compromise coming from Na Taraf which she had done in the past.

The other aspect of the matter that has to be considered is the effect of the compromise petition. That was the final document and in our judgment the rights of the parties are to be determined on that document and that document only, provided of course that it was executed under circumstances which would make it binding on her, a pardanashin lady. The document was executed after the adoption. It recites that fact and states that the adoption had already been made in consideration of the compromise of both the probate cases, namely, the one filed by Amarendu for probate of Rajendu's first will and the other filed by Anilabala for the probate of Rajendu's second will. The recital further states that the adoption had been made in the interest of a natural born son. That phrase does not necessarily imply that the adopted boy was to have the same right as had been conferred on a natural born son of Rajendu by his second will. What the rights of the adopted boy would be vis-a-vis the property rights of Anilabala is not defined either in the deed of adoption or in this document. The former deed (Ex. 4-2 178) only states that boy Dibyendu had been taken in adoption by Anilabala and so had become the son of her husband and all rights of Santi Debi over him had ceased. The effective and operative part of the petition of compromise does not confer on Dibyendu any right of immediate enjoyment or enjoyment on attaining majority by destroying or curtailing the life estate conferred on Anilabala by her husband's second will and which according to the terms of that will (which was to be probated according to the compromise) was not to be divested on adoption. We therefore hold on the construction of the petition of compromise that her life-estate was not taken away either on adoption or on the adopted son attaining majority. Even if the phrase "in the interest of a son born of Anilabala's womb" used in the recital has the effect contended for by the plaintiff we cannot hold Anilabala to be bound by the compromise, for that was an essential term and no body explained to her the full effect thereof. There is no evidence that at the time of the explanation of the document by Rakhal Babu, the latter brought to the notice of Anilabala the substance of Rajendu's second will, and explained to the lady that that will conferred on her a life estate which was to last even on adoption and that by that phrase in the petition of compromise she would be losing that interest. In the absence of such clear statements by Rakhal Babu we do not think his explanation of the document to be adequate for that purpose. It would not in our judgment be enough to bind the lady if Rakhal Babu had simply stated that the adopted boy would become the owner on attaining majority or that her life estate would cease without explaining to her her position under the terms of the second will.

Even if the plaintiff had established his case that he had an estate which he was entitled to enjoy on attaining majority we have grave doubts about the maintainability of his prayer for injunction. Anilabala was in possession of the properties in the assertion of her own right. That was quite apparent to the plaintiff. Before the suit the plaintiff wanted to take forcible possession but was unsuccessful. After filing the suit he applied for the appointment of a receiver. In his order on the said application, the Subordinate Judge found that Anilabala was in possession not only as an executrix but also in her own right as legatee (I. 160 at 161). In spite of that finding, the second prayer in the plaint was not amended and possession prayed for. The reason why such a course was not adopted by the plaintiff is obvious. If he had amended his prayer in that manner he would have had to pay ad valorem court-fees on the market value of the properties in suit. It could not have proceeded on the basis of the comparatively small court-fee that had been affixed by him on the plaint. The suit as framed is a suit for declaration with a prayer for injunction. The first question is whether in this case where the plaintiff is out of possession injunction could be regarded as "further relief" mentioned in the proviso to S. 42, Specific Relief Act. And second question is, assuming that a prayer for injunction would be "further relief" within the meaning of that section in such a case, whether the Court in its discretion would grant it to a plaintiff out of possession and against the defendant who is in possession. The cases establish the proposition that "further relief" mentioned in the proviso to S. 42, Specific Relief Act, must be "relief in relation to the legal character or right as to property to which the plaintiff is entitled to and whose title to such character or right the defendant denies or is interested to deny and that relief must also be appropriate to and necessarily consequent on the right or title asserted" : 26 C.W.N. 206 at p. 211.[1]

On this principle where the plaintiff whose title is denied by the defendant is out of possession and the defendant is in possession, the "further relief" would be recovery of possession and a suit for declaration of title will not be maintainable unless the plaintiff prayed for possession also. If, however, the plaintiff is out of possession but the de-

1. ('22) 9 A.I.R. 1922 Cal. 8 : 65 I.C. 8 : 33 C.L.J. 592 : 26 C.W.N. 206, Joy Narain Sen Ukil v. Srikantha Roy.

fendant is not in possession or is not in a position to deliver possession to the successful plaintiff injunction would be the further relief. This proposition has been laid down by the Judicial Committee of the Privy Council in 65 I.A. 106.[2] On the observations made by Lord Thankerton in that case it may be urged that where the plaintiff is out of possession and the defendant is in possession or is able to deliver possession to the plaintiff "further relief" would be recovery of possession and if such relief is not claimed the suit would be a bad suit. In this case, however, we prefer to rest our decision on the second point we have indicated above. Even if injunction could be considered to be further relief within the meaning of the proviso to S. 42, Specific Relief Act, we would not have granted it to plaintiff in the exercise of our discretion even if he had established his right to present enjoyment of the estate, as he could have prayed for recovery of possession, on the principle formulated in 33 Mad. 452.[3]

As on the merits we have found that the plaintiff is not entitled to possession, we think that he ought to get a declaration that he is the adopted son of Rajendu. As Anilabala had denied the factum and validity of the adoption that is the only relief he can obtain. The result is that this appeal is allowed in part. It is declared that the plaintiff is the adopted son of Rajendu Narayan Roy. On the finding that the life-estate conferred on defendant 1, Anilabala Debi, by the second will of Rajendu Narayan Roy is still subsisting and will subsist during her life-time, the prayer for injunction made by the plaintiff is refused. As the success is divided, the parties must bear their respective costs throughout.

G.N./R.K. *Appeal partly allowed.*

2. ('38) 25 A.I.R. 1938 P.C. 73 : 172 I.C. 993 : 65 I.A. 106 : 32 S.L.R. 350 : I.L.R. (1938) Lah. 63 (P.C.) Sunder Singh-Mullah Singh Sanatan Dharma High School Trust v. Managing Committee, Sundar Singh-Mullah Singh Rajput High School.
3. ('10) 33 Mad. 452 : 5 I.C. 630 : 20 M.L.J. 301, Rathnasabapathi Pillai v. Ramasami Aiyar.

Hindu law —
(a) ('40) Mulla, Page 507 Pt. (Z), and sub-s. (2).

A. I. R. (29) 1942 Calcutta 251

B. K. MUKHERJEA AND ROXBURGH JJ.

Jnan Chandra Mukherjee — Plaintiff — Appellant

v.

Manoranjan Mitra, Defendant 4 and others, Defendants — Respondents.

Appeal No. 994 of 1938, Decided on 27th June 1941, from appellate decree of Addl. Dist. Judge, 2nd Court, Dacca, D/- 9th February 1938.

(a) Contract—Enforceability—Stranger when can enforce stated—Stranger held not entitled to enforce contract.

A stranger to a contract which reserves a benefit for him cannot sue upon it though the consideration need not move from the promisee. There are two well recognized exceptions to this doctrine. The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party: *Case law discussed.* [P 252*d*]

A sold his property to *B* for a consideration that *B* would pay *A's* creditors. The property was not sold for a fixed consideration and the vendee did not retain out of it a certain sum of money which he undertook to pay to the creditors. The consideration for the transfer was that the purchaser would satisfy the creditors of the vendors, and release the latter from their liability in respect of the two debts. The amount which the vendee was to pay to the creditors would depend upon the arrangement which he might be able to make with them. He took the chance of his being able to induce the creditors to give up their claim for interest either in whole or in part. It was for the benefit of the vendors themselves and not for the benefit of the creditors that this bargain was made:

Held that the vendee was not in any way a trustee for the creditors in respect of the money due to them. The creditors hence could not enforce the contract: ('18) 5 A.I.R. 1918 Cal. 941 and ('38) 25 A.I.R 1938 P.C. 245, *Disting.* [P 254*c*, *f*]

(b) Limitation Act (1908), S. 20 — Surety *(Quære)*.

Whether a payment by the principal debtor would keep alive the debts against the surety under S. 20: ('40) 27 A.I.R. 1940 Cal. 401; 28 Bom. 248 and ('18) 5 A.I.R. 1918 Cal. 707, *Ref.* [P 254*g*, *h* P 255*a*]

(c) Limitation Act (1908), S. 21 — Co-contractor.

The payment by a co-contractor would not entitle the creditor to get an extension of time as against other co-contractors. [P 255*a*]

Dr. Roy, Rajendra Chandra Guha and Abinas Chandra Bhattacharji — for Appellant.

Dr. Nares Chandra Sen Gupta, Kiron Mohan Sircar, Satyendra Nath Mitra (for minor respondents represented by Deputy Registrar) — for Respondents.

JUDGMENT. — This appeal is on behalf of the plaintiff and it arises out of a suit commenced by him to recover a sum of Rs. 5000 alleged to be due as principal and interest on two hundis executed by the defendants in his favour. The material facts are not in controversy and may be shortly stated as follows: Defendants 1 and 2, who are two brothers took a loan of Rs. 2500 only from the plaintiff and executed two hundis in respect of the same—one on 12th August 1924, and the other on 14th August, following. Defendants 3 and 4 also signed both the hundis as co-debtors along with defendants 1 and 2 though, it is said, that they were only sureties for the latter. On 8th August 1927, a sum of Rs. 5 was paid towards interest due on the hundis. This amount was paid by all the four defendants and the endorsements were signed by them all. There were two other subsequent payments of interest one of Rs. 10 and the other of Rs. 5 on 20th April 1930 and 18th April 1933, respectively, but on both these occasions the payments were made by defendants 1 to 3 only and not by defendant 4. On 20th June 1932, defendants 1 and 2 executed a kobala in respect of certain properties in favour of defendant 4 who was an officer

as well as a relation of theirs and as consideration for the same defendant 4 undertook to pay the debts due to the plaintiff as well as to another creditor named Prokash Chandra Nag Choudhury whose names were specifically mentioned in the schedule to the conveyance. It was recited in the document that defendant 4 had stood surety in respect of both these loans and he had given hopes to defendants 1 and 2 that he would be able to induce the creditors to abandon their claim for interest and give full acquittance to the debtors on receipt of the principal sums only. The value of the properties was stated in the kobala to be Rs. 3000 and that was exactly the principal amount advanced by these creditors. As no money was paid by any of the defendants, the plaintiff instituted the present suit on 19th June 1935 and the claim was laid at Rs. 5000 which was the principal and interest due on the two hundis. As against defendant 4, the claim was based not only on the hundis but on his express undertaking to pay the dues of the plaintiff as contained in the conveyance mentioned aforesaid.

The first three defendants did not contest the suit and it was contested by defendant 4 alone. Defendant 4 denied any personal liability on the hundis and contended inter alia that the suit against him was barred by limitation. It was further alleged that no liability could be imposed on him on the basis of the kobala that was executed by defendants 1 and 2 in his favour. The Subordinate Judge who tried the suit passed a decree against the first three defendants and dismissed the suit against defendant 4. It was held by the Subordinate Judge that the suit was barred by limitation as against defendant 4 who did not join in the last two payments of interest, and as the plaintiff was not a party to the contract contained in the kobala executed by defendants 1 and 2 in favour of defendant 4, he could not enforce it against the latter. This view was affirmed in appeal by the Additional District Judge of Dacca. It is against this decision that the plaintiff has come up on appeal to this Court. Dr. Roy who appears for the appellant has taken two points in support of the appeal. He has contended, in the first place, that as under the terms of the kobala executed by defendants 1 and 2 in favour of defendant 4 the latter was made a trustee for payment of the debt due to the plaintiff, it was competent to the latter to sue defendant 4 for enforcement of that obligation even though he was not a party to the document which created it. The second point taken is that the Courts below erred in law in holding that the plaintiff's suit was barred by limitation as against defendant 4.

So far as the first point is concerned, the law seems to be fairly well settled. A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine. The first is where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. There are numerous authorities, both English and Indian, which have laid down these propositions of law and reference may be made, among others, to the decisions in (1881) 16 Ch.D. 125,[1] (1881) 16 Ch.D. 290,[2] (1885) 30 Ch. D. 57,[3] (1915) A. C. 847,[4] 53 Cal. 922,[5] 32 C. W. N. 634,[6] 40 C. W. N. 1037,[7] 41 C.W.N. 1008[8] and A. I. R. (1935) Mad. 904.[9] There are a number of cases in India where under marriage settlements or in connexion with family arrangements or otherwise a charge is created on specific immovable property for the benefit of a third person or provisions are made for the maintenance or marriage expenses of female members. In such cases the beneficiaries, though not parties to the contract, are entitled to sue : *vide* 37 I. A. 152,[10] 33 Mad. 238,[11] 38 Mad. 788.[12] A Full Bench of the Madras High Court, *vide* 53 Mad. 270,[13] has placed these cases under different categories and treated them as additional exceptions under the Indian law to the general doctrine. In our opinion, they do really come under the first exception and the third parties are allowed to sue entirely on the footing that the instruments created a trust in their favour. This would be clear from the latest pronouncement of the Judicial Committee which is to be found in 43 C. W. N. 1.[14]

These general propositions of law cannot be disputed and in fact have not been disputed by Dr. Roy who appears in support of the appeal. The sole point for our consideration, therefore, is as to whether having regard to the nature of the agreement contained in the kobala (Ex. 5) and the surrounding circumstances of this case, a trust was in fact created in favour of the present plaintiff. Dr. Roy contends that a trust is created in the present case, firstly, because defendant 4 took the property burdened with certain obligation and, secondly, because he got a transfer of the property on the express undertaking that he would pay the debts due to certain specified creditors whose names appeared in the schedule to the instrument and who thereby became express beneficiaries under the same. Before considering this point, it would be proper to set out

1. (1881) 16 Ch. D. 125 : 43 L. T. 742 : 29 W. R. 342, In re Empress Engineering Co.
2. (1881) 16 Ch. D. 290 : 43 L. T. 481 : 29 W. R. 452 : 50 L. J. Ch. 140, Lloyds v. Harper.
3. (1885) 30 Ch. D. 57: 54 L. J. Ch. 1154 : 53 L.T. 306 : 33 W. R. 803, Gandi v. Gandi.
4. (1915) 1915 A. C. 847 : 84 L J. K. B. 1680: 113 L. T. 386 : 59 S. J. 439: 31 T. L. R. 399, Dunlop Pneumatic Tyre Co. v. Selfridge.
5. ('26) 13 A.I.R. 1926 Cal. 1009: 96 I. C. 846 : 53 Cal. 922 : 30 C. W. N. 812, Jiban v. Nirupama.
6. ('28) 15 A.I.R. 1928 Cal. 518: 114 I. C. 658. 55 Cal. 1315 : 32 C. W. N. 634 : 47 C. L. J. 587, Krishna Lal Sadhu v. Pramila Bala Dasi.
7. ('36) 23 A. I. R. 1936 Cal. 663 : 167 I. C. 604 : 63 Cal. 1172 : 63 C. L. J. 287 : 40 C. W. N. 1037, Adhar Chandra v. Dalgobinda.
8. ('37) 24 A.I R. 1937 Cal. 625:175 I.C. 929:I.L.R. (1937) 2 Cal. 698 : 66 C L.J. 373 : 41 C.W.N. 1008, District Board Malda v. Chandraketu.
9. ('35) 22 A. I. R. 1935 Mad. 904 : 162 I. C. 221, Ramaswami v. Krishna & Sons.
10. ('10) 32 All. 410 : 7 I. C. 237 : 37 I. A. 152 : 7 A L. J. 871 (P. C.), Khwaja Muhammad Khan v. Husaini Begum.
11. ('10) 33 Mad. 238 : 4 I. C. 1083 : 19 M. L. J. 739, Suppu Ammal v. Subramaniam.
12. ('14) 1 A. I. R. 1914 Mad 95 : 24 I. C. 943 : 38 Mad. 788, Sundara Raja v. Lakshmiammal.
13. ('30) 17 A. I. R 1930 Mad. 382 : 124 I C. 55 : 53 Mad. 270 : 58 M.L.J. 420 (F. B.), Subbu Chetti v. Arumachalam.
14. ('38) 25 A.I.R. 1938 P. C. 245 : 176 I. C. 883 : 43 C. W. N. 1 (P.C.), Uma Nath v. Jang Bahadur.

the material portions of this document itself. The conveyance starts by saying that the vendors had borrowed money from two persons whose names appear in the schedule and they had not been able to pay off the same. They had been unable to sell their properties also owing to economic depression obtaining in the country. In these circumstances, they approached the purchaser who was their relation and well-wisher and the latter gave them an assurance that he would go to the creditors personally and satisfy the debts with the principal amounts only. "Considering that we would not be able to secure more advantage," so the document proceeds, "in respect of the liquidation of our debts in any other way, we, having settled in accordance with our wishes to give you in kobala properties, — the present market value of which is Rs. 3000, which is the amount of debts specified in schedule Ka,—and you having agreed to release us from the liability of the debts due to the creditors described in schedule Ka and having agreed to take the properties in kobala in consideration thereof, we are, for that consideration, selling the properties described in schedule Kha . . . ." The rest of the document is not material except the last paragraph which runs as follows :

"You will release us from our debts by liquidating the dues of those creditors in any way you can. If you do not liquidate these debts and they sue us in Court you will be liable for it."

Taking the document as it stands, the first branch of Dr. Roy's contention seems to be manifestly untenable. It cannot be said that the property itself was transferred to defendant 4 charged with the payment of debt due to the plaintiff. It was a case of a sale out and out and the vendee took the property without any limitation whatsoever though the consideration for the transfer was the promise made by him to pay the debts due to the creditors. The decision of the Privy Council in 43 C. W. N. 1[14] upon which Dr. Roy relies has no application to the facts of the present case. We now come to the other branch of Dr. Roy's contention as to whether defendant 4 could be said to have constituted himself a trustee in respect of the property sold or the consideration money payable for it, for the benefit of the plaintiff and the other creditor. It is conceded by Dr. Roy that if *A* promises *B* to pay a debt due by *B* to *C*, that by itself would not make *A* a trustee and *C* a beneficiary in respect of the amount due to the latter. He says, however, that there is something more in this case. Here is a transfer of property in favour of the promisor who has declared himself liable in a particular way with regard to the property or its consideration money for the benefit of certain named persons. Nothing more, says Dr. Roy, is necessary to constitute a trust and in support of his contention he has relied strongly upon the cases in (1818) 36 E.R. 224[15] and 22 C. W. N. 279.[16] As the case in (1818) 36 E. R. 224[15] is regarded as a leading decision on the subject, and has been referred to in numerous subsequent cases both in England and in India, it is necessary to examine that decision carefully with a view to ascertain what exactly it laid down. The facts of that case were as follows : The defendant Williams was the landlord of Parker, one of the plaintiffs, and not only there were arrears of rent due by Parker to Williams in respect of two farms for which the latter had the right to distrain but Parker was indebted to the defendant to the extent of £539 odd for moneys advanced. On Parker's representing to Williams that he was indebted to Gregory to the amount of about £900 for which he was in fear of arrest and was about to leave the kingdom, Williams undertook that if Parker would give up to him the farms and execute an assignment of his properties, he would pay Gregory's debts in the first instance out of the sale proceeds and after paying off the debts due to himself refund the surplus, if any, to Parker. On the basis of this understanding Parker executed a bill of sale to Williams of his properties. It appears that the sale proceeds of the properties came up to £1195 and was not even sufficient to satisfy the debts due to Williams by Parker. On a bill filed by Gregory and Parker against Williams, the agreement was enforced against Williams to the extent of £900, the alleged amount of Gregory's debt, though the actual debt was in excess of that. A question was raised as to whether Gregory could enforce the agreement to which he was not a party. Sir William Grant, M. R. in his judgment dealt with the point in the following manner :

"Now, it may be of doubt whether they could have recovered at all upon this agreement; for the agreement is not made directly to Gregory, it is made to Parker only and the consideration is furnished by Parker, for, it is Parker alone that does the acts which constitute the consideration for the agreement. Gregory himself furnishes no part of the consideration and he is no party to the contract. Parker acts as his trustee and Gregory may derive an equitable right through the medium of Parker's agreement."

So, what was decided by Sir William Grant was not that Williams was a trustee of the property for Gregory but that Parker being a trustee for Gregory in respect of the promise made to him by Williams, Gregory could sue Williams through Parker on the ground that the promise was made to the latter as his trustee. Whether Williams was a trustee for Gregory has nowhere been adverted to or discussed in the body of the judgment and the whole decision seems to have proceeded on the footing that Williams was liable on his contract to pay £900 to Gregory, and though Gregory was not actually a party to the contract, Parker acted as a trustee for him in respect of the promise and through Parker, Gregory could enforce the promise against Williams. It must be noticed that Parker himself figured as a plaintiff in the suit along with Gregory. It is true, as has been pointed out by Dr. Roy, that the case in (1818) 36 E.R. 224[15] has been treated in many subsequent decisions as laying down that it was Williams, the assignee of the property, who was really a trustee for Gregory. It may be that an entrustment of property to Williams could reasonably be inferred from the circumstances of the case, but the actual decision in the case, as we have pointed out above, was something different. In (1881) 16 Ch. D. 125[1] where the case in (1817) 3 Mer. 582[17] was considered, Sir George Jessel made the following observations :

"There may be an agreement like that in (1817) 3 Mer 582[17] where the agreement was to pay out of property and one of the parties to the agreement may constitute himself a trustee for the benefit of the third party. So, again it is quite possible that one of the parties to the agreement may be the nominee or the trustee of the third person."

15. (1818) 36 E.R. 224, Gregory v. Williams.
16. ('18) 5 A.I.R. 1918 Cal. 941 : 36 I. C. 792 : 27 C. L. J. 483 : 22 C. W. N. 279, Dwarka Nath v. Priya Nath.
17. (1817) 3 Mer. 582 : 17 R.R. 136, Gregory v Williams.

It is the second of the above propositions that *a* was in our opinion the express basis of the decision in (1817) 3 Mer. 582[17] though the first might have been implied in it. It is curious to notice that James L. J. who was also a party to the decision in (1881) 16 Ch.D. 125[1] relied on (1817) 3 Mer. 582[17] as a definite authority for the second proposition, in (1881) 16 Ch.D. 290[2] which is reported in the very same volume. Here, there was no entrustment of property and Lloyds, the promisee was suing on behalf of an outsider. Referring to this point James L. J. made the following observations in his judgment :

"I am of opinion that Fry J. was well-warranted in the conclusion at which he arrived that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested. That brings the case within the authorities of which there are more than one, namely, (1817) 3 *b* Mer. 582[17] before Sir William Grant, (1840) 6 M. & W. 467[18] and many other cases which proceed on the principle that if *A* is trustee for *B*, *A* can sue on behalf of *B*."

The very same principle was invoked in (1919) A.C. 801[19] where the charterer sued the shipowner for the amount of broker's commission and the claim was allowed against the shipowner on the ground that the charterer was the nominee or trustee for the broker. If this principle were to be invoked in the present case, then defendants 1 and 2, the promisees, ought to be regarded as trustees for the plaintiff and the plaintiff should have sued through them for enforcement of the contract against defendant 4. This is not however the plaintiff's case and Dr. Roy makes it clear in his argument that he is not relying on this principle in support of his client's case. He relies entirely on *c* the first proposition enunciated by Sir George Jessel in (1881) 16 Ch.D. 125[1] which was accepted by this Court in 22 C.W.N. 279[16] and his contention is that defendant 4 in the circumstances of this case constituted himself a trustee for the benefit of his client.

We do not think that in the present case there was any entrustment of the property to defendant 4. In (1817) 3 Mer. 582[17] Williams took assignment of the property from Parker for the express purpose of disposing it of and applying the sale proceeds towards the payment of £ 900 due to Gregory in the first place and to the satisfaction of his own dues after that. The residue, if any, he undertook to refund to Parker. There was an agreement in fact to pay out of a certain property, but this element is entirely lacking in the present case. Defendant 4 was under no obligation to use the property or its *d* sale proceeds in any particular way ; he was to take it as a purchaser in absolute right and the promise that was made was entirely a personal covenant which had nothing to do with the property itself. Dr. Roy appreciated this difficulty and that is why he said that defendant 4 might be regarded as a trustee in respect of the consideration money and in support of his contention he laid great stress upon the decision of this Court in 22 C.W.N. 279.[16] This contention cannot also in our opinion succeed. In 22 C. W. N. 279[16] the first two defendants who were indebted to the plaintiff for a certain sum of money transferred the property to defendant 3 and on the very day that the conveyance was executed the *e* purchaser executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hand. We might say that in these circumstances a definite sum of money was allocated and held by defendant 3 for the benefit of the plaintiff and in a sense the money was earmarked for that purpose. But nothing like that happens in the present case. The property was not sold for a fixed consideration and the vendee did not retain out of it a certain sum of money which he undertook to pay to the creditors. The consideration for the transfer was that the purchaser would satisfy the two creditors of the vendors, and release the latter from their liability in respect of the two debts. The amount which the vendee was to pay to the creditors would depend upon the arrangement which he might be able to make with them. He took the chance of his being *f* able to induce the creditors to give up their claim for interest either in whole or in part. But it is perfectly clear that it was for the benefit of the vendors themselves and not for the benefit of the creditors that this bargain was made. If the transferee has not made good his promise, it is open to defendants 1 and 2 under the terms of the kobala to sue defendant 4 for the recovery of the sum that has been decreed to the plaintiff against them. We cannot hold, however, that defendant 4 was in any way a trustee for the plaintiff in respect of the money due to him. The first contention of Dr. Roy, therefore, must fail.

The other point raised by Dr. Roy relates to the question of limitation. As has been said already, the only payment which was made by defendant 4 towards the interest due on the hundis was on 8th *g* August 1927, and the suit is admittedly filed more than three years after that date. The question is whether the payment by the other debtors could save limitation against defendant 4. Dr. Roy argues that defendant 4 being only a surety for the debtor, a payment by the principal defendants would keep alive the debt against the surety under S. 20, Limitation Act, and in support of his contention he has relied upon a decision of Lort-Williams J. in 44 C. W. N. 985.[20] There is some difference of judicial opinion on this point as to whether a payment made by a principal debtor would save limitation against the surety and conversely whether a payment by the surety will keep alive the debt against the principal debtor. The view that was accepted by Sir Lawrence Jenkins in 28 Bom. 248[21] and by this Court in 44 Cal. 978[22] is that the liabilities of the debtor and the surety are distinct *h* though they arise out of the same transaction and consequently the payment of interest by the principal debtor cannot extend the period of limitation against the surety. The other view which is indicated by Lort-Williams J. in the case noted above is that there is really one debt owing to the debtor and the surety and, therefore, a payment by one of them would save limitation against the other. This view assumes that though the debt is common,

18. (1840) 6 M. & W. 467 : 9 L.J. (N.S.) Ex. 177 : 8 Dowl. P.C. 360 : 4 Jur. 341 : 55 R.R. 694, Lamb v. Vice.

19. (1919) 1919 A.C. 801:88 L.J.K.B. 861: 121 L.T. 393: 14 Asp. M.C. 451: 24 Com. Cas. 268 : 35 T.L.R. 542, Les Affreteurs Reunis. v. Leopold Walford.

20. ('40) 27 A. I. R. 1940 Cal. 401 : 191 I. C. 608 : I. L. R. (1940) 2 Cal. 362 : 44 C. W. N. 985, Ranjit Kumar Roy v. Kaviraj Kishori Mohan Gupta.

21. ('04) 28 Bom. 248 : 5 Bom. L. R. 1020, Gopal Daji Sathe v. Gopal.

22. ('18) 5 A. I. R. 1918 Cal. 707 : 39 I. C. 705 : 44 Cal. 978 : 25 C. L. J. 238 : 21 C. W. N. 482, Brojendra Kishore v. Hindusthan Co-operative Insurance Society.

there are really two distinct contracts, one with the debtor and the other with the surety ; for, if the surety be taken to be a joint contractor with the principal debtor, a payment by one will not save limitation against the other under S. 21, Limitation Act. In the case before us, the hundis make it perfectly clear that defendant 4 was a joint contractor with the other defendants, and there was no separate contract with him and the case of the plaintiff proceeded throughout on that footing. In the trial Court limitation was sought to be saved against defendant 4 by attempting to prove that the other defendants were authorised by him to make the payment and the question was not at all raised before the lower appellate Court. In our opinion, therefore, so far as the present case is concerned, defendant 4 must be deemed to be a co-contractor with defendants 1 and 2 and the payment by the latter would not entitle the plaintiff to get an extension of time as against defendant 4. The result, therefore, is that the appeal is dismissed with costs. The cross-objection is not pressed and is dismissed without any order as to costs. No order is necessary on the application and the affidavit.

R.K. *Appeal dismissed.*

Lim. Act —
(c) ('42) Chitaley, S. 21, N. 7 Pt. 1.
('38) Rustomji, Page 416 Pt. 2.

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* A. I. R. (29) 1942 Calcutta 255

B. K. MUKHERJEA AND ROXBURGH JJ.

Raj Kumari Prafulla Nalini Dassi and another—Decree-holders—Appellants

v.

Nrishingha Kumari Dasi and others—Judgment-debtors—Respondents.

Appeal No. 257 of 1939 (S.M.A.), Decided on 8th August 1941, from appellate order of Dist. Judge, Nadia, D/- 19th August 1939.

*** (a) Limitation Act (1908), Art. 182 (6) — Decree coming within prohibition of S. 48, Civil P. C.—Art. 182 (6) cannot be availed of.**

Article 182 (6) Limitation Act, cannot be availed of by a decree-holder if his decree comes within the prohibition contained in S. 48, Civil P. C. Therefore, if a decree-holder has realised an amount of money by execution of his decree, but is compelled to refund that amount by a decree passed in a subsequent suit for refund, there is no doubt that he will be entitled to take out execution for this amount, if the application is presented within three years from the date of the final decree in the refund suit, provided 12 years have not already run out from the date of the original decree. If 12 years had already expired from the date of the original decree, the decree-holder will not be still entitled to avail himself of the provisions of Art. 182 (6), Limitation Act : ('22) 9 A.I.R. 1922 Mad. 268, ('32) 19 A.I R. 1932 All. 351 and ('40) 27 A. I. R. 1940 Mad. 127 (F.B.), *Rel. on.* [P 256*d*; P 257*a*]

The decree-holder may be entirely blameless and the refund order might be made after 12 years, without any fault on his part. But the law has to be interpreted as it stands even though it might lead to hardship and injustice. [P 256*h*; P 257*a*]

(b) Civil P. C. (1908), S. 48 — Subsequent application for execution for recovery of amount which decree-holder had to refund is not one for revival or continuation of original execution proceeding.

The subsequent application for execution for recovery of the amount which the decree-holder had to refund, is in substance a new application and not one for revival or continuation of the original execution proceeding. The decree is fully satisfied and the original execution case is dismissed on full satisfaction. [P 257*b*]

(c) Civil P. C. (1908), S. 48—Character of subsequent application different from that of previous one—It is fresh application.

Where the character of the subsequent application is different from that of the previous one, the later application cannot but be regarded as a fresh application: ('29) 16 A.I.R. 1929 P.C. 209, *Rel. on.* [P 257*c*]

In the first application the only prayer of the decree-holders was for attachment of the surplus sale proceeds, belonging to all the judgment-debtors and lying with the collector. In the second proceeding they sought to attach and sell certain immovable properties which were owned by one of the judgment-debtors :

Held that the subsequent application was a fresh one. [P 257*b*]

Gopendra Nath Das and Biraj Mohan Roy— for Appellants.

Ramaprosad Mukherjee, Jajneswar Majumdar and Mohit Kumar Chatterjee — for Respondents.

JUDGMENT.—This appeal is on behalf of the decree-holder, and it is directed against an appellate order made by the District Judge of Nadia affirming an order of the Munsif, First Court of that place, dismissing the appellants' application for execution of a decree on the ground that it is barred under S. 48 Civil P. C. The appellants decree-holders obtained a rent decree against respondents 1-4, and the predecessor-in-interest of respondent 5 for a sum of Rs. 1829 as. odd on 23rd March 1919. The judgment-debtors had, amongst other properties, a patni tenure which they held under Satyabala Dasi and others, and this patni was sold at the instance of the latter, for default in payment of patni rent, under Regn. 8 of 1819 on 17th November 1919, just six days before the appellants obtained their decree. The patni was purchased at the regulation sale, by one Rakhal Das Tarafdar for Rs. 13,000 and after meeting the patni rent due to the zemindar, a large sum of money still remained with the Collector as surplus sale proceeds. On 5th January 1920, the appellants applied for execution of their rent decree against the judgment-debtors and in course of the execution proceedings, the surplus sale proceeds of the patni taluk lying with the Collector, were attached, and the entire decretal dues were satisfied from the same. The execution case started by the appellant was thus dismissed on full satisfaction on 2nd March 1920 Subsequently, a darpatnidar under the judgment-debtors, instituted a suit to set aside the patni sale. This suit was decreed, and the patni sale was set aside on 8th January 1922. The auction purchaser then got back his purchase money from the zemindars by instituting a suit against them, and recovering a decree upon the same, and the zemindars in their turn sued the appellants for refund of the money taken away by them in execution of their decree against the judgment-debtors. This suit was decreed by the trial Court on 13th

September 1929. There was an appeal to the District Judge, against this decision and that being dismissed, a second appeal was taken to this Court, which was eventually dismissed on 14th November 1935. The decree-holders being thus compelled to refund the whole amount which they had taken in satisfaction of their decree filed the present application on 14th November 1938, praying for revival of the original application for execution which was dismissed on 2nd March 1920, and for realisation of the decretal dues by attachment and sale of other properties belonging to some of the judgment-debtors. Both the Courts below refused to treat this application of the appellant as a continuation of their original application for execution, and they rejected it on the ground that any application for execution was now barred under S. 48, Civil P. C. It is the propriety of this view that has been challenged before us in this appeal.

Mr. Das who appears for the appellants has contended before us that, as his clients are seeking execution in respect of the amount which they had to refund to the zemindars, under a decree obtained by the latter in a suit brought against them, they are entitled under cl. (6) of Art. 182, Limitation Act, to a period of three years from 14th November 1935 when the decree was made by the final Court of appeal in the refund suit. The application for execution was therefore quite in time, and S. 48, Civil P. C., did not in any way affect or curtail the provision of Art. 182. It is also argued that in any event, the Courts below should have treated the present application as one in continuation or for revival of the former application for execution. So far as the first point is concerned, there is no doubt that the present case comes within the wording of Art. 182, cl. (6), Limitation Act, which provides for execution of a decree in respect of any amount which was recovered by the decree-holder by execution of his decree, but which he was directed to refund later on by a decree passed in a suit for such refund. The period of three years mentioned under column (2) of the article is to begin in such cases from the date when the final decree is made in the suit for refund. The difficulty however is created by the fact that the Legislature when it introduced the present cl. (6) in Art. 182, Limitation Act, did not alter the provision under column (1) of the article, or that of S. 48, Civil P. C. Article 182, Limitation Act, governs an application for execution of a decree or order of any civil Court which is not provided for by Art. 183, or S. 48, Civil P. C. Section 48, Civil P. C., imposes a restriction on the right of the decree-holder, by fixing a maximum time for execution, and by enacting that no order for execution shall be made upon an application presented after the expiry of 12 years from the date of the decree, or from the other dates specified in cl. (b) of the section. If a decree-holder has realised an amount of money by execution of his decree, but is compelled to refund that amount by a decree passed in a subsequent suit for refund, there is no doubt that he will be entitled to take out execution for this amount, if the application is presented within three years from the date of the final decree in the refund suit, provided 12 years have not already run out from the date of the original decree. The question, however, is as to whether if 12 years had already expired from the date of the original decree, the decree-holder will be still entitled to avail himself of the provision of Art. 182 (6), Limitation Act. The answer in our opinion should be in the negative.

Under S. 3, Limitation Act, every application made after the period prescribed by Sch. 1, Limitation Act, shall be dismissed. Article 182 of Sch. 1 prescribes a period of three years beginning from the dates specified in the various clauses, for an application for execution of a decree, which inter alia is not provided for by S. 48, Civil P. C. In a sense every application for execution is provided for under S. 48, Civil P. C., which prescribes a period of 12 years after which no such application could be entertained by a Court. If we give this interpretation to these words in Art. 182 the result would be an absurdity, for the whole of the article would in that case be rendered inoperative and would not be applicable to any application for execution of a decree. The words should reasonably be construed to mean "not provided for as regards dismissal by S. 48, Civil P. C." In other words execution can be allowed under Art. 182 only if it is not barred and liable to be dismissed under S. 48, Civil P. C. To quote the language of Ramesam J. in 45 Mad. 785,[1] "to an application for execution of a decree Art. 182 has first to be applied and if it is found not wanting when tested by Art. 182, then S. 48, Civil P. C., operates as a further test."

A point similar to the present was discussed in 54 All. 622.[2] There a decree was amended under S. 152, Civil P. C., more than 12 years after the decree was passed; and within a year from the date of amendment the decree-holder presented his application for execution of the decree. Under Art. 182 (4), Limitation Act, the period of three years would run from the date of amendment of the decree, and the application was quite in time, if cl. (4) of Art. 182 was applicable. It was held that Art. 182, Limitation Act, was subject to the provision of S. 48, Civil P. C., and as the execution of the decree was barred under the latter section, cl. (4) of Art. 182, Limitation Act, could not be availed of by the decree-holder to get a starting point for limitation from the date on which the amendment was made. This decision was followed by the Madras High Court in I. L. R. (1940) Mad. 349[3] and it was pointed out by K. Ayyangar J. that while the case of an amendment was made and provided for by Art. 182, Limitation Act, it was significant that the language of S. 48, Civil P. C., had been left unaltered. It was therefore a fair inference that the period of 12 years should be counted from the date of the decree irrespective of any amendment that it might have undergone since. The same reasoning applies in respect to cl (6) of Art. 182, and if it was the intention of the Legislature to allow a decree-holder a period of three years from the date when the decree for refund was subsequently passed against him, irrespective of the fact that the original decree had then become barred under S. 48, Civil P. C., it would have made suitable alterations either in the language of S. 48, Civil P. C., or in that of Art. 182, Limitation Act, itself. Of course it can be argued that in case of amendment of a decree if the amendment was not applied for or obtained within 12 years, the decree-holder must be to blame, and it is proper that he should suffer for his neglect and inaction. In a case under cl. (6) on the other hand the decree-holder may be entirely blameless and the

1. ('22) 9 A.I.R. 1922 Mad. 268 : 70 I.C. 396 : 45 Mad. 785 : 43 M.L.J. 168, Subbarayan v. Natarajan.
2. ('32) 19 A.I.R. 1932 All. 351 : 138 I.C. 93 : 54 All. 622 : 1932 A.L.J. 471, Faqir Chand v. Kundan Singh.
3. ('40) 27 A.I.R. 1940 Mad. 127 : 187 I.C. 176 : I.L.R. (1940) Mad. 349 : (1940) 1 M.L.J. 235 (F.B.), Rama Chandra Rao v. Parsuramayya.

refund order might be made after 12 years, without any fault on his part. The circumstances of the present case indicate that this might lead to hardship and injustice, and we are inclined to think that there is a definite lacuna in this respect in the present law. We are however bound to interpret the law as it stands, and, in view of the clear wording in Art. 182, Limitation Act, it is not possible for us to hold that cl. (6) of the Article could be availed of by a decree-holder, if his decree comes within the prohibition contained in S. 48, Civil P. C. This contention of Mr. Das must therefore fail.

The second contention put forward by Mr. Das cannot also in our opinion succeed. There are two material reasons which stand in the way of our treating the present application, as one for revival or continuation of the original proceeding. In the first place, the earlier proceeding had finally terminated and had been disposed by a judicial order passed on 2nd March 1920. It is not a case where execution proceedings were interrupted by reason of circumstances over which the decree-holder had no control, or an order of dismissal or striking off was made merely for administrative or statistical purposes. The decree was fully satisfied and the execution case dismissed on full satisfaction. The provision of cl. (6) of Art. 182 itself indicates, that the subsequent application for execution for recovery of the amount which the decree-holder had to refund, is in substance a new application. The other reason is that the present application cannot be said to be of the same nature as the previous one. As has been pointed out by the trial Judge, in the first application the only prayer of the decree-holders was for attachment of the surplus sale proceeds, belonging to all the judgment-debtors and lying with the collector. In the present proceeding they seek to attach and sell certain immovable properties which are owned by one of the judgment-debtors. Where the character of the subsequent application is different from that of the previous one, the later application cannot but be regarded as a fresh application : *vide* 33 C. W. N. 977.[4] The result is that this appeal fails. We direct that each party would bear his own costs in all the Courts.

K.S./R.K. *Appeal dismissed.*

4. ('29) 16 A.I.R. 1929 P.C. 209 : 118 I.C. 268 : 33 C.W.N. 977 (P.C.), Maharaj Bahadur Singh v. A. H. Forbes.

Limitation Act —
(a) ('42) Chitaley, Art. 182, Note 23 Pt. 3.
('38) Rustomji, Page 1665 Pt. 3.
(b) ('42) Chitaley, Art. 182, Note 143 Pts. 2 and 17.
('38) Rustomji, Page 1699 Pts.4 and 5; Page 1701 Pt. 3.
C. P. C. —
('40) Chitaley, S. 48 Note 7 Pt. 6a.
('41) Mulla, Page 202 Note "Fresh application."
(c) ('40) Chitaley, S. 48, Note 7 Pt. 6.
('41) Mulla, Page 203 Pt. (y).
Limitation Act —
('42) Chitaley, Art. 182, Note 143 Pt. 20.
('38) Rustomji, Page 1695 Pt. 7 and Page 1696 Pts. 4 and 6.

A. I. R. (29) 1942 Calcutta 257

NASIM ALI AND SEN JJ.

Girija Prasanna Deb Gupta—Plaintiff — Appellant

v.

N. M. Khan, Defendant 2 and others— Respondents.

Appeal No. 936 of 1939, Decided on 23rd June 1941, from appellate decree of District Judge, Tipperah at Comilla, D/- 23rd January 1939.

(a) Civil P. C. (1908), O. 41, Rr. 33 and 4 — Word 'parties' in O. 41, R. 33—Scope — Trial Court decreeing suit against *B* and dismissing it against *A* without costs—Appeal by *B*—While dismissing suit against *B* as well appellate Court can decree costs incurred by *A* in trial Court.

Order 41, R. 33 authorises appellate Court to pass any decree which ought to have been passed by the trial Court. The word 'parties' in O. 41, R. 33 is wide enough to include persons who were parties to the suit in the trial Court but were not parties to the appeal. Consequently, where the trial Court dismisses the suit against one of the defendants *A* without awarding him any costs, the appellate Court in the appeal by the other defendant *B* while dismissing the suit as against *B* as well can under O. 41, R. 33 decree costs incurred by *A* in the trial Court even if *A* did not file any appeal or cross-objection and was not party to the appeal. Order 41, R. 4 cannot apply to such a case as it contemplates a case where the decree appealed from proceeds on any ground common to all the defendants. [P 260*f*,*g*]

(b) Civil P. C. (1908), O. 41, R. 33 and S. 35 — Defendants filing joint memo of appeal — Appeal allowed — Court cannot award separate sets of pleaders' fee for appeal.

Where the defendants file a joint memorandum of appeal from the decree passed against them in the trial Court, the appellate Court while allowing the appeal cannot award separate sets of pleaders' fee for appeal to each defendant. [P 260*h*]

(c) Civil P. C. (1908), O. 41, Rr. 4 and 33 — Trial Court's decree against defendants *A* and *B* proceeding on common ground — Appeal by *A* alone—Appellate Court while dismissing suit against *A* can dismiss it with costs against *B* as well.

Where the trial Court's decree against defendants *A* and *B* proceeds on a common ground and *A* alone appeals, the appellate Court while allowing the appeal and dismissing the suit against *A* can dismiss it with costs against *B* as well although he was not a party to the appeal. [P 260*h*]

S. M. Bose, Hemendra Kumar Das, Priya Nath Dutt, Shyama Charan Deb and Amarendra Mohan Moitra — for Appellant.

E. C. Ormond and Amiruddin Ahmed; and Tafazzal Ali and Imam Hossain Chowdhury — for Respondents 1 to 3; and 5, respectively.

JUDGMENT. — This is an appeal against the judgment and the decree of the District Judge of Comilla, dated 23rd January 1939 reversing the decision of the Subordinate Judge of Comilla, dated 23rd June 1938. The suit out of which this appeal arises was instituted by the appellant against the

respondents for recovery of Rs. 2100 as damages. a The facts about which there is no dispute in this appeal, are these :

(1) Defendant 2 was appointed Sub-Divisional Magistrate of Brahmanberia Sub-Division in the district of Tippera, in April 1934. At that time there was a fund known as Momin Fund which was being run by an unregistered society of which the successive Sub-Divisional Officers of Brahmanberia were Presidents. After defendant 2 came to Brahmanberia as Sub-Divisional Officer, this unregistered society was registered under the name and style of Co-operative Muslim Education Society Ltd., (hereinafter referred to as the Society). Defendant 2 was elected president of this Society. Defendant 3, a Deputy Magistrate, was the second officer of Brahmanberia at that time. He became a member of this Society.

(2) There was a meeting of this society on 25th b May 1936. Defendant 2 presided over this meeting. At this meeting, a resolution (Ex. P 1) was passed for approaching the Brahmanberia Municipality for a suitable site for the construction of a Muslim Hall. In this resolution, no mention was made about any particular site. A copy of this resolution was forwarded to the Chairman of the Municipality. On 30th May 1936, the Municipality passed a resolution (Ex. C) requesting the Secretary of the Society to supply necessary details as to specification etc., of the proposed building. On 2nd June 1936, the Secretary of the Society wrote a letter (Ex. I) to the Municipality. In this letter two alternative sites (50 x 25 cubits of land on the western bank of the Cutchery tank and 100 x 50 cubits of land in the southern bank of the Lokenath tank known as Silver Jubilee Park) were suggested. On 4th June 1936, two petitions (Exs. 20 and 20A), c signed by a large number of rate payers of the Municipality protesting against the free gift of the land on the southern bank of the Lokenath tank were filed in the municipal office. On the next day, the letter of the Secretary of the Society was considered by the Municipality at a special meeting The Municipality refused the proposal for a free gift of any land to the Society on the ground that there was no provision in the Municipal Act for making a free gift. On the same date, six Commissioners sent a requisition (Ex. E) to the Chairman of the Municipality to convene a special meeting immediately for considering the desirability of granting a piece of land measuring 100 x 50 cubits on the western portion of the southern bank of the Lokenath tank under a mokarari permanent lease at a nominal rent and without any selami for the purpose of erecting a Muslim institute by the Society. On d 11th June 1936, the Municipality by a resolution (Ex. 14A) agreed to grant a permanent mokarari lease to the Society at an annual rent of 4 annas without payment of any selami.

(3) On the same day (11th June 1936) a suit was filed in the first Court of the Munsif at Brahmanberia, viz., Title Suit No. 153 of 1936 on behalf of the rate-payers of the Municipality against the Municipality and the Society for a declaration that the resolution granting lease to the Society was null and void and for an injunction restraining the Society from raising any permanent structure on the land. On the next day, the Munsif issued interim injunction. This injunction was served on the Secretary of the Society on the morning of 13th June.

(4) On 17th June 1936, a criminal case was filed in the Court of the Sub-Divisional Magistrate of Brahmanberia by defendant 5 against the plaintiff and his younger brother on the allegation that defendant 5 paid Rs. 600 to the plaintiff on con- e tract for sale of certain lands but the plaintiff and his brother denied receipt of the money and refused to execute the kobala. On that day defendant 2 being out on tour defendant 3 heard the petition of complaint and summoned the plaintiff under S. 406, Penal Code, and fixed 24th June 1936 for appearance of the plaintiff in Court. On 21st June 1936 the plaintiff was served with summons. On 24th June 1936 plaintiff appeared before defendant 2. On that day defendant 2 recorded the following order : "Accused appears. To furnish bail for Rs. 1000. In default to hajat till 9th July 1936. To 9th July 1936 for evidence." After the said order was passed, 26 pleaders of the Brahmanberia Bar filed a bail bond on behalf of the plaintiff. This bail bond was sent to defendant 4 (the Court Sub-Inspector of Police) for enquiry and report about the fitness of the sureties. Defendant 4 thereupon asked for time f for enquiry. This prayer of defendant 4 was allowed by defendant 2. A pleader then moved defendant 2 for the release of the plaintiff on bail. Defendant 2 thereupon verbally ordered that he would release the plaintiff if the money be put in cash. Thereafter an application (Ex. 11) was filed before defendant 2 on behalf of the plaintiff for permission to deposit Rs. 1000 in cash. Defendant 2 thereupon passed the following order : "Let the money be deposited in the treasury during the usual hours of its transaction." The money however was not deposited in the treasury on that date. Plaintiff was then put under handcuff and was sent to the local sub-jail. On the next day i. e. 25th June 1936 two petitions were filed on behalf of the plaintiff (Exs. 12 and 13). There were two prayers in Ex. 12. The first prayer was for acceptance of the money in the treasury on that day and the g second prayer was for permission to deposit the money in the nezarat and for acceptance of the same by the Nazir. No order was passed on the first prayer and the second prayer was refused. The prayer in Ex. 13 was for a direction on the Court Sub-Inspector for expediting the enquiry and for early submission of report by him. The order passed by defendant 2 on that petition was "Court Sub-Inspector to report." On 26th June 1936 the money was deposited and the plaintiff was released. The Court Sub-Inspector defendant 4 also submitted his report (Ex. 32) on that date.

(5) On 30th June 1936 the plaintiff filed an application (Ex. 22) before the District Magistrate of Tipperah for transfer of his case from the file of defendant 2. The District Magistrate thereupon called for a report from the trying Magistrate h (defendant 3). Defendant 3 thereupon submitted his report (Ex. 23). The petition for transfer was heard on 14th July 1936. On 11th September 1936 the Public Prosecutor of Comilla filed an application (Ex. 24) for withdrawal of the criminal case. The plaintiff was thereupon discharged under S. 494, Criminal P. C.

(6) The plaintiff thereafter served notices on defendants 1 to 4 under S. 80, Civil P. C., and filed the present suit on 25th November 1936.

Plaintiff's case briefly stated is as follows : Defendant 2 as President of Muslim Co-operative Education Society and defendant 3 as a member thereof were anxious to utilise a portion of the Silver Jubilee Park for the purpose of constructing a Muslim Institute Hall In pursuance of this desire, they caused the Society to move the Municipality to make a free gift of a portion of this Park for the purpose of constructing the Muslim In-

stitute Hall. After the Municipality refused the request of the Society, defendants 2 and 3 threatened, coerced and brought undue pressure upon certain Hindu Commissioners of the Municipality who signed the requisition (Ex. E) with the result that the Municipality passed a resolution on 11th June 1936 granting a permanent mokarari lease of a site situated on the park. The plaintiff took a leading part both in respect of the petitions of protest and in the institution of Title Suit No. 153 of 1936 in the first Court of the Munsif at Brahmanberia. Defendants 2 and 3 suspected that the plaintiff was responsible for the institution of the suit and were greatly displeased with the plaintiff. They therefore determined to harass the plaintiff and put him into trouble. In pursuance of this determination, they caused defendant 2 to file a false criminal case against the plaintiff on 17th June 1936. Defendant 3 without due consideration of the allegations made in the petition of complaint summoned the plaintiff under S. 406, Penal Code. The allegations in the petition of complaint were entirely false and baseless. Defendant 3 issued the process in consultation with and at the instance of defendant 2. It was not a bona fide order made in the exercise of defendant 3's powers as a Magistrate and in exercise of his jurisdiction as such. The criminal proceedings against the plaintiff were conducted in camera and the plaintiff had no notice of them until 21st June when he was served with summons. Plaintiff appeared in Court of defendant 2 at 11 A. M. on 24th June 1936 with cash money ready. But his case was not called till 12 A.M. on that date. The amount of bail demanded from the plaintiff was in excess of the amount which was the subject-matter of the criminal charge. The position of the plaintiff in life was well-known to defendant 2 and in spite of that he passed the order that in default of bail the plaintiff would remain in Hazat till 9th July 1936. The pleaders who executed the bail bond are all respectable and leading members of the Brahmanberia Bar. Their position in life and solvency were known to defendant 2. In spite of that, defendant 2 directed the Court Sub-Inspector (defendant 4) to report as to the fitness of the sureties. Defendant 4 wanted time to hold local enquiries as to the fitness of the sureties, in consequence of a previous arrangement with defendant 2. As soon as defendant 2 passed a verbal order that if the money be put in cash plaintiff would be released immediately the cash money was tendered. This tender was made half an hour before 3 P. M. that is within the hours of transaction at the treasury. Defendant 2 deliberately deferred passing orders regarding the acceptance of the money tendered. He passed orders for deposit of the money in the treasury after 3 P. M. which was too late for deposit of money in the treasury. As a result of this delay in passing the order the money could not be deposited in the treasury on 24th June. According to a pre-arranged plan plaintiff was handcuffed and made to walk to the local sub-jail through crowded streets. He was confined in the sub-jail that night.

An attempt was made on 24th June by a pleader on behalf of the plaintiff to obtain the signature of the plaintiff on a properly stamped vakalatnama. But this was not permitted by defendant 4. Another attempt was made at the sub-jail but this was also not successful. On 25th June plaintiff's prayer for depositing the money with the Nazir of the Court or for accepting the bail bond filed on 24th June was refused without any reason. Defendants 2, 3 and 4 caused illegal, wrongful and malicious detention of the plaintiff from 24th June 1936 to 26th June 1936. This detention was responsible for immense mental sufferings, agony, bodily pain, humiliation before the public, irreparable loss and injury to the good name and reputation of the plaintiff who is a pleader of 12 years standing practising at Brahmanberia, a landlord and is connected with several public institutions. After the plaintiff was discharged under S. 494, Criminal P. C., in spite of an order for refund of the cash deposit of Rs. 1000 made by the Additional Magistrate on 11th September 1936, the money was not refunded until 21st September 1936. The acts and orders of defendants 2, 3 and 4 in setting up defendant 5 to file a false petition of complaint were illegal and mala fide and were done with the sole object of unnecessarily and unjustly harassing the plaintiff and lowering him in the eyes of the public. Defendants 2 and 3 acted beyond their judicial powers and in excess of their jurisdiction. Their acts were a trespass upon the person and property of the plaintiff. Plaintiff was accordingly entitled to get Rs. 2100 as damages from the defendants. (Rs. 500 as compensation for wilful, wrongful and malicious prosecution, etc., and detention, Rs. 300 as compensation for physical injury due to illegal handcuffing, Rs. 500 as compensation for loss of good name and reputation, Rs. 600 as compensation for mental agony, Rs. 200 as costs incurred by the plaintiff in defending the criminal case instituted against the plaintiff.) Written statements were filed by all the defendants.

Defendant 1 the Secretary of State for India challenged the sufficiency and validity of the notice under S. 80, Civil P. C., pleaded the bar of limitation and denied liability for actions of defendants 2 to 4 in the discharge of their duties. Defendant 5 in his written statement said that the allegations in the petition of complaint filed by him against the plaintiff were all true and that he had reasonable and probable cause for filing the said criminal case. Defendants 2 and 3 pleaded that they did not set up defendant 5 to file the criminal case against the plaintiff that the suit was bad for multifariousness, that the claim against them was barred by limitation and that the Judicial Officers' Protection Act was a bar to the maintainability of the suit against them. They also pleaded that the claim for damages was excessive. The defence of defendant 4 was that he had nothing to do with the starting of the criminal case and that everything he did was done by him bona fide in the discharge of his duties. The following issues were settled between the parties :

1. Has the plaintiff cause of action for this suit?
2. Is the suit bad for misjoinder of parties and causes of action?
3. Is the suit barred by limitation?
4. Is the notice under S. 80, Civil P. C., a valid and sufficient notice?
5. Is the Judicial Officers' Protection Act a bar to the maintainability of the suit as against defendants 2, 3 and 4?
6. Was the complaint against the plaintiff instituted by the combined efforts of defendants 2, 3 and 4? Was defendant 5 a mere tool in the hands of defendants 2, 3 and 4? Was the complaint false and malicious?
7. Were the acts done and orders passed by defendants 2, 3 and 4 in connection with the prosecution and detention of the plaintiff in Hajat collusive, mala fide, illegal or in excess of their jurisdiction ?
8. Were the acts done or orders passed by defendants 2, 3 and 4 done or passed with the object of harassing the plaintiff or lowering him in the esti-

mation of the public or to cow him down or to cause him mental and physical pain ? Has the plaintiff been lowered in the estimation of the public or has he suffered mental and physical pain by reason of these acts and orders?

9. Did defendants 2, 3 and 4 act as the agents of defendant 1? If not, is defendant 1 liable?

10. What damages, if any, is the plaintiff entitled to recover and from which of the defendants?

11. To what relief, if any, is the plaintiff entitled?

At the time of the hearing of the suit, issue 2 and issue 9 (the claim against the Secretary of State for India) were not pressed. The Subordinate Judge answered issues 1 and 3 to 5 against the defendants. As regards issues 6, 7 and 8 the Subordinate Judge arrived at the following findings : (1) That there was a conspiracy among defendant 2 and the prominent members of the Co-operative Muslim Education Society Ltd., including defendants 3 and 5 to put the plaintiff into trouble and that the criminal case brought by defendant 5 against the plaintiff was the result of that conspiracy. (2) That defendant 2 was the real complainant in the criminal case and that defendant 5 was the name lender. (3) That the criminal case was false to the knowledge of defendant 5 and that he had no reasonable and probable cause for filing the criminal case. (4) That defendant 4 was not in the conspiracy from the very beginning, that he was at best guilty of irregularities in the discharge of his duties and that he abused his powers only to please defendant 2.

As regards issue 10, the finding of the Subordinate Judge was that plaintiff was entitled to recover Rs. 2100 as damages against defendants 2, 3 and 5. The subordinate Judge accordingly dismissed the suit against defendants 1 and 4 without any costs and passed a decree for Rs. 2100 as damages against defendants 2, 3 and 5 with costs.

Only defendants 2 and 3 appealed to the District Judge. The learned District Judge has arrived at the following findings : (1) That the plaintiff in his plaint did not plead expressly and specifically conspiracy among defendants 2 to 5. (2) That the suit was bad for multifariousness, misjoinder of parties and causes of action. (3) That the notice under S. 80, Civil P. C., was inadequate and invalid in so far as the tort of malicious prosecution is concerned. (4) That defendants 2 and 3 had nothing to do with the filing of the criminal case by defendant 5 against the plaintiff. (5) That the acts done and orders passed by defendants 2 and 3 in the criminal case were lawful and were done and made without malice and in good faith within the limits of the jurisdiction of these defendants as Magistrates and consequently these defendants were protected by the Judicial Officers' Protection Act and S. 270, Government of India Act, 1935. (6) That defendant 4 did nothing to please defendant 2 and that he was not guilty of procrastination and delay in conducting his enquiry about the fitness of the sureties who executed the bail bond in the criminal case. (7) That the plaintiff has failed to prove that defendant 5 instituted the criminal case without reasonable and probable cause.

On these findings, the learned District Judge allowed the appeal of defendants 2 and 3 and dismissed the suit against them with costs in both Courts. The learned District Judge dismissed the suit against defendant 5 with costs in the trial Court and awarded in favour of defendants 1 and 4 their full costs in the trial Court under O. 41, R. 4 and R. 33, Civil P. C. The learned Judge further directed that each of the defendants would get a separate set of costs with a separate pleader's fee. Hence this appeal by the plaintiff. The learned counsel on behalf of the appellant urged only the three grounds in support of this appeal, viz : (1) That the District Judge was in error in awarding costs incurred by defendants 1 and 4 in the trial Court. (2) That the District Judge was wrong in awarding two sets of pleaders' fees to defendants 2 and 3 for hearing of the appeal, and (3) that the District Judge should not have awarded costs to defendant 5 incurred by him in the trial Court.

As regards the first point the contention of the learned counsel is that the District Judge had no jurisdiction to award costs incurred by defendants 1 and 4 in the trial Court as they were not parties to the appeal. The District Judge apparently has passed the decree for costs in favour of defendants 1 and 4 under O. 41, Rr. 4 and 33, Civil P. C. Order 41, R. 4 however contemplates where the decree appealed from proceeds on any ground common to all the defendants. The suit was decreed against defendants 2, 3 and 5, but it was dismissed against defendants 1 and 4. The decree against defendants 2, 3 and 5 proceeded on a common ground. There was no decree against defendants 1 and 4. The provisions of O. 41, R. 4 are therefore not applicable. Order 41, R. 33 of the Code however is in very wide terms. It lays down thus :

"The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection."

This rule authorises appellate Court to pass any decree which ought to have been passed by the trial Court. On the findings of the trial Judge there cannot be any doubt that defendants 1 and 4 were entitled to get their costs in the trial Court. The trial Judge has given no reasons as to why he did not award any costs in their favour. There cannot be any doubt therefore that the District Judge had power to decree costs incurred by defendants 1 and 4 in the trial Court. It is true that these defendants did not file any appeal or cross-objection and they were not parties to the appeal before the District Judge. Rule 33 however lays down that the appellate Court can exercise its power in favour of any of the respondents or parties. The word 'parties' is wide enough to include persons who were parties to the suit in the trial Court but were not parties to the appeal. The District Judge was therefore right in awarding costs incurred by defendants 1 and 4 in the trial Court. As regards the second point it appears that defendants 2 and 3 jointly filed one memorandum of appeal. The learned Judge should not therefore have directed the plaintiff to pay to defendants 2 and 3 two sets of pleaders' fee for the appeal before him.

As regards the third point it appears that the decree of the trial Judge against defendants 2, 3 and 5 proceeded on a common ground. The District Judge in view of his findings was within his power in dismissing the suit against defendant 5 with costs. The decree for costs in favour of defendant 5 although he was not a party to the appeal finds support from O. 41, R. 4 as well as from O. 41, R. 33, Civil P. C. The result therefore is that this appeal is allowed in part. The decree of the District Judge is modified in the manner indicated above. In the

memorandum of appeal to this Court about 34 grounds were taken but only three were pressed. The appeal has substantially failed. Respondents 1, 2 and 3 will get one set of costs while respondent 5 will get another set of costs from the appellant in this Court.

G.N./R.K. *Appeal partly allowed.*

C. P. C. —
(a) ('40) Chitaley, O. 41 R. 33, N. 6 Pt. 4 and N. 7, Pt. 1.
('41) Mulla, Page 1199 Pts. (l) and (m).
(b) ('40) Chitaley, S. 35, N. 27 Pt. 1.
('41) Mulla, Page 151 Pt. (s).
(c) ('40) Chitaley, O. 41 R. 4, N. 1 Pt. 3.
('41) Mulla, Page 1158 Pt. (r).

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BISWAS J.

Natabar Sasmal and others — *Appellants*

v.

Krishna Chandra Bera and others — *Respondents.*

Appeal No. 479 of 1938, Decided on 1st August 1941, from appellate decree of Sub-Judge, second Court, Hooghly, D/- 5th August 1937.

(a) Easement—Necessity—Water drained by khal—Silting of khal does not give rise to easement of necessity.

Where the claimants' water used to be drained away by the khal, the mere silting up of the khal cannot give rise to an easement of necessity in favour of the claimants, even if it be shown that they had no other means of outlet for this water. It is certainly up to them to have taken steps to keep the khal clear of silt. [P 262*g*]

(b) Civil P. C. (1908), O. 1, R. 8—Inhabitants of group of villages restraining defendants from discharging rain water on plaintiffs' lands — Defendants causing opening in bund constructed by plaintiffs — Representative suit held quite in order.

A representative suit was commenced on behalf of the inhabitants of a group of four contiguous villages lying on the eastern side of a khal, flowing north to south to restrain the discharge of surplus rain water from the defendants' mouza on the other side of the khal on and to the plaintiffs' lands in these villages which were admittedly at a lower level. On their side of the khal, the plaintiffs had constructed a bund or embankment to protect their lands from overflooding. The khal silted up, and this caused an obstruction of the defendants' drainage. The defendants caused an opening to be made in the plaintiffs bund in order to provide an outlet for their surplus water. The plaintiffs closed up the opening, and then instituted the suit asking for a declaration of their title and for a permanent injunction against the defendants :

Held that the suit satisfied all the requirements of O. 1, R. 8. The cause of action was no doubt ultimately dependent on ownership of land, but merely because the lands threatened by the defendants' action belonged to different owners, it could not be said that there was not such a community of interest among the plaintiffs in respect of the cause of action or the relief claimed as will support such a suit. A representative suit was quite in order in the circumstances of the case. [P 262*h*; P 263*a*]

(c) Civil P. C. (1908), O. 1, R. 8—Representative suit —Other persons having common interests with defendant need not be joined directly or indirectly if they have not invaded plaintiffs' rights.

In a representative suit by plaintiffs, although other persons may have a common interest with the defendants, if such other persons have not invaded the plaintiffs' rights the plaintiffs are not bound to proceed against them either by impleading them directly as defendants or by moulding the suit on a representative basis so as to include them in effect within its scope. [P 263*a*]

(d) Easement—Natural right—Right of upper owner to flow water to and over lands of lower owner—Nature of such right explained—When it ceases or is suspended explained.

Where the defendants' lands are situated at a higher level, and the lands of the plaintiffs are contiguous, the defendants as the upper proprietors would be entitled to demand as of right that water naturally rising in, or falling on, their lands and not passing in defined channels, shall be allowed by the plaintiffs as the proprietors of adjacent lower lands to run naturally thereto. The owner of a lower heritage cannot escape the burden of receiving the water which falls from a piece of higher ground merely because the water flows across an intervening tenement belonging to another owner. Where, however, the upper and the lower lands are divided by a khal or watercourse which expressly serves as a defined channel for carrying off the surface water from the higher level, the existence of such a channel must imply in law a separation between the lands on either side, and so long as the channel remains, there can be no question of the lower land owner receiving, or being obliged to receive, any water from the upper area. So long as the channel remains it is immaterial whether any pre-existing natural right is deemed to be extinguished or merely to be held in abeyance. A right of an upper land owner to throw his surface water on to land at a lower level is a natural right, and not in the strict sense of the word an easement. It is a right which is not acquired, but is an incident of property owing its origin to the disposition and arrangements of nature. It is incapable, therefore, of being lost by non-user or extinguished permanently, and the maxim "*tantum prescriptum quantum possessum*" has no application : ('32) 19 A.I.R. 1932 P. C. 46, *Rel. on.* [P 263*d*,*e*,*f*,*g*]

The lower owner can, however, prescribe against such right by way of an adverse easement. The effect of the creation of such an adverse easement is only to cause, during the period the easement right is operative, suspension of the natural right, not its complete extinction, and the natural right would accordingly revive on the extinction of the easement : ('36) 23 A. I. R. 1936 Rang. 282 and ('26) 13 A. I. R. 1926 Mad. 449 (F. B.), *Rel. on.* [P 263*h* ; P 264*a*]

Such a natural right, though not capable of being extinguished as such, may nevertheless be abandoned. The abandonment may either be by express agreement between the owner of the dominant land and the owner of the servient land or may be implied from a long and continuous interruption on the part of the owner of the servient land submitted to by the owner of the dominant land : 7 W.R. 498, *Rel. on.* [P 264*b*]

The purposes for which, and the circumstances in which, the altered conditions are brought into

existence as well as the subsequent mode of user or
a enjoyment will all have to be looked into; if, for instance, the khal is only an arrangement made by the "servient" owner in his own land for the reception of the waters coming from above, this will not in fact constitute even a temporary interruption of the natural right. If, on the other hand, it should appear that the khal has been excavated by the "dominant" owner with the express idea of relieving the lower land of the burden which rests on it by virtue of its natural position, this may well be regarded as a permanent abandonment of the natural right, and there can accordingly be no question of its revival at a later stage, merely because the khal no longer serves as a proper means of drainage. Though there is no express abandonment, still an abandonment may be inferred from the fact of long and continuous interruption of the natural right caused by the khal and submitted to
b by the dominant owner. The natural right merely remains suspended so long as the easement remains operative by actual enjoyment. Where in addition to the khal the servient owner takes other measures, such as putting up a bund or embankment, to obstruct the flow of the water from the higher level to his land, the adverse enjoyment may easily be supposed to continue even after the khal is silted up : *Case law discussed.* [P 264*c*,*d*,*e*]

(Lower owners were found to have acquired easement right derogatory to the natural right of the upper owner, which was held not abandoned by lower owners.) [P 264*h*]

(e) Civil P. C. (1908), S. 100 — Inferences of fact cannot be interfered.

The High Court is not justified in setting aside inferences of fact in second appeal particularly
c when they are not shown to have been based on an incorrect application of any principles of law. [P 265*a*]

Apurbadhan Mukerjee — for Appellants.

Hiralal Chakravarty and Mahendra Kr. Ghose — for Respondents.

JUDGMENT. — This is an appeal on behalf of the defendants, and arises out of a representative suit commenced under the provisions of O. 1, R. 8, Civil P. C., on behalf of the inhabitants of a group of four contiguous villages which may be collectively referred to as Bandipur. These villages lie on the eastern side of a khal, flowing north to south, and the object of the suit is to restrain the discharge of surplus rain water from the defendants' mouza, Bamunkhana on the other side of the khal on and to the plaintiffs' lands in these villages
d which are admittedly at a lower level. It is not known when, by whom and in what circumstances the khal was excavated, but it is not disputed that this served as a channel for draining off the surplus rain water from the defendants' mouza. On their side of the khal, the plaintiffs had constructed a bund or embankment to protect their lands from over-flooding. The khal finally discharged itself into a river called Jhumjhumi towards the south through a sluice-gate which was located in mouza Harisingpur. Latterly, the khal appears to have silted up, and presumably because this caused an obstruction of the defendants' drainage, the defendants, it is alleged, wrongfully caused an opening to be made on or about 29th November 1938, in the plaintiffs' bund at a point "G" in order to provide an outlet for their surplus water. The plaintiffs closed up the opening, and then instituted the present suit, challenging what they regarded as an unlawful invasion of their rights by the defendants. They asked for a declaration of their title and for a
e permanent injunction against the defendants. The defence was that the people of Bamunkhana had an indefeasible right to discharge their surplus water over the Bandipur lands through the opening in the plaintiffs' bund, and the defendants sought to support this right on a variety of grounds. They claimed the right, in the first place, by prescription and immemorial user; secondly, as an easement of necessity; and thirdly, as a natural right incident to their ownership of lands situated at a higher level. The learned Munsif of Arambagh who heard the suit in the first instance found against the defendants on the question of prescription and immemorial user, but held in their favour on the other two grounds, and in the result dismissed the suit. On appeal, the learned Subordinate Judge of Hooghly reversed the decision, negativing
f the case of the defendants on all points. It is against his judgment and decree that the present appeal has been preferred.

In this Court, the arguments have centred mainly round the question of natural right claimed by the defendants. As regards their claim on the basis of a right acquired by prescription or immemorial user, no serious attempt has been made to challenge the findings of the lower appellate Court, and it must be held that the defendants have failed to establish this part of their case. Their case as regards an easement of necessity is equally untenable. As the learned Subordinate Judge points out, there had been some previous proceedings, culminating in a suit in 1932, between the inhabitants of Bamunkhana and those of another village south of Bandipur called Banharisingpur, in which the defendants had asserted a right to discharge their
g surplus rain water over the lands on the other side of the khal, but this they had claimed to do through some openings in the bund at Banharisingpur, and not through the present disputed opening at Bandipur. Further, having regard to the fact that the defendants' water used to be drained away by the khal, I do not think the mere silting up of the khal could give rise to an easement of necessity in favour of the defendants, even if it was shown that they had no other means of outlet for this water at present. It was certainly up to them to have taken steps to keep the khal clear of silt. The learned Munsif seemed to think that the liability in this respect was that of the plaintiffs, but this was based on a pure surmise on his part, unsupported by evidence, that the site of the khal was originally the property of the plaintiffs, and that the plaintiffs must have made this excavation to get their supply of earth for the bund
h they erected. The question of natural right remains, therefore, the main contention in the appeal, but before dealing with this, it is necessary to dispose of certain preliminary points which were raised on behalf of the appellants.

It was contended in the first place that a representative suit of this nature was not maintainable. It is difficult, however, to appreciate the objection. The suit satisfies all the requirements of O. 1, R. 8, Civil P. C., and one fails to see how any infirmity attaches to it by reason of its representative character. The cause of action is no doubt ultimately dependent on ownership of land, but merely because the lands which are alleged to be threatened by the defendant's action belong to different owners, I do not think it can be said that there is not such a community of interest among the plaintiffs in respect of the cause of action or the relief claimed as

will support such a suit. In my opinion, a representative suit is quite in order in the circumstances of the case.

It was next urged that as the plaintiffs were suing in a representative character, it was necessary for them to have sued the defendants also in a similar capacity. This argument is equally difficult to follow. It may be that there were other persons having a common interest with the defendants, whether belonging to the defendants' mouza Bamunkhana or to any other mouza lying on the same side of the khal, but if such other persons had not invaded the plaintiffs' rights the plaintiffs were certainly not bound to proceed against them, either by impleading them directly as defendants or by moulding the suit on a representative basis so as to include them in effect within its scope. As it is any decree the plaintiffs might recover in the present suit would be binding only on those who have been joined as defendants, though so far as the plaintiffs are concerned, the decree would enure not only to their benefit, but also to the benefit of those whom they have sought to represent under the provisions of O. 1, R. 8. A further objection was raised on the ground that the suit was in essence one for a declaration that the defendants did not have the right they claimed, not a suit for declaration of the plaintiffs' own rights. There is, in my opinion, no substance in this objection, which is really based on a misapprehension of the nature and scope of the suit. The plaintiffs' whole case was that the action of the defendants amounted to an interference with their lawful rights, and that is why they asked for a permanent injunction against the defendants. I do not think, therefore, that the suit could be held to be not maintainable as merely asking for a negative declaration against the defendants.

Turning now to the main question in the appeal, it will be seen that the particular kind of natural right which is claimed on behalf of the defendants in this case is the right which the owner of land at a higher level has against the owner of lower level land to discharge on it surface water from his tenement. The existence of such a right is now well established on authorities going back to the Sudder Dewani Adawalat: *see*, for instance, (1860) S. D. A. 301;[1] (1862) W. R. F. B. 22;[2] 20 W. R. 287;[3] 8 Cal. 468;[4] 12 Cal. 323;[5] 19 C. W. N. 54;[6] 22 C.W.N. 666.[7] It is a right which is supposed to arise by virtue of the relative situation of the two tenements, and is recognised as an inseparable incident of the ownership of land: it is analogous to an easement, and yet strictly not an easement: 49 Mad 441.[8] It is not disputed that the defendants' lands are situated at a higher level, and there can be no doubt, therefore, that if the lands of the plaintiffs were contiguous, the defendants as the upper proprietors would be entitled to demand as of right that water naturally rising in, or falling on their lands and not passing in defined channels, shall be allowed by the plaintiffs as the proprietors of adjacent lower lands to run naturally thereto.

The first question which arises in this case is whether and how far the interposition of the khal affected the position. It may be conceded that the owner of a lower heritage cannot escape the burden of receiving the water which falls from a piece of higher ground merely because the water flows across an intervening tenement belonging to another owner. There is here no real break caused in the contiguity of the lands by the fact of different ownership. It seems, however, to be quite a different proposition where the upper and the lower lands are divided by a khal or watercourse which expressly serves as a defined channel for carrying off the surface water from the higher level. The existence of such a channel must imply in law as it means in fact a separation between the lands on either side, and so long as the channel remains, there can obviously be no question of the lower land owner receiving, or being obliged to receive, any water from the upper area. So long as the channel remains, it seems indeed to be immaterial whether any pre-existing natural right is deemed to be extinguished or merely to be held in abeyance.

The position is, however, altered if and when the channel silts up and the water can no longer be disposed of that way. The question will then arise, assuming that a natural right existed from before, whether the change in the physical condition of the channel will revive such right, and this in turn will depend on whether during the period the channel continues functioning, the natural right also continues, though suspended for the time being. As has been already indicated, it is now well settled that a right of the kind we are considering, that of an upper land owner to throw his surface water on to land at a lower level, is a natural right, and not in the strict sense of the word an easement. In other words, it is a right which is not acquired, but is an incident of property owing its origin to the disposition and arrangements of nature. It is incapable, therefore, of being lost by non-user or extinguished permanently, and the maxim "*tantum prescriptum quantum possessum*" has no application: *see* 59 I.A. 56[9] at p. 65; and Mitra's Limitation and Prescription, Edn. 6, Vol. 1, pages 463 to 467.

Such a right may, however, be subject to restrictions by way of easements, as is in fact expressly recognized by sub-s. (b) and illus. (i) of S. 7, Easements Act (Act 5 of 1882). Thus it has been held in 14 Rang. 544,[10] that though every land owner has a natural right to deal with his surface-drainage water as he pleases, and can let it find its way by gravitation to his neighbour's land, if that is at a lower level than his own land, nevertheless the owner of the lower land may acquire by prescription, as an easement restricting this natural right, the right to throw water back to the land at a higher level. This decision is not really inconsistent with that of the Madras Full Bench in 49 Mad. 441,[8] where, overruling an earlier decision in 29 Mad

1. (1860) S. D. A. 301, Muthoora Mohan Mytee v. Mohendro Nath Paul.
2. (1862) 1862 W.R.F.B. 22 (F.B.), Hameedunnissa v. Anund Moyee Dossee.
3. ('73) 20 W. R. 287, Kopil Pooree v. Manik Sahoo.
4. ('82) 8 Cal. 468 : 10 C. L. R. 396, Imam Ali v. Poresh Mandal.
5. ('86) 12 Cal. 323, Abdul Hakim v. Gonesh Dutt.
6. ('15) 2 A. I. R. 1915 Cal. 486 : 27 I. C. 268 : 19 C. W. N. 54, Ramadhin Singh v. Jadunandan.
7. ('18) 5 A. I. R. 1918 Cal. 422 : 41 I. C. 863 : 22 C. W. N. 666, Kasiswar Mukherjee v. Jyoti Kumar Mukherjee.
8. ('26) 13 A. I. R. 1926 Mad. 449 : 94 I. C. 677 : 49 Mad. 441 : 50 M. L. J. 377 (F.B.), Sheik Hussain Sahib v. Subbayya.
9. ('32) 19 A.I.R. 1932 P. C. 46 : 136 I. C. 413 : 55 Mad. 268 : 59 I. A. 56 (P.C.), Secretary of State v. Subbarayudu.
10. ('36) 23 A.I.R. 1936 Rang. 282 : 163 I C. 453 : 14 Rang. 544, U Po Thet v. Chettyar Firm.

539,[11] the Court held that an owner of land on a
a lower level to which surface-water from adjacent land on a higher level naturally flows is not entitled to deal with his land in such a way as to obstruct the flow of water from the higher land. The very fact that the lower owner could not legally so interfere with the natural right of the upper owner would indeed go to show that he could prescribe against such right by way of an adverse easement.

The effect of the creation of such an adverse easement could of course only be to cause, during the period the easement right is operative, suspension of the natural right, not its complete extinction, and the natural right would accordingly revive on the extinction of the easement. It is further to be observed that such a natural right, though not capable of being extinguished as such, may, nevertheless be abandoned. This was in fact expressly held by Markby J. in 7 W.R. 498,[12] where he point-
b ed out that the abandonment may either be by express agreement between the owner of the dominant land (i. e., the land which derives benefit from the exercise of the right) and the owner of the servient land (i. e., the land which has to suffer the exercise of the right), or may be implied from a long and continuous interruption on the part of the owner of the servient land submitted to by the owner of the dominant land.

The position consequently seems to be that these natural rights and liabilities may be altered by contract or grant, express or implied, as well as by enjoyment of an adverse easement obstructing the flow of the water from the higher to the lower ground. It follows, therefore, that if any artificial alteration is made in the configuration or disposition of the lands or any conditions are otherwise created affecting the exercise by the upper owner of
c his natural right to discharge his surface water to the lower level, such as by excavating a khal or channel between the two tenements, then this fact alone will not be sufficient to determine whether the natural right is thereby merely suspended for the time being or finally extinguished. The purposes for which, and the circumstances in which, the altered conditions are brought into existence as well as the subsequent mode of user or enjoyment will all have to be looked into.

If, for instance, the khal (to take the illustration which is apposite in the present case) appears to be only an arrangement made by the "servient" owner in his own land for the reception of the waters coming from above, this will not in fact constitute even a temporary interruption of the natural right, but will really be one mode of submitting to the exercise of such right. As the Full Bench points out in the
d Madras case already referred to, 49 Mad. 441[8] at p. 450, the lower owner is always at liberty to make any alterations he prefers in his land for carrying off the water from his neighbour's land. If, on the other hand, it should appear that the khal has been excavated by the "dominant" owner with the express idea of relieving the lower land of the burden which rests on it by virtue of its natural position, this may well be regarded as a permanent abandonment of the natural right, and there can accordingly be no question of its revival at a later stage, merely because the khal no longer serves as a proper means of drainage. It may also well be that though there is no express abandonment, still an abandonment may be inferred from the fact of long and continuous e
interruption of the natural right caused by the khal and submitted to by the dominant owner. The facts, again, show that the khal is only such interruption of the natural right on the part of the owner of the servient land as to constitute no more than an adverse easement, in which case of course the natural right merely remains suspended so long as the easement remains operative by actual enjoyment. Where in addition to the khal the servient owner takes other measures, such as putting up a bund or embankment, to obstruct the flow of the water from the higher level to his land, the adverse enjoyment may easily be supposed to continue even after the khal is silted up.

Now, the question as to the true effect of a change in the original disposition of the lands resulting in a diversion of the natural flow of the surface water from the higher tenement to the lower, whether it f
amounts to an abandonment of the natural right of the superior owner, or merely operates as a temporary suspension of the natural right by adverse enjoyment on the part of the inferior owner, or whether, on the other hand, it is only an alternative mode adopted or accepted by the inferior owner himself of discharging the burden which naturally rests on his land, constituting thereby a recognition of the continuance of the natural right, is obviously a question of fact which must depend on the particular circumstances of any given case, to be decided no doubt in accordance with the established principles of law. It is impossible to draw any *a priori* conclusions from the mere fact of the altered conditions.

Such, then, being the position, it should not be difficult to dispose of the present appeal on the findings of the learned Subordinate Judge on the facts of the case. These findings, in my opinion, g
show a correct appreciation of the legal principles applicable. As the learned Judge points out, there is no evidence to show when, how or in what circumstances the khal between the plaintiffs' and the defendants' villages came into existence, but from the local features and other circumstances he holds that it was excavated for the purpose of serving, and did serve, as a defined channel for the drainage of the water from the defendants' village on the higher level. He finds further that with the excavation of this artificial channel there resulted an abandonment of any natural right which the owners of the higher lands might have had to discharge their waters over the plaintiffs' mouzas, and he expressly refers to the decision in 7 W. R. 498.[12] Such abandonment, according to the learned Judge, was the result of an agreement between the owners on either side, and in support of this conclusion he h
refers to the fact, among others, that the people in the eastern (or the plaintiffs') villages erected a bund on their side of the khal and took other orders with their lands which they would not otherwise have done. In any case, he points out that the khal did operate as an interruption to the exercise of the natural right which the defendants claimed, and the interruption was so long and continuous that an abandonment could be inferred. Finally, the learned Judge holds that on the facts the owners of the lower lands may be supposed to have acquired by prescription a right of easement in derogation of the defendants' natural right, as in the Rangoon case in 14 Rang. 544,[10] which he cites. There had certainly been no abandonment of such easement right on the part of the lower owners.

On these findings, there can be really no answer to the plaintiffs' claim even if the existence of a

11. ('05) 29 Mad. 539 : 16 M. L. J. 582 : 1 M.L.T. 333, Mahamahopadhyaya Ranga Chariar v. Municipal Council of Kumbakonam.

12. ('67) 7 W. R. 498, Khetturnath Ghose v. Prosunno Ghose.

previous natural right be assumed in favour of the defendants. In the circumstances referred to, the silting up of the khal could not possibly revive such right. The learned advocate for the appellants strenuously sought to challenge these findings as mere inferences of the learned Subordinate Judge which he was not properly entitled to draw, but, in my opinion, they are inferences of fact, which I should not be justified in setting aside in second appeal, and in any case they are not shown to have been based on an incorrect application of any principles of law. The result is that the judgment and decree of the learned Subordinate Judge must be affirmed, and this appeal dismissed with costs. Leave to appeal under Cl. 15, Letters Patent, is granted.

R.K. *Appeal dismissed.*

C. P. C. —
(b) ('40) Chitaley, O. 1 R. 8 N. 8.
('41) Mulla, Page 506 Note : "Same interest."
(c) ('40) Chitaley, O. 1 R. 8 N. 14.
('41) Mulla, Page 509 Note : "May be sued."
(e) ('40) Chitaley, Ss. 100 and 101 N. 52, Pts. 1 and 2.
('41) Mulla, Page 367 Pt. (g).
Limitation Act —
(d) ('42) Chitaley, S. 2 (5) N. 2, Pt. 2; S. 26 Notes 3 and 13.
('38) Rustomji, Page 495 Note : "As of Right."

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* A. I. R. (29) 1942 Calcutta 265

B. K. MUKHERJEA AND BISWAS JJ.

Umakanta Bhattacherjee — Plaintiff — Appellant

v.

Bedbati Debi w/o Rajani Kanta Choudhury and another — Defendants — Respondents.

Appeal No. 1094 of 1938, Decided on 11th August 1941, from appellate decree of Dist. Judge, Murshidabad, D/- 25th March 1938.

*** Hindu law—Dayabhaga School—Succession — Married daughter though past child-bearing age — Her husband willing and competent to adopt during life time of her father and actually adopting shortly after his death — She comes within expression married daughter likely to have son and is entitled to succeed in preference to brother's son.**

The expression "daughter's son" as used by the Dayabhaga includes the adopted son of the daughter : *Case law referred.* [P 267*g*]

As an adopted son confers the same amount of spiritual benefit on his adopted mother's father as a natural born son, the possibility of having an adopted son must be deemed to be equally efficacious from the spiritual point of view as the likelihood of having male issue in the ordinary way. Therefore, where a married daughter, though past child-bearing age, is in existence and her husband is willing and competent to adopt a son during the life time of her father and actually adopts after his death, she comes within the expression of a married daughter likely to have a son and is entitled to succeed her father in preference to a brother's son. [P 268*a*,*b*,*c*,*d*]

Panchanon Ghose and Amarendra Narain Bagchi — for Appellant.

Rama Prosad Mukherjee and Binayak Nath Banerjee — for Respondents.

B. K. MUKHERJEA J. — This appeal raises an interesting point of law relating to the succession of a married daughter to the property of her father under the Dayabhaga School of Hindu law. The properties in suit belonged admittedly to one Ganga Gobinda Bhattacherjee who died in 1286 B. S., leaving behind him his widow Nritya Kali and three daughters, to wit, Bedbati, Ramrangini and Girijabala. Nrityakali succeeded to the estate of her husband and enjoyed it in the limited interest of a Hindu widow till her death on 21st Baisakh, 1342 B. S. At the time of her death, two of her daughters Ramrangini and Girijabala were childless widows, and the only surviving married daughter was Bedbati, though she had no male issue. The only child of Bedbati was a daughter named Binapani who had a son named Sudhir, and Sudhir's son, Tarun Kumar was adopted as a son by Bedbati and her husband sometime after Nritykali's death. Umakanta, the plaintiff, is a son of a brother of Ganga Gobinda, and he commenced the present suit for recovery of possession of the properties left by Ganga Gobinda on the allegation that he was the nearest heir of the latter at the time of Nrityakali's death. So far as Ramrangini and Girijabala are concerned, it was not disputed that being childless and widowed daughters, they could not inherit the property of their father, and they themselves did not lay any claim to the same. As regards Bedbati, the case of the plaintiff was that although she was a married daughter, she, having neither any son nor the possibility of having a son in future, was excluded from inheritance under the Dayabhaga School of Hindu law. As Bedbati alone got her name registered in respect of the properties left by her father under the Land Registration Act, the suit was instituted against her as the principal defendant, the only other defendant being Tarun Kumar, the boy whom Bedbati and her husband had purported to adopt.

It may be stated here that Bedbati, defendant 1, was 62 years of age at the time when Nrityakali died, and it was practically conceded at the time of the trial that she was past child-bearing age at the time. The whole controversy centred round the point as to whether she could still be regarded as a married daughter, with the possibility of having a son, by reason of the fact that her husband was willing to adopt a son even during the life time of Nrityakali, and in fact a son was actually adopted by him shortly after her death. The trial Court decided this point in favour of the plaintiff and against defendant 1, and held that the likelihood of adopting a son was not the same thing as the possibility of having male issue as contemplated by the Dayabhaga. In this view of the case, the plaintiff who was a nephew of Ganga Gobinda was declared to be the heir to the estate of the latter in preference to defendant 1 and the suit was decreed. On appeal, the Disirict Judge of Murshidabad reversed the decision of the trial Court and dismissed the plaintiff's suit, being of opinion that a married daughter who was capable of adopting a son was not excluded from inheritance under the Dayabhaga law. It is the propriety of this view that has been challenged before us in this appeal. To determine this question, it would be necessary for us first of all to look to the passages in the Daya-

a bhaga bearing on the point. The rights of succession of the daughter and the daughter's son are discussed in Chap. 11, S. 2 of the Dayabhaga. The relevant passages may be set out as follows :

"V. 1. The daughter's right of succession on failure of the wife is declared. On that subject Manu and Narada say : "The son of a man is even as himself; and the daughter is equal to the son : how, then, can any other inherit his property notwithstanding the survival of her, who is as it were himself ?" Narada particularizes the daughter as inheriting in right of her continuing the line of succession : 'On failure of male issue, the daughter inherits, for she is equally a cause of perpetuating the race; since both the son and daughter are the means of prolonging the father's line.' The author states the circumstance of her continuing the line as a reason of the daughter's succession : and the

b line of descendants here intends such descendants as present funeral oblations; for one, who is not an offerer of oblations, confers no benefits, and consequently differs in no respect from the offspring of a stranger or no offspring at all.

V. 2. It is the daughter's son, who is the giver of a funeral oblation, not his son; nor the daughter's daughter : for the funeral oblation ceases with him.

V. 3. Therefore the doctrine should be respected, which Dicshita maintains; namely, that a daughter who is mother of male issue or who is likely to become so, is competent to inherit, not one who is a widow, or is barren, or fails in bringing male issues as bearing none but daughters, or from some other cause.

V. 4. Here again, the unmarried daughter is in the first place sole heiress of her father's property

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* * * *

V. 6. This is proper; for, should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment, as declared by holy writ.

* * * *

V. 8. But if there be no maiden daughter, the succession devolves on her who has, and on her who is likely to have, male issue."

It would be clear from these passages that though the heritable rights of the daughter, or for the matter of that, of all female heirs, are said to follow from express texts, yet here also Jimuta Vahana lays stress on the doctrine of spiritual benefit. In the text of Narada quoted in the first verse the reason assigned for daughter's succession is that she is a cause of perpetuating the race.

d According to Jimuta Vahana, the line of descendants spoken of in this passage refers to such descendants as are capable of conferring spiritual benefit, for such descendants as offer no oblation do not in any way differ from strangers. It is because of incapacity to confer spiritual benefit that a daughter's son's son or a daughter's daughter is not entitled to inherit. A spiritual reason, though of a different character is put forward for giving preference to a maiden daughter; and among married daughters, those who have or are likely to have male issue are only entitled to succeed, barren and widowed daughters and those who have given birth to daughters alone being excluded on the ground that they neither have nor are likely to have male issue who can confer spiritual benefit on the propositus. In verse 10 of this section, it is expressly said that a married daughter, who was not appointed, confers less benefit on her father than the son and the rest and is of benefit by means only of her son; it is proper, therefore, that she should succeed only, e on failure of other heirs down to the unmarried daughter.

Another thing that is to be noticed in this connexion is that in order to entitle a married daughter to succeed, it is enough, according to the Dayabhaga that she has the merest possibility of having a male child. A daughter endowed with a son (*putrabati*) and one who has the possibility of getting a son (*sambhavit-putra*) are placed exactly on the same footing, and no preference is given to a daughter having a male child already over another who has only the chance of getting one. As Jimuta Vahana expressly says in verse 11 of the section, this would not be proper, for the son of the latter born subsequently might in this manner be excluded from inheritance. The idea of the commentator thus seems to be that it is eminently desirable that a daughter's son should succeed in preference to f remoter heirs. If there is a married daughter who is likely to get a son, such daughter would get the property, so that the daughter's son may come after her death. If no son is actually born to the daughter, the rights of the remoter heirs to come after the death of the daughter would not be affected.

Mr. Panchanon Ghose who has appeared for the appellant has argued before us that the word '*putra*' (son) in the expression "having or likely to have a son" ("*putrabati*" and "*sambhabita-putra*") as used by the Dayabhaga means and refers to the natural born son and not to the adopted son. This is supported, he says, by the text quoted above, which excludes from inheritance widowed and barren daughters and those who give birth to daughters only. If the word '*putra*' includes an adopted son also, there is no reason why a barren daughter or g one who has given birth to daughters only, should be excluded for they or their husbands might be quite capable of adopting a son and thus remove the bar that stands in the way of their succeeding to the estate of the father.

The point is not certainly free from difficulty, and one can feel a reasonable doubt as to whether Jimuta Vahana had really in mind the adopted son of a daughter when he was discussing the heritable rights either of the daughter or of the daughter's son. The Hindu Smriti writers, as is well-known, divide the twelve kinds of sons into two sets of six, of whom the first six succeed to the father as well as to all other kinsmen or members of the Gotra, while the second six inherit the property of the father alone. Some of the law-givers place the adopted son under the first category, but many others would include him under the second. Jimuta h Vahana refers in this connexion to a text of Devala and says as follows :

"In a partition among sons of the wife and the rest with a true legitimate son, such of them, as are of the same class with the (adoptive) father and superior by tribe to the true son, whether they be sons of an appointed daughter, or issue of the wife, or offspring of an unmarried damsel, or secretly produced, or abandoned (by the natural parents) or received with a bride, or born of a twice married woman, or given, or self given, or made or brought, shall be entitled to the third part of the share of a true son. So Devala, after having described the twelve sons, expressly declares, 'These twelve sons have been propounded for the purpose of offspring: being sons begotten by a man himself, or procreated by another man, or received for adoption, or voluntarily given. Among these, the first six are heirs of

kinsmen, and the other six inherit only from the father."

"The true legitimate son and the rest, to the number of six, are not only heirs of kinsmen; that is of Sapindas and other relations. The others are successors of their (adoptive) father but not heirs of collateral relations." See Dayabhaga Chap. X, V. 7 and V. 8.

There is weighty opinion in favour of the view that Jimuta Vahana following Devala has placed the adopted son in the lower sub-division of sons, and an adopted son according to him cannot succeed to anybody else but his own adoptive father This is the view taken by Mr. Golap Chandra Sarcar Sastri in his Tagore Lectures on the Law of Adoption, and, in fact, if we look to the enumeration of sons in Verse (7) quoted above the adopted comes undoubtedly after the first six. This opinion found expression in an early decision of this Court in (1864) W. R. F. B. 121,[1] where it was held by three Judges of this Court that an adopted son cannot succeed to the estate of the adoptive maternal grandfather. If this was the proper view, we would have no hesitation in holding that Jimuta Vahana had not in mind the adopted son of a daughter, when he was laying down the rights of inheritance of the daughter or of the daughter's son. According to this view, the adopted son of a daughter could not succeed to the property of the adoptive maternal grandfather at all, and a fortiori by such a son the daughter could not rank as '*putrabati*' or endowed with son. The difficulty, however, is created by the way in which the law on this point has been shaped by judicial decisions. In 6 Cal. 256[2] it was expressly held by a Full Bench of this Court that an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son, and (1864) W. R. F. B. 121,[1] was overruled. Mitter J. who delivered the judgment of the Full Bench referred to in this connexion to various texts in Dattaka Mimansa and Dattaka Chandrika which would go to show that the adopted son confers the same spiritual benefit upon the relations of his adoptive mother as a legitimate son does. A text of Nanda Pandita which was referred to in the judgment stands as follows :

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)" Dattaka Mimansa, S. 6, p. 50.

The author of Dattaka Chandrika likewise says :

"But the absolutely adopted son presents oblations to the father, and the other ancestors, of his adoptive mother only" (S. 3, p. 17).

As the adopted son confers the same spiritual benefit as the natural born son—and according to the Dayabhaga, the law of inheritance is based substantially upon the doctrine of spiritual benefit, —and as an adopted son is cut off from the inheritance of the relatives of his original mother, it would accord with the dictates of natural justice and equity that he should have the same heritable capacity as the legitimate son. Both in this case and in the earlier case in 5 Cal. 615,[3] Mitter J. refuted the view that according to Dayabhaga an adopted son occupies an inferior position in the scale of sons and can succeed to none else but the adoptive father. The relevant passage in his judgment in 5 Cal. 615[3] stands as follows :

"The author of the Dayabhaga deduces his conclusion in verse 8 from Devala's text referred to in verse 7. But it is not correct to say that Devala's text places the 'son given' within the class of sons who are not heirs of kinsmen. Devala's text is not before us and it may be that, in reciting the twelve descriptions of sons, he followed the order given in verse 7, because we find that the same text, which is referred to in the Dattaka Chandrika and Dattaka Mimansa and Colebrook's Digest, recites the sons in the same order. But the text, after reciting them in that order, classifies them thus namely : (1) son begotten by a man himself, (2) or procreated by another, (3) or received (4) or voluntarily given. After having classified them in this manner, the text goes on to say : 'Among these the first six are heirs of kinsmen etc.'

It seems to me to be reasonable to hold that the phrase 'first six' here refers to the first six according to the classification immediately preceding, and not the first six according to the recital of the different descriptions of sons given in an earlier portion of the text. In a note by Srikrishna Tarkalankar, the order, which the different descriptions of sons occupy according to the aforesaid classification, is given, and it appears from it that the adopted son falls within the first six."

The decision in 6 Cal. 256[2] was affirmed by the Judicial Committee in 10 I.A. 138,[4] and it can now be taken to be settled law that an adopted son has the same rights in the family of adoption as a natural born son except in the particular instances which are specifically mentioned by the Dattaka Mimansa and the Dattaka Chandrika : *vide* also the case in 43 I.A. 56.[5] We must accept the position therefore that the expression 'daughter's son' as used by the Dayabhaga includes the adopted son of the daughter. Suppose, now a man dies leaving behind him a married daughter and a son adopted by the latter. Can the married daughter be regarded as '*putrabati*' in order to entitle her to succeed to the property of her father ? In our opinion, the answer must be in the affirmative. We cannot agree with Mr. Ghose that in such circumstances the daughter would be excluded as she has not got a son of her own, and the inheritance would devolve upon the adopted son of the daughter as the next heir of the maternal grandfather. To adopt such a view would be to give an adopted son preference over the natural born son. In 33 Cal. 947,[6] which was decided by a Bench of five Judges of this Court, Maclean C. J. observed in his judgment as follows :

"On 2nd November 1900, Ranimani, who was until then childless adopted with her husband Romacant Sen the defendant Jugal Kishore Sen as their son, and there is no contest as to the validity of this adoption. By this adoption Ranimoni attained the status of a daughter with a son. The cases in 5 Cal. 615[3] and 10 I.A. 138[4] have finally settled the law that an adopted son holds precisely the same position as a son born as regards inheritance from the adopted mother's relations, and that

1. (1864) 1864 W.R. F.B. 121 (F.B.), Morun Moyee v. Bejoy Krishna.
2. ('80) 6 Cal. 256 : 7 C. L. R. 145 (F. B.) Uma Sunker v. Kali Komul.
3. ('80) 5 Cal. 615, Puddo Kumari Debee v. Juggut Kishore Acharjee.
4. ('84) 10 Cal. 232 : 10 I.A. 138 : 13 C.L.R. 379 : 4 Sar 458 (P.C.), Kali Komul v. Uma Sunker Moitra.
5. ('15) 2 A.I.R. 1915 P.C. 41 : 32 I.C. 403 : 40 Bom. 270 : 43 I.A. 56 (P.C.), Nagindas Bhagwandas v. Bachoo Hurkissondas.
6. ('06) 33 Cal. 947 : 3 C.L.J. 502 : 10 C.W.N. 695 (S.B.), Radha Prosad Mullick v. Ranee Moni Dasee.

the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. Ranimoni must now be recognised to be a daughter with a son, and she stands in the same position under the Hindu law as her sister Prem Mani."

It is true that the decision itself was reversed on another ground by the Judicial Committee, but the propriety of the observations quoted above has never been questioned. If a married daughter having an adopted son can rank as '*putrabati*' for the purposes of inheritance under the Dayabhaga law both consistency and reason would demand, in our opinion, that a married daughter who is likely to have an adopted son have the same right to inherit. It is conceded by Mr. Ghose that the word '*putra*' must be given the same meaning in '*sambhabita-putra*' as in '*putrabati.*' As an adopted son confers the same amount of spiritual benefit on his adopted mother's father as a natural born son, the possibility of having an adopted son must be deemed to be equally efficacious from the spiritual point of view as the likelihood of having male issue in the ordinary way. If, as we have suggested above, the intention of the law giver is that the daughter's sons should be allowed to come in before the other remoter agnatic relations of the propositus, and that inheritance should not go to the latter, so long as the married daughter retains the chance of having a son, there is absolutely no reason why a remoter heir should be allowed to take the property if a married daughter is in existence and her husband is quite willing and competent to adopt a son. There is no question here of invoking the fanciful analogy of constructive pregnancy as was suggested in the judgment of the trial Judge. As we have said already, what Jimuta Vahana insists upon is the mere possibility of having a son and not the actual existence of one. It is not necessary, therefore, to take recourse to the absurd fiction that the son subsequently adopted by the daughter must be deemed to have been in the mother's womb ever since the date when the succession opened. We do not think also that any practical difficulty will arise in determining the rights of succession. The act of adoption is really the act of the husband and not of the wife. In the case of a married daughter, if the husband is willing to adopt a son and is not incapable of making an adoption by reason of any physical or mental defect, we can at once say that there is likelihood of the married daughter getting an adopted son and she should be allowed to succeed in preference to a remoter heir. If she actually adopts a son, such son if living would succeed to the property after her death; and even if no adoption is as a matter of fact made, the property would eventually go to the reversioners whose rights are thus not destroyed altogether. The view we are taking is supported by Mr. Golap Chandra Sarkar Sastri in his Tagore Law Lectures on Adoption : *vide* Hindu Law of Adoption, page 398.

In the case before us, both the Courts below have found that the husband of defendant 1 was willing and eager to adopt a son during the life-time of Nrityakali, and as already stated, a son was actually adopted by him and his wife soon after Nrityakali's death. In the circumstances, defendant 1 would, in our opinion, rank as a daughter likely to have a son and would be entitled to succeed to the property of her father in preference to the plaintiff who is a son of her father's brother. The result is that we affirm the decision of the Court below and dismiss the appeal. There will be no order as to costs in this appeal.

BISWAS J. — I agree.

K.S./R.K. *Appeal dismissed.*

Hindu law —

('40) Mulla, Page 93 S. 88 No. 5 "Priority among daughters" and No. 6 "Daughter's son."

('38) Gour, Pages 1010 and 1011 S. 334 Paragraphs 2385, 2386, 2387 and 2389.

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* A. I. R. (29) 1942 Calcutta 268

DERBYSHIRE C. J. AND PANCKRIDGE J.

In the matter of Indian Iron and Steel Co. Ltd.

Income-tax Reference No. 13 of 1940, Decided on 10th March 1941.

(a) Income-tax Act (1922)—Interpretation — Decisions of English income-tax cases are not precedents under Indian Act.

The decisions of English income-tax cases are not precedents under the Indian Income-tax Act. The Indian Income-tax Act is different from the English Income-tax Act in wording and effect, and cases in India must be decided on the wording of the Indian Income-tax Act alone taken as a whole. [P 271*e*]

*** (b) Income-tax Act (1922), Ss. 10 (2) (vi) and 26 (2)—Right to carry forward unabsorbed balance of depreciation allowance cannot be claimed by successor of business.**

Under the Income-tax Act an assessee is entitled to the depreciation allowance in respect of wear and tear to his buildings, plant, machinery, etc., based on its costs to him whilst he is carrying on his business and he may carry forward the unabsorbed balance of this allowance as long as he carries on his business, but nowhere is it provided in the Act that his successor may acquire this benefit when he acquires his predecessor's business. It is not a right which passes to his successor under the Income-tax Act, nor is it a right which he can transfer by agreement : (1940) A. C. 812, *Ref.* [P 272*a*,*c*]

(c) Income-tax—Deductions—Assessee must establish his claim to.

The deductions claimed are by way of relief from the liability to pay income-tax upon profits or gains, and the tax-payer must establish his claim upon a correct interpretation of the language of the material enactments : (1940) A. C. 812, *Foll.* [P 272*b*]

*** (d) Income-tax Act (1922), Ss. 10 (2) (vi) and 26 (2) — Person purchasing business in middle of year—Current depreciation allowance —Mode of calculation of, stated.**

Where a person purchases a business in the middle of a year, he is not entitled to claim current depreciation allowance based on the cost of the plant, etc., to his predecessor for the whole of the previous year. He is entitled to such allowance on that basis only for the period of the previous year before his purchase and for the post-purchase period, he is entitled to claim such allowance only on the basis of the price paid by him to the plant, etc. : ('36) 23 A. I. R. 1936 P. C. 5 and ('38) 25 A.I.R. 1938 Bom. 241 (S.B.), *Rel. on.* [P 272*e*,*f*]

(e) Income-tax Act (1922), S. 10 (2) (vi) Proviso (b)—Applicability.

The allowances must be directly connected with the assessee before the proviso can have any application. [P 274*g*]

S. M. Bose, S. C. Isaacs and Sukumar Mitter — for Assessee.

R. C. Pal and B. C. Pal — for Commissioner of Income-tax.

DERBYSHIRE C. J. — The Commissioner of Income-tax, Bengal, at the request of the assessees, the Indian Iron and Steel Co., Ltd., has stated a case under S. 66 (2), Income-tax Act of 1922. The facts of the case are fully stated in the reference to which are appended Annexure "A" an agreement between the Bengal Iron Co., Ltd. and the Indian Iron and Steel Co., Ltd., for the transfer of the undertaking and assets of the former to the latter; Sch. I which was a scheme of arrangement agreed to by the share-holders of the Bengal Iron Co., Ltd., and confirmed by the English Courts for the purpose of carrying out the transfer and also, Sch. II which contains special resolutions of the Indian Iron and Steel Co. Ltd., passed by that company's share-holders for the furtherance of the transfer. Both the concerns carried on in a large way the business of ironsmelters and founders and steel-makers. The Bengal Iron Co., was registered in England under the English Companies Act many years ago; the Indian Iron and Steel Co., was registered under the Indian Companies Act, later—about the year, 1918. For some years previous to 1936 both the companies made small profits or suffered losses and each was entitled, under the provisions of S. 10 (2) (vi), Income-tax Act of 1922, to large amounts of unabsorbed depreciation arising from the fact that in both companies the depreciation allowable under the Income-tax Act had for several years exceeded the profits earned.

The proper legal formalities regarding the transfer were complied with, and such transfer took effect from 2nd December 1936. The transfer itself, as is evidenced by the documents annexed to the case mentioned above, was a complicated transaction but put shortly the relevant portions of it are as follows: (1) The Bengal Iron Co. Ltd., went into liquidation; (2) the liquidator of the Bengal Iron Co., transferred to the Indian Iron and Steel Co., which took over on 2nd December 1936, the entire undertaking, business, property and assets of the Bengal Iron Co. on that date and "the benefit, so far as capable of being assigned, of any claim which the Bengal Iron Co. may have in respect of unabsorbed depreciation allowances;" and (3) The Indian Iron and Steel Co., paid off the debenture indebtedness of the Bengal Iron Co., and in return for the shares in the Bengal Iron Co. held by its shareholders issued shares in the Indian Iron and Steel Co. or, in the alternative, paid cash for the shares.

The Bengal Iron Co., ceased to operate as and from 2nd December 1936, and the liquidator proceeded to wind up the company. It is not clear whether the Bengal Iron Co. has been finally dissolved by the English Courts or not. It is however clear that from 2nd December 1936, the Bengal Iron Co. ceased to carry on business and the whole of its undertaking, properties and assets were transferred to the Indian Iron and Steel Co. who carried on both concerns as one. An assessment was made upon the Indian Iron and Steel Co. for the year 1937-1938 in respect of the previous year 1st April 1936 to 31st March 1937—the year of the transfer. It is set out in Annexure "B" to the case and summarised in para. 4 of the case. The Indian Iron and Steel Co. appealed against this assessment and the Assistant Commissioner of Income-tax made an altered assessment which is set out in Annexure "E" and summarised in para. 5 of the case.

The questions of law arising out of the Assistant Commissioner's assessment are set out in para. 6. It will be noticed that the Indian Iron and Steel Co., as the successor to the Bengal Iron Co. are assessed for the year of the transfer in two parts, namely (1) in respect of the business of the Bengal Iron Co. carried on from 1st April 1936 to 2nd December 1936 and (2) for a period 3rd December 1936 to 31st March 1937, in respect of the working of the combined concerns. As regards the working of the Bengal Iron Co., from 1st April 1936 to 2nd December 1936, there was a profit of Rs. 3,76,162, but that was completely absorbed by the depreciation allowance for that period on the Bengal Iron Co.'s assets and the unabsorbed depreciation allowance on the Bengal Iron Co.'s assets brought forward. These two depreciation allowances amounted altogether to Rs. 94,07,479. There was thus the large depreciation allowance of Rs. 90,31,317 left unabsorbed at the date of the transfer.

The Assistant Commissioner of Income-tax refused to allow this unabsorbed depreciation allowance of the Bengal Iron Company to be carried forward into the accounts of the Indian Iron and Steel Company. As regards the combined company, the Assistant Commissioner of Income-tax allowed the Indian Iron and Steel Company a depreciation of Rs. 7,60,077 in respect of the original buildings, plant, etc., of the old Indian Iron and Steel Company based on the original cost to that company for the whole year, and a further depreciation allowance in respect of the buildings, plant, etc., acquired from the Bengal Iron Co. for the part of the financial year after the transfer, i. e., from 3rd December 1936 to 31st March 1937, amounting to Rs. 3,77,767 based on the cost to the Indian Iron and Steel Co., of the acquired Bengal Iron Co's. assets; in all Rs. 11,37,844. He further allowed the Indian Iron and Steel Co. to bring into this account the unabsorbed depreciation allowance that they were entitled to in respect of the original buildings, plant, machinery, etc. of the Indian Iron and Steel Co., namely Rs. 62,00,775. That made a total depreciation allowance for the year in question of Rs. 73,38,619. Against that sum of Rs. 73,38,619 was set off the profits of the original Indian Iron and Steel Co.'s business for the whole year and of the acquired business for the period 3rd December 1936 to 31st March 1937; in all Rs. 36,84,324.

The assessees, the Indian Iron and Steel Co., (combined concern) contend that they are entitled also to the balance of the unabsorbed depreciation allowance of Rs. 90,31,317 of the Bengal Iron Co. and that they should be allowed to carry this forward into their accounts. The practical effect of such a contention prevailing would be to render immune from income-tax an equal amount (rupees 90,31,317) of the future profits of the combined concern. We were informed from the Bar during the hearing of the case, (and in fact it is public knowledge), that large profits have in fact been made by the assessees since the amalgamation, and rupees one crore and seventy lacs thereof distributed to their share-holders. No income-tax, we were informed, has as yet been paid by the assessees. The assessees' contention is based on the following reasoning: Firstly, the Indian Iron and Steel Co. is entitled to the benefit of this unabsorbed depre-

ciation allowance, by virtue of the terms of the assignment, by which it is specifically assigned to them. Again, the Indian Iron and Steel Co., is the successor to the Bengal Iron Co. within the meaning of S 26 (2), Income-tax Act, as it stood during the year of assessment, which is as follows :

"Where, at the time of making an assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

The reasoning goes on: that if regard is had to S. 26 (2) an assessment on a notional basis should be made upon the Indian Iron and Steel Co. for the whole of the year of the transfer, i. e., from 1st April 1936 to 31st March 1937; that in such an assessment the assessees would stand in the shoes of the Bengal Iron Co., at the beginning of the year and obtain credit for the Bengal Iron Co.'s unabsorbed depreciation allowance at the beginning of such year, namely, Rs. 85,45,150 together with their own unabsorbed depreciation allowance of Rs. 62,00,775; that at the end of the transfer year they would be entitled to the remaining depreciation allowance derived partly from the Rs. 85,45,150 and the Rs. 62,00,775 together with the current year's depreciation allowance on the whole concern; such sum less profits made during the year would be automatically carried forward to the following year as an allowance against profits and so on for the succeeding years by reason of proviso (b) of S. 10 (2) (vi) which runs as follows :

"Where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or, if there is no such allowance for that year be deemed to be the allowance for that year, and so on for succeeding years."

No previous case on all fours with this has been cited to us although English cases based on the English Income-tax Act of 1918, Sch. D, Cases I and II, R. 6, have been cited. Rule 6, Sub-r. (3) bears considerable resemblance to proviso (b) of S. 10 (2) (vi), of the Indian Income-tax Act. I quote R. 6 (3) with R. 6 (1) which leads up to R. 6 (3) :

"6 (1) In charging the profits or gains of a trade under this schedule, such deduction may be allowed as the Commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on.

"(3) Where full effect cannot be given to any such deduction in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year, and deemed to be part of that deduction, or, if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years."

Section 32, Finance Act, 1926, introduced a new R. 11 (2) to Cases I and II of Sch. D which is as follows :

"If at any time after the said fifth day of April, any person succeeds to any trade, profession or vocation which until that time was carried on by another person and the case is not one to which para. (1) of this rule applies, the tax payable for all years of assessment by the person succeeding as aforesaid shall be computed as if he had set up or commenced the trade, profession or vocation at that time, and the tax payable for all years of assessment by the person who until that time carried on the trade, profession or vocation, shall be computed as if it had then been discontinued."

It should be mentioned here that S. 29, English Finance Act, 1926, abolished the rule by which the profits of the business were assessed on the average of the previous three years and substituted therefor the profits of the single previous year. It may be, though I speak with no authority upon it, that S. 32, Finance Act, 1926, was considered necessary to give proper effect to the operation of S. 29 of the same Act. It should be noted that at all material times under the Income-tax Acts the profits of the single previous year have been the basis of assessment. Reference has been made to the case in (1940) A. C. 812.[1] There the appellant company was incorporated in 1930 to acquire the undertakings of, and to amalgamate, two steel companies respectively formed in 1918 and 1920 on the terms of a scheme sanctioned by an order of Court under the Companies Act, 1929, Ss. 153 and 154. The scheme was carried out and the undertakings and properties of the two old component companies were vested in the appellant company in return for shares. The two old companies being dissolved, the new company took over their business as from 22nd August 1930.

The business of the two companies had been carried on at a loss for several years before the amalgamation. For the year 1936-37, the appellant company claimed to set off against its assessment for income-tax inter alia the wear and tear allowances of the two old component companies for the years before the amalgamation in accordance with R. 6 of the rules applicable to Cases I and II of Sch. D, English Income-tax Act, 1918, notwithstanding the new R. 11 of the same rules substituted by the Finance Act, 1926, S. 32. It was held that this could not be done.

Section 154, English Companies Act, 1929, provides for the making of an order transferring to a transferee company the whole or any part of the undertaking and the property or liability of any transferor company. Reliance has been placed upon the words of Lord Romer in his speech at page 828 which run as follows :

"It must be conceded that were it not for the change in the law effected by S. 32, Finance Act, 1926, the appellants would have been entitled to deduct from their profits for the year ending 5th April 1937, the aggregate of the wear and tear allowances that had been made to the Strip Company up to 22nd August 1930. For, on this latter date, the appellants succeeded to and continued thereafter to carry on the very same trade that up to then had been carried on by the Strip Company. The allowances would accordingly by reason of the

1. (1940) 1940 A. C. 812 : 9 I.T.R. Sup. 20, United Steel Co. Ltd. v. Culington.

provisions of sub-rule (3) of R. 6 of the rules applicable to Cases I and II of Sch. D, Income-tax Act, 1918, be added to the amount of the deduction for wear and tear for the year of assessment in question and deemed to be part of that deduction."

At p. 819, Lord Caldecote appears to express a somewhat similar view. Regard, however, must be paid to the words of Lord Maugham in the same case at pp. 821 and 822 which are in these terms :

"I will begin by observing that the right under R. 6 is not a chose in action or an asset of the tax-payer, and that it could not be assigned to the appellants. It relates only to deductions allowable to a tax-payer in charging the profits or gains of a trade as representing the diminished value by reason of wear and tear of machinery or plant used in the trade by and belonging to the tax-payer. Sub-rule (3) of R. 6 allows the deduction to be added by the tax-payer to the amount of the deduction in a subsequent year if there has not been a previous opportunity of making the deduction out of profits. It is clear that if the trader goes out of business, this right to carry forward a deduction is lost unless indeed there is a statutory right given to some other trader, presumably a successor, to deduct the diminished value (by wear and tear) of machinery and plant used by the predecessor from the profits or gains of the successor. It will be remarked that the machinery and plant might have been placed on the scrap-heap, or perhaps acquired by the successor for a very small sum. It is a little difficult to see the reason in such a case for giving to the successor the right claimed. But there is always a possibility of finding in the twists and turns of the income-tax maze some relief or refuge for the harassed tax-payer and this possibility we must now examine. . . ."

Again at p. 823 :

"To my mind, it is clear that there is no possibility of reading into the rule i.e. 11 (2) or any other existing rule to which we were referred, a right to exercise the remarkable privilege contended for, namely of deducting from profits made after a previous business has been discontinued the diminished value of plant and machinery which the successor has perhaps never acquired."

At p. 826, Lord Russel of Killowen said :

"The right here claimed is not only personal to the old companies, but is a right which can only be asserted in relation to income-tax payable by them respectively in respect of the profits of the trades carried on by them respectively ; and even assuming that the order of Eve, J. operated to vest that right in the appellants, it does not become in transitu a right exercisable in regard to income-tax payable by the appellants in respect of the profits of the trade carried on by the appellants."

Lord Wright, at p. 827, said :

"I question whether the claim to an allowance under R. 6 of the rules applicable to Cases I and II of Sch. D, Income-tax Act, 1918, can properly come under the description of a property, right or power. But, in any case, the old companies never had any such right or property or power, however it is described, in respect of these allowances. All they had was a claim to allowances from their own profits in respect of wear and tear or losses. Neither company during its existence ever had profits or gains from which the deductions now claimed in whole or in part could have been made. The appellant company has been carrying on its own trade as from 1930 and it is in respect of the profits of that trade that the allowances are claimed. The old companies never had any interest in that trade. Their own trade ceased in 1930. This I think is a sufficient answer. . . ."

The views of Lords Maugham, Russell of Killowen and Wright seem to be opposed to those of Lords Caldecote and Romer on the question of the transfer of the unabsorbed depreciation, if R. 11 (2) is left out of consideration. Their Lordships however all arrived at the same result. It has been repeatedly said that decisions of English Income-tax Cases are not precedents under the Indian Income-tax Act. It has been pointed out many times that the Indian Income-tax Act is different from the English Income-tax Act in wording and effect. The present case must be decided on the wording of the Indian Income-tax Act alone taken as a whole. It must be remembered that in the present case the Indian Iron and Steel Company did not buy the shares of the Bengal Iron Company and run the Bengal Iron Company as an existing concern. What the Indian Iron and Steel Company did was to buy the assets of the Bengal Iron Company when it went into liquidation. They paid for them less than their cost. This fact was admitted in argument and is clear from an examination of the returns made by the assessees. For instance, the Bengal Iron Company's depreciation before the transfer for eight months was Rs. 8,62,329, and, therefore for a whole year Rs. 12,93,394. The appellate officer in his order dated 21st August 1939, which is Annexure "E" stated the Bengal Iron Company's assets depreciation to be "on Bengal Iron Company's assets on cost to the appellant — Rs. 11,33,301." Put another way, the assets in respect of which depreciation is claimed were taken over by the assessees at a depreciated figure, though perhaps not the figure at which they stood in the Bengal Iron Company's books. To ascertain the nature, purpose and effect of the depreciation allowance, S. 10, Indian Income-tax Act, must be examined. Summarizing the relevant parts of S. 10, sub-s. (1) provides that the tax shall be payable by an assessee in respect of the profits or gains in any business carried on by him. Sub-section (2) provides that the profits shall be computed after making the following allowances :

"(iv) in respect of insurance against risk of damage or destruction of building machinery, plant, furniture, stocks or stores used for the purpose of the business. . . . " and

"(vi) in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee . . . ."

Proviso (b) states that where full effect cannot be given to "such allowance" in any year "the allowance or the part to which effect has not been given shall be added to the amount of depreciation for the following year and so on for succeeding years." In the whole of the section there is no mention of a change in the ownership of the business, nor any suggestion that the allowance is available to the successor. If it had been intended to make this allowance available to the successor to the business, the following words could well have been added to the end of Proviso (b) : "Where the business is carried on by an original owner of the business or his successor." No such words are to be found.

The effect of S. 26 (2), Income-tax Act, in my view, is simply to provide that as regards the year of assessment, where a succession has occurred in the ownership of the business in the previous year, the successor is made liable to pay income-tax for that year on the total profits actually earned by the business during the previous year, i.e., the one in

which the succession occurred — whether earned under the predecessor or the successor. Section 26 (2) says nothing as to any right of the successor to take advantage of the unabsorbed depreciation his predecessor might have been entitled to. If the Legislature had intended by this sub-section to transfer, or make transferable the unabsorbed depreciation, it would have provided for it in express terms. It is clear from the Act that an assessee is entitled to the depreciation allowance in respect of wear and tear to his buildings, plant, machinery, etc., based on its cost to him whilst he is carrying on his business; it is clear also that he may carry forward the unabsorbed balance of this allowance as long as he carries on his business, but nowhere is it provided that his successor may acquire this benefit when he acquires his predecessor's business. Lord Caldecote in (1940) A.C. 812[1] at p. 818 speaking of depreciation allowances under the English Income-tax Acts said :

"The deductions claimed are by way of relief from the liability ay income-tax upon profits or gains, and the tax-payer must establish his claim upon a correct interpretation of the language of the material enactments."

Applying that pronouncement (which is of a general character and not based on any particular wording of the English Income-tax Acts), in this case the position is that under S. 10 (1) of the Indian Income-tax Act, the tax is payable by the assessee on the profits and gains of any business carried on by him; since no exemption from tax is expressly given anywhere in the Act to the successor arising from the unabsorbed depreciation allowance of the predecessor, therefore none is given. The depreciation allowance therefore being a deduction permitted to the assessee under the Income-tax Act in respect of wear and tear of his plant and machinery based on its cost to him, against the profits he may make when carrying on his business, is a statutory privilege personal to him so long as he carries on his business. When he ceases to pay income tax on his business profits through ceasing to carry on his business, the permission to deduct ceases; it is not a right which passes to his successor under the Income-tax Act, nor is it a right which he can transfer by agreement. In reaching the above conclusions, I believe I have arrived at the same views as to the general nature and operation of depreciation allowances as those expressed by Lords Maugham, Russell of Killowen and Wright who formed the majority in the House of Lords in (1940) A. C. 812.[1] The result though derived through different provisions of law, is the same. Lord Maugham referred to the claim to succeed to depreciation allowances as "a right to exercise the remarkable privilege of deducting from profits made after a previous business has been discontinued the diminished nature of the plant and machinery which the successor has perhaps never acquired." The assessees in the present case bought the undertaking and assets of the Bengal Iron Co., "and the benefit so far as it is capable of being acquired of any claim which the Bengal Iron Co., may have in respect of unabsorbed depreciation allowances."

The assessees took a shrewd and, in my view, accurate view of the legal nature and effect of the Bengal Iron Company's unabsorbed depreciation allowance as the wording of the clause relating to it shows. They knew it was doubtful whether they could acquire it, but they took it for what it was worth and have made the best of their claim to it. To have acceded to their claim would have been to read into the Income-tax Act something which it did not contain. The effect to the assessees in so doing would have been to give them immunity from taxation in respect of future profits to the amount of Rs. 90,31,317 simply because the Bengal Iron Co. had made small profits or suffered losses in the past when the assessee company had nothing to do with the Bengal Iron Co.'s business. A further and more general result would be to put a premium on the sale value of depreciated unsuccessful business undertaking at the expense of the general taxpayer. But for the reasons I have given, in my view, the law does not lead to such results.

As regards the computation of the depreciation allowances for the period since 2nd December 1936, those allowances are based on the cost of the plant etc., to the assessee — the Indian Iron and Steel Co., Ltd. *See* S. 10 (2) (vi) of the Act and the case in 63 I.A. 74.[2] As regards the period, 1st April 1936 to 2nd December 1936, the allowances are based on the cost of the plant, etc., to the person who carried on the business during that period, i.e., on the original cost of such plant, etc., of the Bengal Iron Co. Ltd. This follows from what I have said above and from S. 26 (2) of the Act and also from the decision in I. L. R. (1938) Bom. 374.[3] For the reasons I have given above I am of the opinion that the assessment made by the Assistant Appellate Commissioner of Income-tax in this case was right and that the questions asked in the reference should be answered as follows :

(1) Whether in assessing, under the provisions of S. 26 (2), Income-tax Act, in the circumstances of the present case, a person succeeding to the business of another, the income of the business of the latter up to the date of succession should be assessed to tax separately, or whether the assessment should be made in respect of such business as if it had throughout the year of succession been carried on by the successor? This question is involved and difficult to answer as asked; the best answer to it is that the Appellate Assistant Commissioner's assessment as summarised in para. 5 of the case is correctly made.

(2) Whether in the circumstances of this case the Indian Iron and Steel Co., Ltd., was entitled in law in its assessment for 1937-38 to have the whole of the depreciation allowance on the buildings, machinery, etc., of the Bengal Iron Co., acquired by it computed on the original cost of such assets to the Bengal Iron Co. ? The answer is as indicated above—No.

(3) Whether in the facts and circumstances stated above, the assessee company, in its assessment for 1937-38 and subsequent years, is entitled in law to the benefit of the unabsorbed depreciation allowance of Rs. 85,45,150 of the Bengal Iron Co. Ltd. The answer is—No.

We make no order as to costs.

PANCKRIDGE J. — Of the three questions raised by this reference, the third is of very great importance, not only to these assessees, but in all probability, having regard to the increasing tendency in modern commerce and industry towards merger and amalgamation, to many other assessees.

2. ('36) 23 A. I. R. 1936 P.C. 5 : 159 I.C. 545 : 59 Mad. 175 : 63 I. A. 74 (P. C.), Commissioner of Income-tax, Madras v. Buckingham and Carnatic Co., Ltd.
3. ('38) 25 A. I. R. 1938 Bom. 241 : 174 I.C. 905 : 39 Cr. L. J. 905 : I. L. R. (1938) Bom. 374 : 40 Bom. L. R. 343 (S.B.), Commissioner of Income-tax, Bombay v. Mazagaon Dock, Ltd.

It is also of great importance to the revenue authorities. In times of depression, profits are small or non-existent. Meanwhile, the unabsorbed depreciation allowance goes on increasing, so that it is not difficult to conceive a situation, where, if the argument on behalf of the assessee is well-founded, the principal attraction for the purchase of a moribund business will be a considerable unabsorbed depreciation balance, which will be used by the purchaser to set against his own trading profits, and to enable him to avoid the payment of income-tax until it is exhausted.

I will very briefly recapitulate the facts which are of no great complexity. The assessees are a rupee company, and in 1936 an elaborate scheme was devised whereby the assessees undertook to acquire the whole undertaking of the Bengal Iron Co., Ltd., which was a sterling company incorporated in England, and which I shall henceforward call the Bengal Company. It is common ground that the assessee succeeded to the business of the Bengal Company within the meaning of S. 26 (2), Income-tax Act, 1922 (as that section stood before the recent amendment) on 3rd December 1936.

The transfer was in terms of an agreement in writing dated 8th September 1936, a copy of which together with the scheme of arrangement and amalgamation attached thereto, is annexure "A" to the letter of Reference. At the date of the transfer the unabsorbed depreciation allowance, to which the Bengal Company were entitled under the provisions of S. 10 (2) (vi) of the Act and the proviso thereto, amounted to Rs. 85,45,150. It was thought prudent to make it clear in the agreement that the assessees were, if possible, to have the benefit of this balance as from the date of the transfer of the assets, and cl. (3) (a) of that document provides that the undertaking, properties, and assets of the transferor company shall include the benefit, so far as capable of being assigned, of any claim which the transferor company may have in respect of all unabsorbed depreciation allowances. The position of the assessees at the time of the assessment for 1937-38 was that they were entitled in respect of their original business to an unabsorbed depreciation allowance of Rs. 62,00,775. The assessment for 1937-38, based on the profits and gains of the assessees' business for the previous year, as made by the Income-tax Officer and as subsequently modified by the Appellate Assistant Commissioner, is as follows. In applying the provisions of S. 26 (2) of the Act the assessment divides the previous year into the period prior to 3rd December 1936 and the period subsequent thereto. 3rd December 1936 is admittedly the date when the succession took place. The assessment allows current depreciation on the Bengal Company's assets for the first period computed on the original cost to that company. For the second period current depreciation has been allowed on these assets computed on their cost to the assessees, that is to say, to the successors to the business, namely, the Indian Iron and Steel Co., Ltd.

It is admitted with regard to the assessments for the years succeeding 1937-38 that in view of the decision of the Judicial Committee in 63 I.A. 74[2] current depreciation must be reckoned on the basis of the price paid for the Bengal Company's assets by the present assessees. The assessees and the income-tax authorities are also agreed that the current depreciation on the assets must be computed on their original cost to the Bengal Company, at any rate with regard to that portion of the previous year prior to the succession. This is in accordance with the decision of the Bombay High Court (Beaumont C. J. and Rangnekar J., Blackwell J. dissenting) in I.L.R. (1938) Bom. 374.[3] The only difference between the assessees and the revenue authorities with regard to current depreciation allowance is this. The assessees maintain, on the language of S. 26 (2) that the authorities are wrong in splitting the year of succession into two periods, and that current depreciation should be computed as if the business had been the predecessors' business of the whole of the previous year, in respect of which the assessees are liable to be assessed by reason of the sub-section. Having regard to the magnitude of the sums involved, the practical difference between the two methods as regards the year of assessment is not very great. For the four post-succession months current depreciation computed on the cost to the Bengal Company would be Rs. 4,31,000 odd, while on the basis of the cost to the assessees they have been allowed Rs. 3,77,000 odd as current depreciation on the assets taken over. Moreover, if the authorities are right in their treatment of the unabsorbed depreciation allowances of the Bengal Company, it appears that the "split" previous year favours the assessees.

The reason for this is that the authorities have allowed the current depreciation of Rs. 3,77,000 to be taken into the general depreciation account of the assessees, and added, together with the current depreciation allowance on their original assets, to their unabsorbed depreciation balance. If current depreciation had been reckoned for the whole of the previous year on the cost to the Bengal Company, the assessees would have had no advantage from it whatever, for the unabsorbed depreciation allowance of the Bengal Company, the benefit of which has been refused to the assessees, would merely have been increased by Rs. 4,31,000.

The real point at issue concerns the accumulated unabsorbed depreciation allowances of the Bengal Company. On 31st March 1936 these stood at Rs. 85,45,150 and unquestionably by virtue of proviso (b) to S. 10 (2) (vi) that company was entitled to bring them forward to the next year. The Assistant Commissioner has permitted this sum to be brought forward and added to the current depreciation allowance for the pre-succession period the result being a sum of Rs. 94,07,479. From this he has deducted Rs. 3,76,162 being the Bengal Company's profits for this period. But he has ruled that the assessees are not to be given credit for any further benefit from the balance thus arrived at of Rs. 90,31,317. The assessees say that they are entitled to add this balance to the balance of Rs. 36,84,324 which the Assistant Commissioner has found to be their unabsorbed depreciation allowance on 31st March 1937. This sum has been arrived at by adding the unabsorbed depreciation allowance of the assessees brought forward from 1935-36 to the current depreciation on their original assets for 1936-37, and on the Bengal Company's assets for the post-succession period, and then subtracting therefrom the profits of the original business for the entire year and the profits of the acquired business for the four post-succession months. At the request of the assessees the Commissioner of Income-tax has referred the following questions to this Court :

(1) Whether in assessing, under the provisions of S. 26 (2), Income-tax Act, in the circumstances of the present case, a person succeeding to the business of another, the income of the business of the latter up to the date of succession should be assessed to tax separately, or whether the assessment should be made in respect of such business as if it had

throughout the year of succession been carried on by the successor ?

(2) Whether in the circumstances of this case the Indian Iron and Steel Company, Limited was entitled in law in its assessment for 1937-38 to have the whole of the depreciation allowance on the buildings, machinery, etc., of the Bengal Iron Company acquired by it computed on the original cost of such assets to the Bengal Iron Company ?

(3) Whether in the facts and circumstances stated above the assessee company in its assessment for 1937-38 and subsequent years is entitled in law to the benefit of the unabsorbed depreciation allowance of Rs. 85,45,150 of the Bengal Iron Company, Limited ?

I do not think that the first question requires a separate answer. Read with the second question, it calls upon us to decide whether the Assistant Commissioner was right in computing current depreciation on the Bengal Company's assets on one basis up to the date of transfer, and on a different basis thereafter. I. L. R. (1938) Bom. 374[2] affords no direct guidance on the point, as there the succession occurred on the first day of the financial year. It followed that the profits and gains of the previous year on which the successor was assessed were all profits and gains made by the predecessor. I confess I do not altogether understand the decision of the Allahabad High Court in 7 I. T. R. 374.[4] From p. 389 of the report it appears that the income-tax authorities 'split' the year of succession in a manner which resembles the method employed in this case : the Court referred to I. L. R. (1938) Bom. 374[2] and observed as follows :

"It is clear that an assessment under S. 26 (2) is not made on the profits actually received by the successor referred to in that section and is at best a hypothetical or notional assessment. The assessment is made on the supposition that the whole of the profits for the 'previous year' were received by the successor even though the whole or a part of those profits must have been received by his predecessor. In other words, the successor is, for the purposes of assessment under S. 26 (2), to be assumed as his predecessor with respect to the previous year and the profits have to be computed on this assumption. That being so, in the computation of the profits for the 'previous year' deduction must be made with respect to all the allowances enumerated in sub-s. (2) of S. 10 to which the predecessor may have been entitled."

If the Court considered that it followed from I. L. R. (1938) Bom. 374[2] that a successor assessee is entitled to claim depreciation reckoned on the costs of the assets to his predecessor over the whole of the previous year, including that part of it when the assets were the successor's, and the profits and gains made were made by him, I am of opinion that the decision is erroneous. The assessees attach much importance to the language of S. 26 (2), especially to the provision that the assessment shall be made on the person succeeding as if he had been carrying on the business throughout the previous year, and as if he had received the whole of the profits for that year. In my opinion, to arrive at a proper construction of the sub-section regard must be had to its object. That object is to make the succession liable to be assessed on profits and gains made by the predecessor. A special section is not necessary to make the successor assessable on the profits and gains of the business, from the date at which he becomes the owner. It appears to me to follow that as regards current depreciation, he is only entitled to the allowances claimable by his predecessor in respect of the profits and gains on which the predecessor would be liable to be taxed except for the section. To bear the construction for which the asseesees contend the section would have to provide that the succession should be deemed to have taken place at the close of the previous year. I think question (2) could be answered thus : "No. The Indian Iron and Steel Co. Ltd., were entitled to have depreciation, computed on the original cost to the Bengal Iron Co. Ltd., only from 1st April 1936 to 3rd December 1936."

I now pass to the question of the Bengal Company's unabsorbed depreciation allowance. The assessees claim to have transferred it to their accounts. In (1940) A.C. 812[1] Viscount Maugham at p. 823 described a claim, somewhat similar to the claim of the assessees in this case, as one for "a remarkable privilege." It would certainly seem astonishing if the assessees were entitled to use this immense unabsorbed allowance to protect the profits, not only of the business they have acquired, from taxation, but also the profits of their original business. They specifically claim to take the unabsorbed balance into general depreciation account and use it to set against their entire future profits, although they are compelled to admit that the limitation imposed by proviso (c) to sub-cl. (vi) must be read with reference only to the assets taken over from the Bengal Company. On the other hand, it may be said that the fact that in this case the successor has a business of his own is accidental, and that it seems unjust that a business should lose the privilege the law gives to it in the hands of its original owner, merely because it passes to another by inheritance, bequest or assignment.

Like all questions of this character it must be decided solely on the language of the statute. Now, with regard to this I have come to the conclusion that the Commissioner of Income-tax is right in the importance he attaches to the limitation imposed by the words "such allowance" in proviso (b). In other words, the proviso can only apply to allowances that fall within the ambit of sub-cl. (vi). Under S. 10 (1) the tax is payable by an assessee under the head "Business" in respect of any profits or gains of any business carried on by him. Sub-section (2) deals with allowances. Sub-clause (vi) provides for an allowance in respect of depreciation of a sum equivalent to such percentage on the original cost of the assets to the assessee as may in any case or class of cases be prescribed. Proviso (b) deals with the bringing forward of such allowances which are wholly or in part unabsorbed by profits. Therefore, the assessees can only claim to bring forward allowances computed on the original cost of the assets to them. But what they in fact claim to bring forward are allowances computed on the original cost not to them, but to the Bengal Company or, in other words, allowances which are outside the scope of the proviso. To my mind this completely disposes of the assessees' contention, and I agree that the answer to question 3 must be in the negative. This is really enough, and possibly more than enough for the purposes of this reference.

I feel, however, that I should not omit to deal with (1940) A.C. 812,[1] because although the House of Lords unanimously rejected the appellants' claim to set off against their own profits, allowances for wear and tear which the companies, the appellants, had acquired would have been entitled to carry forward against future profits, had they continued to

4. ('39) 7 I. T. R. 374 (All.), In re Kamlapat Moti Lal.

trade, yet it was recognised that the claim would have been sustainable but for the change in the law effected by S. 32, Finance Act, 1926. I have, therefore, examined the rules as to wear and tear as they stood prior to the passing of that statute. Rule 6 (1) to Cases 1 and 2 of Sch. D is concerned with wear and tear and runs as follows :

"In charging the profits or gains of a trade under this schedule, such deduction may be allowed as the commissioners having jurisdiction in the matter may consider just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on."

Rule 3 makes provision for the carrying forward of such deductions in terms closely resembling those of our proviso (b). The difference, however, is obvious. The deduction for wear and tear is fixed by the commissioners on a just and reasonable basis provided that the conditions of the rule are satisfied. There is no reference to the original cost to the assessee whose profits and gains are being taxed. There is nothing, therefore, to prevent the provisions as to carrying forward continuing to be effective after a person in the words of R. 11 "succeeds to the trade." Under the Income-tax Act the situation is different inasmuch as the allowances must be directly connected with the assessee before the proviso can have any application. I formally concur in the answer to the questions as framed by my Lord, the Chief Justice.

K.S./R.K. *Questions answered.*

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B. K. MUKHERJEA AND ROXBURGH JJ.

Sm. Ashalata Bose—Decree-holder — Appellant

v.

Manindra Nath Bose and another — Judgment-debtors—Respondents.

Appeal No. 224 of 1939, Decided on 27th June 1941, from appellate order of Dist. Judge, Howrah, D/- 24th August 1939.

Civil P. C. (1908), O. 21, Rr. 67 to 69 and 90 —Rr. 67 to 69 not complied with — Sale is not nullity — Non-compliance is material irregularity entitling aggrieved party to have it set aside under O. 21, R. 90 — Sale proclamation fixing 10th January 1938 as date of sale — Sale not held on 10th January owing to notice under S. 34, Bengal Agricultural Debtors' Act — On 10th January Court while adjourning sale putting off passing final orders till 15th on which date Court fixed date of sale — Omission to fix date of sale on 10th January held did not render sale nullity but was material irregularity within O. 21, R. 90.

Failure to comply with the provisions of O. 21, Rr. 67 to 69 does not alone render a court sale a nullity. The aggrieved person can treat such non-compliance as a material irregularity and take proper steps to have the sale set aside on proof of substantial injury, under O. 21, R. 90 : ('25) 12 A.I.R. 1925 Cal. 201 and 16 Cal. 794, *Not approved*; ('21) 8 A. I. R. 1921 Cal. 597 and ('38) 25 A. I. R. 1938 Cal. 699, *Rel. on.* [P 276 C 1]

On the application of the decree-holder for execution, a sale proclamation was issued fixing 10th January 1938 as the date of the sale but the sale could not be held on 10th January 1938 because of the notice issued to the Court under S. 34, Bengal Agricultural Debtors' Act, and on that date the Court directed the matter to be put up on 15th January 1938 and at the same time adjourned the sale till further orders, the effect of the two orders being that the Court while adjourning the sale on 10th January put off passing final orders regarding the date of the sale till the 15th. On 15th January the Court fixed 17th January for sale and the bid being too low the properties were directed to be sold the next day :

Held that it was not a case where the sale was held on a day which was not the day fixed for holding it, but the omission to fix a date for sale on 10th January 1938 was a material irregularity, for which the sale could be set aside only on an application under O. 21, R. 90, Civil P. C., and it could be presumed that such irregularity must necessarily have led to paucity of bidders. But the irregularity did not make the sale a nullity which would confer no title on the purchaser : ('33) 20 A. I. R. 1933 Cal. 486, *Rel. on.* [P 276 C 2]

Nanda Gopal Banerjee—for Appellant.

Pramatha Nath Mitra and Samarendra Krishna Dev—for Respondents.

JUDGMENT.—This appeal is on behalf of the decree-holder auction purchaser and it arises out of a proceeding commenced by the judgment-debtors to set aside an execution sale under S. 47 and O. 21 R. 90, Civil P. C. The appellant obtained a decree for a sum of Rs. 3550 against the respondents in Title Suit No. 19 of 1936 of the Court of the First Subordinate Judge at Howrah, and there was a declaration of charge in respect of the decretal dues upon certain properties specified in the decree. The decree-holder applied for execution of the decree by sale of some of the charged properties, and sale proclamation was issued fixing 10th January 1938, as the date of sale. On 3rd January 1938, a notice was received by the executing Court from the Debt Settlement Board at Sajipur, under S. 34, Bengal Agricultural Debtors' Act, requesting the Court to stay all further proceedings in execution. On account of this notice the sale could not be held on 10th January 1938, and on that date the decree-holder prayed for a little time in order to enable her to make enquiries regarding the proceedings before the Debt Settlement Board. The Court directed the matter to be put up on 15th January, following, and by another order recorded on the same day directed the sale to be stayed until further orders. On 15th January 1938, the stay order was vacated and the properties with the exception of certain lots were ordered to be put up for sale on 17th January 1938 at 12 noon. On 17th January 1938, the sale was held, but the bid being too low, it was not accepted by the Court, and the properties were directed to be sold again on the following day. On the 18th, the sale was again held, and the bid of the decree-holder herself being accepted by the Court, the properties were knocked down to her.

The judgment-debtors then made an application for cancelling the sale on the ground, that it was a void sale, the notice issued under S. 34, Bengal Agricultural Debtors' Act, not being withdrawn at the date when the sale was held. This application was rejected by the Court on 29th January 1938. On 22nd August 1938 the present application was filed under S. 47 and O. 21, R. 90, Civil P. C., and the judgment-debtors prayed for setting aside the sale on the ground that it was an irregular and illegal sale held in contravention of the provisions

of the Civil Procedure Code. Both the Courts below have held the sale to be a nullity and have set it aside on that ground. It is the propriety of this decision that has been challenged before us in this appeal. The learned District Judge observed in his judgment, that as the sale was stayed without date on 10th January 1938 and a definite date was fixed only on the 15th, the provision of O. 21, R. 69, Civil P. C., was not complied with, and the sale was consequently a void sale. In support of this view, reliance was placed on a decision of this Court in 40 C.L.J. 311.[1] In that case the date of sale fixed by the Court was 1st July 1922. That date happening to be a holiday, the sale could not take place. In a title suit commenced by the sisters of the judgment-debtor claiming the property, an order was made on 4th July 1922, that the execution case should be put up on 7th July with an application for injunction to restrain the sale. On 7th July, the injunction was refused and the property was put up for sale on that date and was sold. It was held that as there was no order of the Court adjourning the sale to 7th July 1922 the sale held on that date was a nullity.

This decision obviously proceeds on the footing that the executing Court can put up a property to sale, either on the day on which the sale was advertised to take place, or on the day to which the sale was adjourned under O. 21, R. 69, Civil P. C., and the sale would be without jurisdiction if it is held on a day to which it never had been adjourned. The proposition finds some support from the observation of Sir Comer Petharam in 16 Cal. 794.[2] On the other hand, there are other decisions of this Court, where the learned Judges refused to take this extreme view and treated such defect as nothing more than a material irregularity which could be redressed pursuant to the provisions of O. 21, R. 90, Civil P. C., *vide* A.I.R. 1921 Cal. 597[3] and A. I. R. 1938 Cal. 699.[4] In the last mentioned case Edgley J. relied upon the pronouncements of the Judicial Committee in 20 I.A. 176[5] and 34 I.A. 37[6] and held that failure to comply with the provisions of O. 21, R. 67 to R. 69 of the Code, would not alone render a court-sale a nullity and it would be necessary for the aggrieved persons to treat such non-compliance as a material irregularity and take proper steps to have the sale set aside on proof of substantial injury, under O. 21, R. 90, Civil P. C. In 20 I.A. 176[5] the sale was held at a date which was less than 30 days from the date on which the copy of the proclamation was fixed up in the Court house. This violation of the provisions of S. 290 of the then Civil Procedure Code which corresponds to O. 21, R. 68 of the present Code did not according to their Lordships render the sale a nullity. It constituted a material irregularity, and before the sale could be set aside it was necessary for the aggrieved party to show substantial injury. In the other case, a fresh sale proclamation was not issued as required by S. 291, (O. 21, R. 69), Civil P. C., and it was held that such omission would not make the sale a nullity.

The question as to whether the sale could be held on a date which was not specified in the sale proclamation and to which it was not adjourned, was of course not raised in either of these cases but as violation of one part of O. 21, R. 69, Civil P. C., was held by their Lordships in 34 I.A. 37[6] to amount only to material irregularity, it can certainly be argued that the violation of the other part could not produce a different result. But even if we assume for our present purposes that the decision in 40 C. L. J. 311,[1] is right, we think that it is not applicable to the facts of the present case. Here the sale could not be held on 10th January 1938, because of the notice issued under S. 34, Bengal Agricultural Debtors' Act. The Court on that date directed the matter to be put up on the 15th and at the same time adjourned the sale till further orders. The learned advocate for the appellant argues that the combined effect of these two orders was that the sale was really adjourned to 15th January next. Such a construction may not be justified, but even if we do not accept that position, the utmost that could be said is, that the Court while adjourning the sale on the 10th, put off passing final orders regarding the date of the sale till the 15th. On the 15th, however, the date of sale was fixed by the Court, and on the date so fixed the sale was held. It is not a case where the sale was held on a day which was not the day fixed for holding it.

It cannot be disputed that the procedure was irregular. The bidders were not expected to turn up on the 15th, as that was not the date of sale, and possibly they were not aware of the order fixing the date of sale. This was undoubtedly a material irregularity which would entitle the judgment-debtor to get the sale set aside on an appropriate proceeding under O. 21, R. 90, Civil P. C. As for ourselves we are even prepared to presume that such irregularity must necessarily lead to paucity of bidders. But we are unable to hold that the sale was a nullity out and out, the Court having no jurisdiction to hold it, and that consequently the title of the auction purchaser could be challenged even by an outsider. The view we are taking receives support from the decision of Guha and Bartley JJ. in 37 C. W. N. 146.[7]

We hold, therefore, that the omission to fix a date for sale on 10th January 1938, was a material irregularity, for which the sale could be set aside only on an application under O. 21, R. 90, Civil P. C., but it did not make the sale a nullity which would confer no title on the purchaser. In the present case the application under O. 21, R. 90, Civil P. C., was made long after the period of limitation had expired. The judgment-debtors were aware of the sale, and they themselves took other steps to have the sale cancelled and no case was or could be made which would give them an extended period of limitation under S. 18, Limitation Act. In these circumstances the application under O. 21, R. 90, Civil P. C., must be dismissed as time-barred. The result is that this appeal is allowed, and the orders made by both the Courts below are set aside. The application of the respondents under S. 47 and O. 21, R. 90, Civil P. C., is dismissed. The sale

1. ('25) 12 A.I.R. 1925 Cal. 201 : 84 I.C. 700 : 40 C.L.J. 311, Motahar Hossain v. Mahomed Yakub.
2. ('89) 16 Cal. 794, Basharutulla v. Uma Churn Dutt.
3. ('21) 8 A.I.R. 1921 Cal. 597 : 65 I.C. 746 : 35 C.L.J. 140, Harisadhan Roy v. Shib Gopal.
4. ('38) 25 A.I.R. 1938 Cal. 699 : 178 I.C. 842 : 67 C.L.J. 96, Jogendra Nath v. Nabi Newaj.
5. ('94) 21 Cal. 66 : 20 I.A. 176 (P.C.), Tasadduk Rasul Khan v. Ahmad Husain.
6. ('07) 29 All. 196 : 34 I.A. 37 (P.C.), Gajraj Mati v. Saiyid Akbar Husain.
7. ('33) 20 A. I. R. 1933 Cal. 486 : 144 I. C. 779 : 37 C. W. N. 146, Gobardhan Behari v. Sarat Chandra Bhattacharjee.

will stand. No order is made as to costs either in this Court or in the Courts below.

G.N./R.K. *Appeal allowed.*

C. P. C. —
('40) Chitaley, O. 21 R. 67, N. 4 Pt. 1, O. 21 R. 68, N. 2 Pts. 1 and 2; O. 21 R. 69 N. 12, O. 21, R. 90, N. 36, Pt. 6.
('41) Mulla, Page 860 Pts. (k) and (n), Page 861 Pt. (t); Page 886 Note "Material irregularity in publishing or conducting sale."

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LODGE AND PAL JJ.

Ayub Ali and others — Appellants

v.

Emperor.

Criminal Appeal No. 370 of 1941, Decided on 28th August 1941.

(a) Criminal P. C. (1898), S. 342—Statements under—Use of—Line of defence taken in previous trial relevant in subsequent trial — Previous statements under S. 342 can be admitted in evidence.

Where the line of defence taken by the accused in the previous trial is a relevant fact in a subsequent trial against him, the statement recorded under S. 342 in the previous trial can be admitted in evidence. [P 279 C 1]

(b) Criminal P. C. (1898), S. 297—Misdirection—Judge expressing his opinion on materials is not misdirection.

Where the Judge states his opinion from the materials on record that the attitude taken by the accused in a previous trial was inconsistent with his attitude in a subsequent trial, it cannot be said that he misdirected the jury. [P 279 C 1]

(c) Criminal P. C. (1898), Ss. 162, 164 — Statements under—Use of—They can be used in subsequent trial for contradicting witness—Each individual statement not put to such witness but witness examined generally as to circumstances under which previous statements made—No miscarriage of justice—Failure held of no importance.

The attention of the witnesses was not drawn to each one of the previous statements that were made by her which were ultimately used for the purpose of contradicting her, but she was cross-examined generally as to the circumstances under which she made her previous statement and in some detail as to particular statements made by her. She was not able to give any satisfactory explanation of the conflict between her statements during the previous trial and her statements in the subsequent trial, and the failure to put each individual statement to her obviously did not result in any miscarriage of justice :

Held that the statements recorded by her in the previous trial were rightly admitted in evidence, and though there was a failure in some respects to comply with the provisions of S. 145, Evidence Act, that failure was of no importance. [P 279 C 2]

(d) Criminal P. C. (1898), Ss. 297, 162 and 164—Judge drawing attention of jury to conflict of evidence of witness in previous and subsequent trials and asking them to decide which version was true—Held no misdirection.

The Judge drew the attention of the jury to the conflict of evidence of a witness in the previous and subsequent trials on a point which was of importance in the subsequent trial and asked them to decide which version was true :

Held that the Judge did not in fact treat the previous statements of the witness as substantive evidence, and that there was no misdirection to the jury in the manner in which the previous statements of the witness were dealt with. [P 279 C 2; P 280 C 1]

(e) Criminal P. C. (1898), S. 297—Evidence of witness sufficiently emphasized in charge to jury—Omission to refer such evidence which was to be unreliable when discussing each question is not misdirection vitiating trial.

Where the Judge had sufficiently emphasized about the evidence of a witness which was wholly unreliable on the face of it, the omission to refer to such evidence when discussing each question is not a misdirection which vitiates the trial. [P 280 C 1]

(f) Criminal P. C. (1898), S. 297—All accused defended together and not having separate defence for each—Failure to tabulate evidence against each accused is not misdirection vitiating trial.

Where all the accused persons were defended together, and there was not any separate defence for each of the accused :

Held that the charge to the jury was not defective merely from the fact that the evidence against each accused was not tabulated at the end of the charge. [P 280 C 2]

Hamidul Huq and Abul Hussain Choudhury — for Appellants.

N. K. Basu and Amrita Lal Mukherjee — for Complainant.

T. Taluqdar — for the Crown.

LODGE J. — The seven appellants before us and one Monomohan De alias Munna were placed on their trial before the Additional Sessions Judge of Tippera on a number of charges. They were tried by the learned Additional Sessions Judge and a common jury. The jury returned a majority verdict in respect of all the accused on all the charges framed. The verdict of the majority, namely, three of the jury was as follows :

Appellants Ayub Ali, Kader Ali and Nur Mian were guilty of offences punishable under Ss. 147, 341, 365 and 366, Penal Code.

Appellants Nur Bux Gazi, Julmat Dhali, Abdul Rahman and Sujat Ali were guilty of offences punishable under Ss. 147, 341, 365/109 and 366/109, Penal Code.

The non-appealing accused Monomohan alias Munna was found guilty of offences punishable under Ss. 365/109 and 366/109, Penal Code.

The learned Judge accepted the majority verdict of the jury and he sentenced Ayub Ali under S. 366, Penal Code to undergo rigorous imprisonment for six years. He sentenced Nur Mian and Kader Ali under the same section to undergo rigorous imprisonment each for four years. Under S. 366 read with S. 109, Penal Code, he sentenced Julmat Dhali, Nur Bux Gazi, Abdul Rahman and Sujat Ali each to undergo rigorous imprisonment for three years; and under S. 366 read with S. 109, Penal Code, he sentenced Monomohan De alias Munna to undergo rigorous imprisonment for four years. No separate sentences were passed against any of the accused

persons in respect of the other offences of which they were found guilty.

The case for the prosecution briefly is as follows: One Sukhada Sundari widow of Suresh Majumdar was living with her five children in her husband's house in the village of Gulisha within the jurisdiction of Chandpur police station. On 12th June 1940 this woman left her home and on the following morning attended at the Chandpur mosque and went through a ceremony of some kind there. As she was coming away from the mosque in the company of Ayub Ali and another she was arrested by the police and made over to her relatives. A case under S. 366 was started against Ayub Ali and another. Ayub Ali and the other man were placed on trial on that charge before the Court of Session. During the pendency of that case and after the accused was acquitted, the woman Sukhada Sundari resided at the basha of a pleader, namely Nagendra Singh in the town of Chandpur. That case came to an end on 6th September 1940 with the acquittal of the two accused persons.

Some time after the acquittal of the accused in that case a proposal was made that the woman Sukhada Sundari should go on pilgrimage with one Jatindra Mohan Basu Raja and his family. The matter was discussed and according to the prosecution it was finally decided on 21st September 1940 that Sukhada Sundari should accompany the Basu Rajas on the pilgrimage. According to the prosecution Sukhada Sundari was agreeable to do so; according to the woman herself she was reluctant to go on the pilgrimage. According to the prosecution, Sukhada Sundari expressed a desire to go back to her village home and see her children and her relatives before going on the pilgrimage. No date however, was fixed for her return to Gulisa to visit her children and her relatives, but on 21st September, while Nagendra Babu and his wife were away from home, the accused Monomohan De alias Munna, a servant of Nagendra Babu, persuaded Sukhada Sundari against her better judgment to start for Gulisa that same evening. Munna engaged the boat of Dinabandhu for that purpose and persuaded Sukhada Sundari to go with him in that boat that evening. There are two routes by which one can travel from Chandpur to Gulisa. The shorter route via Brahman-Shakua goes through a portion of the country which is largely inhabited by Moslems.

The longer route via Bagra was considered by Sukhada to be safer. Accordingly, they travelled by Bagra and arrived at Gulisa on the following morning. On the morning of 22nd September Sukhada had a meal in her mother-in-laws's house and visited other Hindu relatives in the village. At about midday, the accused Munna approached her and said that he had to return to Chandpur immediately as he had urgent work there, and he prevailed upon her to return with him there and then. Munna also said that it was necessary for him to travel by the shorter route via Brahman-Shakua. Sukhada Sundari at first was reluctant to go by this route but ultimately she agreed as Munna insisted, but she first secured an escort of Hindu relatives from the village. Accordingly Girindra Chandra Mazumdar, Jatindra Chandra Nandi and Nani Gopal (Nandi) of that village accompanied her in that boat and all started out on the return journey to Chandpur.

After travelling a distance of about a mile and a half, the party reached the northern end of the submerged fields of the village Chapila and were just entering the mouth of a khal when they found a boat coming from the opposite direction. When this boat reached them it turned across the khal and blocked their further passage. The appellant Kader Ali came out from under the cover of that boat and jumped upon the cover of the boat in which Sukhada was travelling. The cover of the boat was broken by the force of his jump. The appellants Nur Mian and Ayub Ali also boarded Sukhada's boat in the wake of Kader Ali. These three men then commenced to drag Sukhada Sundari towards their boat. Sukhada Sundari resisted and screamed and clung to her friends, and her friends Girindra, Jotindra and Nanigopal attempted to save her. They were threatened, however, by the other accused who were also in the boat from which Ayub Ali and his companions had jumped. Accordingly, Jotindra, Girindra and Nanigopal gave up the struggle and allowed these men to drag Sukhada Sundari away. While this incident was in progress, the accused Munna sat quiet in the boat of Sukhada Sundari making no attempt to intervene. When the accused started away in their boat with Sukhada, Munna got into their boat and left the place with them. In the meantime, some 10 or 12 other boats had come up and surrounded the boat in which Sukhada Sundari's friends had been travelling. These boats remained round Dinabandhu's boat until the boat in which Sukhada Sundari had been taken, had gone some distance. Thereafter, they suffered the people in Dinabandhu's boat to proceed. Girindra and his friends decided to return to Gulisha. When they reached Gulisha they discussed the incident and determined to lodge information with the police. Accordingly, first information report was lodged with the police at 4 A. M. on the morning of 23rd September 1940, and the usual police investigation followed.

The accused Munna was arrested on 24th September 1940. None of the other accused were apprehended or surrendered until the middle of November. The woman Sukhada Sundari remained in the custody of the accused party until the case came up for trial. The defence story is that Sukhada Sundari after she became a widow was ill-treated by her husband's relatives, and also, owing to poverty, was in difficulties in maintaining her family. The appellant Ayub Ali is a neighbour and had been a friend of Sukhada Sundari's late husband. Sukhada fell in love with Ayub Ali and voluntarily left home with him in the previous June. On the morning of 13th June she attended Chandpur mosque and was there converted to Islam, and thereafter married Ayub Ali of her own free will. During the previous trial she remained in the custody of her Hindu relatives, and was by them induced to give false evidence against Ayub Ali. After the close of the previous trial, her Hindu relatives suggested that she should go on a pilgrimage, but she did not agree. She was afraid, however, that she might be compelled by them to go on a pilgrimage and she, therefore, decided to leave the house of Nagendra Babu, pleader, and to return to Gulisha. Accordingly, she set out on the evening of 21st September with Munna for Gulisha. She arrived at Gulisha on the morning of 22nd September and went to the house of her mother-in-law. Her mother-in-law abused her, insulted her and assaulted her with a broom-stick and refused to give her shelter. She then sought shelter in the house of another Hindu relative, viz., the witness Jatindra Chandra Nandi, but there too she was insulted and refused accommodation. Accordingly, of her own free will she went to the house of her husband Ayub Ali. The appellants, in their defence, denied that there was any such incident on 22nd

September as alleged by the prosecution. The accused Munna put forward a different defence. He gave a story very similar to that given by the prosecution. According to him he too started back from Gulisha with the woman Sukhada Sundari in the afternoon of 22nd September and they were held up by the other accused in the manner described by the prosecution witnesses. He asserts, however, that he was no party to the abduction and denied that he left the place of occurrence in the company of the other accused persons. He asserted that he was sent to Chandpur by the relatives of the abducted woman for the purpose of lodging information at the thana.

During the course of the trial, statements made by the accused Ayub Ali in the course of the previous trial were proved and placed before the jury, and the jury were asked to consider these statements in connexion with the defence allegation that the woman Sukhada Sundari was married to the accused Ayub Ali on 13th June 1940. The learned Sessions Judge in his charge to the jury read out the statements recorded under S. 342, Criminal P. C., in the previous trial to the jury and after doing so stated : "This clearly indicates that Ayub Ali had an opportunity of telling the Judge, if he desired to do so, that he had married Sukhada." The learned Judge then proceeded to discuss these statements and other evidence and suggested to the jury that the attitude taken by the accused in the previous trial was inconsistent with the attitude taken in the present trial. He did however draw the attention of the jury also to a petition Ex. B filed in Court during the previous trial by one of the defence witnesses, in which it was clearly asserted that Sukhada had been married to Ayub Ali. The learned advocate for the appellants has argued before us that the statements made by Ayub Ali under S. 342, Criminal P. C., in the previous trial should not have been admitted in evidence and he has further argued that if the statements were admitted in evidence the learned Judge should have emphasised in his charge before the jury that in the previous trial the factum of marriage was not strictly speaking, relevant. In our opinion, the line of defence taken in the previous trial was certainly a relevant fact, and the jury were entitled to know what defence Ayub Ali had taken in that case in view of the attitude taken by the defence in the present case, viz., that Sukhada was married to Ayub Ali on 13th June 1940. We are unable to hold that the learned Judge was wrong in admitting the previous statements into evidence, or that he misdirected the jury when he stated his opinion that the attitude taken by Ayub Ali in the previous trial was inconsistent with his attitude in the present trial. The fact that the learned Judge placed before the jury, Ex. B shows that he placed all the relevant materials before the jury. The fact that he emphasised his own inference from those materials does not justify us in holding that he misdirected the jury on this point.

During the course of the trial the statements made by the woman Sukhada Sundari during the previous investigation and during the previous trial were admitted into evidence. Four statements were taken from Sukhada Sundari during the previous investigation and trial. Her first statement was recorded by the police under S. 162, Criminal P. C. Her next statement was recorded by a Magistrate under S. 164, Criminal P. C. Her third statement was made during the enquiry before the committing Magistrate, and her fourth statement was her evidence on oath during the actual trial in the Court of Sessions. The learned Judge placed all these four statements before the jury. The learned advocate for the appellants has contended before us that a wrong use has been made of the statements of Sukhada recorded during the previous investigation and trial. He has contended that if previous statements of a witness are to be used as substantive evidence except as provided in S. 288, Criminal P. C., they must be statements corroborating her evidence in Court and admissible under S. 157, Evidence Act. But, inasmuch as the previous statements of Sukhada Sundari contradict her evidence in this Court in almost every particular, the learned advocate contended that they were not admissible under S. 157 of the Act. If they be regarded as admissible under S. 155, Evidence Act, for the purpose of impeaching the credit of the witness then the statements, according to the learned advocate, are not admissible as substantive evidence. They are merely admissible to show that the present statements of the woman Sukhada are not reliable. Moreover, according to the learned advocate, inasmuch as the provisions of S. 145, Evidence Act, were not complied with they ought not to have been admitted even under S. 155, Evidence Act.

There can be no doubt that the prosecution were entitled to prove these previous statements in order to impeach the credit of the witness Sukhada. It may be observed that Sukhada was examined not as a prosecution witness in the present case but as a Court witness. It is true that the provisions of S. 145, Evidence Act, were not strictly complied with. The attention of the witnesses was not drawn to each one of the previous statements that were made by her which were ultimately used for the purpose of contradicting her, but she was cross-examined generally as to the circumstances under which she made her previous statement and in some detail as to particular statements made by her. It is obvious from a perusal of that cross-examination, that she was not able to give any satisfactory explanation of the conflict between her statements during the previous trial and her statements in the present trial, and the failure to put each individual statement to her obviously did not result in any miscarriage of justice. In our opinion the statements recorded by her in the previous trial were rightly admitted in evidence, and though there was a failure in some respects to comply with the provisions of S. 145, Evidence Act, that failure was of no importance in the present case.

As to the question whether the statements previously recorded were used for a wrong purpose, it has been argued by the learned advocate for the appellants that these previous statements were used as substantive evidence of the facts contained in them. In our opinion it cannot be said that they were in fact used for that purpose. The learned advocate for the appellants drew our attention to that portion of the charge to the jury in which the learned Judge summarised the various conflicting statements of the woman Sukhada and particularly to the final sentence in the paragraph in question. That sentence reads: "It is necessary for us to come to a decision as to which version is true." The learned advocate has argued from this sentence that the learned Judge treated both sets of statements as substantive evidence and requested the jury to decide which of the two sets of statements they could rely upon. In our opinion the sentence to which reference has been made, does not justify this interpretation. In the present trial the defence emphasised their assertion that Sukhada,

was married to Ayub Ali on 13th June 1940. In respect of one of the charges at least the question whether or not she was married to Ayub Ali before the date of the present occurrence was of the greatest importance, as the learned Judge himself pointed out. The question, therefore, whether or not the woman had been married was of great importance in this particular case, and the learned Judge was right in drawing the attention of the jury to this conflict in evidence and he was right in asking them to come to a decision as to which of the two stories was true. But the learned Judge in inviting the jury to come to a decision as to which of the two versions was true did not rely on the evidence given by the woman during the previous trial. He emphasised circumstances which were not seriously disputed, and he asked the jury to come to their decision after considering all these circumstances. In our opinion the learned Judge was substantially correct when he told the jury that they had to decide which of the two versions was correct, and the Judge did not in fact treat the previous statements of the woman Sukhada as substantive evidence. We are unable therefore, to hold that there was any misdirection to the jury in the manner in which the previous statements of the woman Sukhada were dealt with.

The learned advocate for the appellants has pointed out that in his charge to the jury, when the learned Judge discussed the evidence regarding each of the questions in issue he omits to refer at each stage to the evidence of the woman Sukhada on the point. It is perfectly true that the learned Judge does not in the earlier part of his charge refer to the evidence of Sukhada. He reserved all reference to the evidence of Sukhada to the end of his charge, and he then pointed out the circumstances under which she had made her various statements, and showed that in his opinion her evidence on either side was wholly unreliable. The evidence of the woman Sukhada was sufficiently emphasised by the learned Judge in his charge, and the mere omission to refer to that evidence which, on the face of it, was unreliable, when discussing each question in issue, is not a misdirection, which vitiates the trial.

The learned advocate further contended that in the charge to the jury the case against each individual accused has not been separately discussed and he has argued that as the evidence against the different accused is different, there should have been a separate discussion, and the failure to discuss the evidence against each accused separately is sufficient to vitiate the trial. In the early stages of his charge the learned Judge emphasised the necessity of considering the evidence against each of the accused separately, and of coming to a separate and distinct conclusion whether each of the accused was guilty or not, and, if guilty, of which of the offences with which he was charged. The learned Judge did in fact consider the case of the accused Munna separately from that of the other accused. He set out the defence of Munna separately and at a later stage of his charge he discussed both the evidence and the law regarding the case against Munna quite separately from the other accused. Moreover, he pointed out to the jury during the course of his charge that one accused, namely, Kader Ali had pleaded alibi both in the committing Magistrate's Court and in his statement under S. 342, Criminal P. C., in the Court of Sessions, and he pointed out that there was no evidence whatsoever in support of the plea of alibi and he also pointed out to the jury that even if they rejected the plea of alibi, that was not sufficient to establish the case against the accused Kader Ali, and that they must be satisfied from the prosecution evidence that the guilt of Kader Ali had been established. Moreover, in his general discussion of the evidence of the prosecution witnesses when discussing contradictions and discrepancies in that evidence, he pointed out that the evidence varied in respect of the different accused persons. He pointed out the deficiencies and the discrepancies in the identification of the various accused persons. As all the accused persons other than Munna were defended together, and as there is no indication on the record that apart from the plea of alibi on behalf of Kader Ali there was any separate defence for each of these accused, we are unable to hold that the charge to the jury was defective in the present case, merely from the fact that the evidence against each accused was not tabulated at the end of the charge. The evidence against the separate accused was indicated during the course of the charge and the duty of the jury to consider the case separately against each of the accused was emphasised. It would have been more convenient if at the end the evidence against each accused had been tabulated, but in the circumstances of the present case we do not consider the failure so to tabulate it was a misdirection vitiating the trial.

These are the only criticisms which have been preferred against the charge to the jury. We have considered them carefully, and have come to the conclusion that there are no misdirections in the charge which would justify us in ignoring the majority verdict of the jury, or in setting aside that verdict. In the result, therefore, we see no reason to interfere with the convictions and sentences. We, therefore, order that this appeal be dismissed.

PAL J. — I agree.

K.S./R.K. *Appeal dismissed.*

Cr. P. C. —

(b) ('41) Chitaley, S. 297, N. 11 Pt. 28.
('41) Mitra, Page 1018, N. 915.

(c) ('41) Chitaley, S. 162, N. 16 Pt. 1; S. 164, N. 7 Pt. 11.
('41) Mitra, Page 491, N. 502; Page 502, N. 502 (c) "If duly proved."

(d) ('41) Chitaley, S. 297, N. 11 Pt. 28.
('41) Mitra, Page 1018, N. 915.

(e) ('41) Chitaley, S. 297, N. 11 Pt. 28.
('41) Mitra, Page 1018, N. 915.

(f) ('41) Chitaley, S. 297, N. 11 Pt. 28.
('41) Mitra, Page 1018, N. 915.

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HENDERSON J.

Hafizur Rahman Howladar — *Petitioner*

v.

Md. Amjad Ali Taluqdar of Tarikata P. S. Amtoli, Dist. Bakerganj — *Opposite Party.*

Civil Rule No. 1478 of 1940, Decided on 6th May 1941, issued in matter of order of Addl. District Judge, Bakerganj (Barisal), D/- 28th June 1940.

Bengal Tenancy Act (8 of 1885, as amended by Act 4 of 1928), S. 26F (2) and (3)—Property subject to incumbrance—Parties to sale valuing property free from incumbrance at Rs. 1180 — Notice to pre-emptor stating that Rs. 430 was paid in cash and Rs. 750 was unpaid as being due on incumbrance—Pre-emptor held entitled to pre-empt on payment of Rs. 430.

The parties to the sale valued the property at Rs. 1180 free from incumbrances. The existence of an incumbrance was mentioned but no details were given with regard to it. From the actual notice which was served on the pre-emptor it transpired that Rs. 430 was paid in cash and Rs. 750 was unpaid on the ground that it was due on the incumbrance :

Held that to treat Rs. 1180 as the consideration money would imply the absurdity that the value of the equity of redemption was the same as the value of the property free from incumbrance. Therefore, the pre-emptor was entitled to pre-empt on payment of Rs. 430. If the vendee had paid off any incumbrance he was entitled to make a claim under S. 26F (3). [P 281 C 1]

Dr. N. C. Sen Gupta and Obaidul Huq — for Petitioner.

Jitendra Nath Guha — for Opposite Party.

ORDER. — The question raised in this rule is whether the petitioner is to deposit Rs. 430 or Rs. 1180 before he is entitled to pre-empt under S. 26F, Ben. Ten. Act. It depends upon the meaning to be attached to the words "consideration money or value of the share transferred" in subsection (2).

It appears that there is an incumbrance on the property. Under sub-s. (7), the petitioner will acquire the property subject to incumbrances. The opposite party is attempting to compel the petitioner to reimburse him for an incumbrance which he has failed to discharge. It is common ground that the petitioner must deposit the consideration money as stated in the notice. The question therefore, is what was the consideration money stated in the notice which was served upon the petitioner. It appears from the kobala that the parties valued the property at Rs. 1180 free from incumbrances. The existence of an incumbrance was mentioned but no details were given with regard to it. Then from the actual notice, it transpires that Rs. 430 was paid in cash and Rs. 750 was unpaid on the ground that it is due on the incumbrance. Now if the meaning of the notice was that Rs. 1180 was the consideration money, then there was no point whatever in giving all these details. The interpretation which the opposite party seeks to put upon notice implies the absurdity that the value of the equity of redemption is the same as the value of the property free from incumbrance. No injustice will be done to the opposite party. If he has paid off any incumbrance, he is entitled to make a claim under sub-s. (3).

The rule is accordingly made absolute. The order of the Courts below is set aside. The Munsif is directed to make an order in favour of the petitioner in accordance with law. The opposite party will pay the costs of the petitioner in all Courts. The hearing fee is assessed at one gold mohur.

G.N./R.K. *Rule made absolute.*

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BISWAS AND SEN JJ.

Tumina Khatun — Appellant

v.

Gaharjan Bibi — Respondent.

Appeal No. 95 of 1940, Decided on 16th January 1941, from original order of Dist. Judge, Bakarganj, D/- 15th February 1940.

(a) Mahomedan law—Guardianship—Maternal aunt versus step-mother of father of minor.

A maternal aunt has a preferential right to the custody of a minor under the Mahomedan law over the step-mother of the father of the minor. [P 282 C 1]

(b) Guardians and Wards Act (1890), S. 17—Person entitled to be appointed under personal law — That she is young woman of 21 years with two children or that her father looks after litigation held no disqualification.

Under S. 17 normally a person who under the personal law would be entitled to the custody of the children in preference to any one else should be appointed guardian and it is only in exceptional circumstances that any one else could be appointed. [P 282 C 1]

A woman who was related to the minor as mother's sister was not appointed for the following reasons : (1) She was 21 years of age and had two children and may have more; she was too young and would not have the time to look after the minors, and (2) neither she nor her husband had deposed in the case and it was her father who had applied for her :

Held that neither of these reasons were adequate for refusing to appoint her guardian. [P 282 C 1]

(c) Guardians and Wards Act (1890), S. 17—Welfare of minor is primary consideration—Appointment of woman who has married stranger to minor is not forbidden by Mahomedan law—Such person only loses preferential right under Mahomedan law and can be appointed guardian under S. 17.

Under S. 17 the welfare of the infant is the primary consideration and a stranger may be appointed a guardian, in preference to a relation if the Court considers that the welfare of the infant demands it. The Court should, wherever possible, make an appointment, which is consistent with the personal law to which the minor is subject; and when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. The Mahomedan law, however, has not forbidden the appointment of a woman who has married a stranger to the minor to be guardian of the minor; all that it has laid down is that a woman who has a preferential right to the custody of an infant loses such right on her marriage to a stranger. Therefore a mother's sister of the minor who has married a stranger to minor is not disqualified from being appointed guardian of the minor and the welfare of the minor would be better served by appointing her as guardian in preference to a step-mother of the minor's father. [P 283 C 1, 2]

Radhika Ranjan Guha — for Appellant.

Jitendra Nath Guha — for Respondent.

SEN J. — Moksed and Fatema are the infant son and daughter of Amina and Mobarak Ali. They are aged about four years and six years respectively. Both their parents are dead. Tumina Khatun, the sister of Amina, applied for the guardianship of the person and property of these two infants. Amina's father, Isumaddi, applied to be appointed guardian of the property only of the minors, and Tumina gave up her claim in this respect. The applications were opposed by Gahar Ali Mridha, the paternal grandfather of the minors. The learned District Judge has appointed Isumaddi guardian of the property of the minors, and this part of the order

is not appealed against. He has dismissed Tumina's application to be appointed guardian of the persons of the minors and has appointed Gahar Ali's wife, Gaharjan, the step-mother of Mobarak Ali, as such. The appeal is against this order.

On behalf of the appellant it is argued that Tumina, as maternal aunt, has, under the Mahomedan law, a preferential right to the custody of the minors and that the reasons given by the learned Judge for not appointing her are insufficient. It is pointed out that Gaharjan, being the step-mother of the father of the minors, has no right under the Mahomedan law to be appointed guardian. Learned advocate for the respondent contends, firstly, that the reasons given by the learned Judge for not appointing Tumina are good ones; secondly, that Tumina, having married a person not related to the minors within the prohibited degrees, she has disqualified herself from claiming to be guardian of the minors under the Mahomedan law and that the Court in these circumstances could not appoint her as guardian as the provisions of S. 17, Guardians and Wards Act forbade such appointment.

I shall deal with the question of disqualification later and shall assume for the present that there is no disqualification. Tumina, being a maternal aunt, has certainly a preferential right to the custody of the two minors under the Mahomedan law. Now S. 17, Guardians and Wards Act, provides that, in appointing a guardian of a minor, the Court should, subject to the provision of the section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. The section goes on to say that, in considering what will be for the welfare of the minor, the Court should have regard to the age and sex of the minor, the nearness of kin of the proposed guardian and similar matters. It is clear from the section that normally Tumina, who under the Mahomedan law would be entitled to the custody of the children in preference to any one else, should be appointed guardian and that it is only in exceptional circumstances that any one else could be appointed. The learned Judge seems to have accepted this position. What has to be decided is whether the reasons assigned by the learned Judge for not appointing Tumina are adequate. The reasons given by the learned Judge are two, viz.: (i) She is 21 years of age and has two children and may have more; she is too young and will not have the time to look after the minors. (ii) Neither she nor her husband have deposed in the case and it is her father Isumaddi who has applied for her.

In my opinion neither of these reasons are adequate for refusing to appoint a person guardian, who according to the personal law of the minors, is normally entitled to be so appointed. A married woman of 21 with children is quite mature enough to look after the personal welfare of two infants aged four years and six years. The fact that she has other children is a further qualification and certainly not a disqualification. I see no reason to hold that she would not have time to look after the minors. The second reason is equally inadequate. In the society to which the petitioner belongs, it is usual for the senior male member of the family to look after litigation. The learned Judge has found that Isumaddi, the father of the appellant Tumina, is a fit and proper person to look after the property of the minors. It is difficult to appreciate why in such circumstances he should hold that the fact that Isumaddi is behind his daughter Tumina in her application is one which should render her unfit to be guardian.

The next question for decision is whether Tumina has disqualified herself from being appointed guardian by reason of the fact that she has married a person who is not related to the minors in the prohibited degrees. It is true that, in his petition in opposition to the application for guardianship, Gahar Ali makes this allegation, but there is no evidence given that Tumina has married such a person and there is no finding in the Court below to that effect. If I thought that the fact that Tumina was married to such a person would disqualify her from being appointed guardian of the minors, I would have sent the case back for the ascertainment of this fact, but I hold the view that such a marriage would not disqualify her. Under the Mahomedan law, as I have stated before, Tumina being a maternal aunt, she would have a preferential right to the custody *(hizanit)* of the infants to that of Gahar Ali or his wife Gaharjan. It is, however, laid down by the Mahomedan law that a female otherwise entitled to the custody of a child loses the right of custody if she married a person not related to the child within the prohibited degrees : *vide* the Hedaya, Chap. 14, p. 138; Baillie's Digest 432. If, therefore, Tumina has married a stranger to the minors she has lost the right to the custody *(hizanit)* of the children, which she had under the Mahomedan law prior to her marriage, but it does not necessarily follow from this that she is disqualified from being appointed a guardian of the minors by a Court acting under the Guardians and Wards Act. Under that Act a stranger, who, prior to the order of appointment, had no right whatsoever to the guardianship of the minor, may be appointed guardian. All that the section says is that, subject to the welfare of the minor, the appointment should be made consistently with the personal law of the minor. Thus, preference should be given to persons, who, under the personal law of the minor, would be entitled to guardianship and persons, who are prohibited from being guardian by such personal law, should not be appointed. A stranger, however, may be appointed guardian under the Act if the welfare of the minor demands such appointment. This is perfectly clear from the Act. Now, if, in certain circumstances, a stranger may be appointed, I can see no valid reason for excluding, in those circumstances, a maternal aunt who has married a stranger. She cannot be in a worse position than a stranger as regards her eligibility to be guardian.

It is argued, however, by learned advocate for the respondents that by her marriage to a stranger the maternal aunt has "disqualified" herself from being appointed guardian and reliance is placed for this view upon the case in 11 C.L.J. 632[1] at p. 635. It is true that there are certain observations in that case which seem to indicate this view; but the question under discussion now was not one which required decision in that case and it was not raised in this form. There the mother, who had married a stranger, claimed a preferential right to the guardianship of her child over that of the child's paternal uncle. Mookerjee J., after referring to the Mahomedan law on the subject rejected her claim and, in doing so, he made certain observations to the effect that the mother had disqualified herself from claiming the custody of the child by her marriage to a stranger. In another part of the judgment,

1. ('10) 11 C.L.J. 632 : 5 I. C. 571, Yakub Sheikh v. Nafujan Bibi.

when considering the question of the guardianship of the property of the minor, the learned Judge stated that : "If a person is disqualified for the office of guardian by the law to which the minor is subject, he cannot be appointed guardian." These remarks falling, as they do, from an eminent Judge of this Court, require the most careful consideration and it is with the greatest respect and not without some hesitation that I say that I am unable to agree with the view—if that be the view of the learned Judge—that a Mahomedan mother or aunt, who would otherwise be eligible for the guardianship of an infant, becomes "disqualified" from being appointed guardian under the Guardians and Wards Act, because she has married a stranger to the infants. I have consulted the texts in the Hedaya and also Baillie's Digest. In the Hedaya, the reason is given as to why a woman loses the right of *hizanit* upon her marriage with a stranger to the infant. It is said that the husband of the woman, being a stranger, may illtreat the child. It is further said that on the dissolution of such marriage, the right to custody revives. Baillie gives no reason, but merely states the fact that the right to custody is "made void" by marriage with strangers and that the right revives on the marriage being dissolved. It is clear from these passages that, under the Mahomedan law, a woman, who marries a stranger to the infant, is not considered as having done something which would render her personally unfit to be the guardian of a child. The Mahomedan law nowhere directs that a woman, having minor relations, should always marry the relations of such minors or that the marriages of such women with strangers are looked upon with disfavour. It laid down this rule regarding the custody of minors by females, in order to protect them as far as possible from harsh treatment by strangers. Further, the passages in Baillie and the Hedaya, stating that a woman loses the right of *hizanit* by marriage with a stranger to the minor, occurs where the question of the preferential right of guardianship is being discussed. It is nowhere suggested that, where there are no other eligible relations, the Judge cannot appoint a woman who has lost her right of *hizanit* by her marriage to a stranger. The word "disqualified" is nowhere used. I do not consider, therefore, that the Mahomedan law lays down that a woman, who has married a stranger to the minor, is "disqualified" from being appointed a guardian under any circumstances. It merely lays down that such a woman loses any preferential right which she had by virtue of her relationship to the minor.

As I pointed out before, the terms of Sec. 17, Guardians and Wards Act, are perfectly clear. The welfare of the infant is the primary consideration and a stranger may be appointed a guardian, in preference to a relation, if the Court considers that the welfare of the infant demands it. I realise that the section also enjoins that the Court should, wherever possible, make an appointment, which is consistent with the personal law to which the minor is subject; and that, when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. The Mahomedan law, however, has not forbidden the appointment of a woman who has married a stranger to the minor to be guardian of the minor; all that it has laid down, as I have explained above, is that a woman who has a preferential right to the custody of an infant loses such right on her marriage to a stranger. I am of opinion, therefore, that the appellant is not disqualified from being appointed a guardian. If she has married a stranger, she has only lost her preferential right as aunt. She is in no worse position than Gaharjan, who is stranger to the minors. As between the two, I consider that the welfare of the minors would be better served by appointing the appellant Tumina as guardian. Gaharjan is a step-mother of the infants' father, while Tumina is the infants' mother's sister. It is far more likely that she will look after them with more affection and care than Gaharjan.

There remains Gahar Ali himself. Under the Mahomedan law, the grandfather, in the absence of certain relations, has a right to be appointed guardian. Gahar Ali, as grandfather, would have a preferential right to that of Tumina under the Mahomedan law, if Tumina has married a stranger. The learned Judge has, however, found him to be unfit to be guardian of the property of the minors, inasmuch as his interests are adverse to theirs and inasmuch as he is claiming a right adversely to the minors in certain property left by the minors' father. The learned Judge also points out that he was prosecuted for executing a decree which had already been executed. In these circumstances, I do not consider that it would be proper to appoint him as guardian of the minors' persons. In my opinion, the welfare of the minors will be best secured if Tumina is appointed the guardian of their persons and I, accordingly, appoint her as such; the minors shall remain in the custody of Tumina. This appointment shall be treated for all purposes as having been made by the District Judge of Bakarganj. This appeal is allowed with costs.

BISWAS. — I agree.

K.S./R.K. *Appeal allowed.*

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DERBYSHIRE C. J. AND PANCKRIDGE J.

O. V. Forbes — Appellant

v.

V. G. Peterson — Respondent.

Appeal No. 39 of 1940, Decided on 15th January 1941, from original order in Testamentary Suit No. 13 of 1939.

(a) Succession Act (1925), S. 283 (1) (c) — Person on whom citation is served is bound by probate proceedings even if he stands by.

A person having an interest need not be a party to a probate action to be bound by its results. Where citations have been served and a party is cognizant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened : ('15) 2 A.I.R. 1915 Cal. 393, *Rel. on*; 33 Cal. 116 (P.C.) and ('28) 15 A.I.R. 1928 P.C. 2, *Expl.*

[P 286 C 2]

(b) Succession Act (1925), S. 273 — Expression "civil proceedings" in S. 3 (24), General Clauses Act—Meaning — Oudh Chief Court is High Court within S. 273.

The expression "civil proceedings" in S. 3 (24), General Clauses Act, is used in contradistinction to criminal proceedings, and includes testamentary proceedings. The Oudh Chief Court therefore is a High Court within the meaning of S. 273, Succession Act, and has jurisdiction to grant probate of a will "with effect throughout British India." That grant can only be revoked or annulled by the Oudh

Chief Court or the Privy Council and until so revoked or annulled it stands good. [P 286 C 2; P 287 C 1; P 288 C 1]

(c) Succession Act (1925), S. 271—High Court can exercise discretion under S. 271—Discretion when exercisable.

The High Court has at least the discretion given by the Act to the Judge of a district. The discretion under S. 271 is exercisable by the Court whenever the Court is placed in the position of having to decide what order is to be made upon the application for probate of the will. The Court is not precluded from exercising the discretion afresh in the light of new facts though of course it will not exercise it to the contrary effect whilst the facts remained the same. [P 287 C 1]

(d) Succession Act (1925), Ss. 271 and 270 — Probate action—Concurrent jurisdiction—Points to be considered in avoiding conflict stated — Two sets of proceedings for probate going on at same time in Oudh Chief Court for probate of will and in Calcutta High Court for probate of will and codicil—Proceedings in Calcutta High Court held should be stayed.

In case of concurrent jurisdiction, in a probate action it is very necessary to avoid a conflict. In determining whether the Court should have regard and defer to a jurisdiction with which it may come into conflict or whether the Court can fairly expect that other jurisdiction to defer to it two points should be considered, priority in time and extent of relief asked for or obtainable in the other jurisdiction. [P 287 C 1, 2]

A testatrix who died on 6th June 1939 had resided for some time previous to her death at Lucknow in Oudh and had immovable and moveable property valued at about nine lakhs of rupees, eight lakhs of which was situate in Oudh and about one lakh, consisting of money and shares in companies was in Calcutta. The deceased made a will on 23rd January 1938 and appointed *F* and *P* as executors. On 1st June 1939 that is five days before her death, the deceased was alleged to have executed a codicil to the said will whereby *P* was removed from the office of executor under the will and *N* substituted in her place. The codicil also purported to reduce *P*'s share from one-third to one-sixth and increase the share of *F* from one-third to one-half. On 11th July 1939 *P* applied to the Chief Court of Oudh at Lucknow for grant of probate of the will. Citations were issued and served on *F* and *N* and they were required to produce the will and codicil. On 3rd August *F* applied in the Calcutta High Court for grant of probate of the will and codicil and the matter was set down as a contentious cause. On 30th August 1939 *P* made an application before the Calcutta High Court to stay the Calcutta proceedings under S. 10, Civil P. C., and also on the ground that the application of *F* for probate did not comply with the requirements of S. 279 (1), Succession Act, in that it did not state that (to the best of his belief) no application had been made to any other Court for probate of the same will. The application for stay was dismissed with the result that probate proceedings in the Calcutta High Court went on. There were thus on 30th August two sets of proceedings for probate going on at the same time, namely (a) in the Oudh Court for probate of the will and (b) in the Calcutta High Court for probate of the will and codicil. Although *N* was a party to the Oudh Court proceedings *F* was not but was taking interest in them as he was represented by a counsel and was financing *N* in his activities there. On 30th November 1939 the Oudh Court holding that the codicil propounded by *N* was not proved at all granted probate of the will to *P*, with effect throughout British India and that grant was confirmed in appeal. On 30th April 1940 *P* made an application to the Calcutta High Court for determining the preliminary issue as to the maintainability of *F*'s application to that High Court for probate of the will and codicil, and the Court passed the following order: "The application is stayed sine die with liberty to bring it on upon notice to the other parties in the event of the probate granted by the Lucknow Court being hereafter revoked." In the appeal against the order:

Held (Per *Derbyshire C. J.*) the Calcutta High Court had jurisdiction to grant probate of the will and codicil as part of the property left by the testatrix was lying in Calcutta but since the Oudh Court proceedings were the first to be started and had been finally determined so far as it was possible for them to be finally determined without *F*'s assistance which he deliberately withheld and the Oudh Court was the more natural and more convenient Court, the Calcutta High Court in exercising the discretion which it had under the Succession Act, and also in exercising its right to observe the comity of Courts, was correct in making the order appealed from: (1908) 77 L.J.Ch. 824, *Rel. on.* [P 287 C 1, 2]

(Per *Panckridge J.*)—The petition for probate of the will and codicil filed in the Calcutta High Court could be dismissed as barred by res judicata. When the situation was not complicated by the existence of an infant or of a pardanashin beneficiary, the law in India was substantially the same on the point as in England. Even if the Chief Court of Oudh be not a High Court, and if accordingly the grant of the Chief Court was not covered by the proviso to S. 273, the grant of probate made by it was, until revoked or annulled, conclusive proof, as against those cited if not against all the world, that the grantee had established his title as executor of the deceased's last will and testament. The fact that the grant in such a case would not be effective with respect to assets beyond the limits of the province in which the Court was situated would only mean that with regard to other assets the grantee must apply to the appropriate Court for a grant of letters of administration with the will annexed to which he had an indisputable right. [P 288 C 1, 2]

(e) Succession Act (1925), S. 2 (b) — Codicil should be proved in Court in which probate of will has been obtained.

As a matter of practice, codicils should be proved in the Court from which the probate of the will has been obtained: (1883) 8 P.D. 167, *Approved.* [P 287 C 2]

S. M. Bose, Khaitan and D. P. Chatterjee — for Appellant.

Sir Asoka Roy, Advocate-General and P. C. Ghosh — for Respondent.

DERBYSHIRE C. J.—This is an appeal from an order of Ameer Ali J. dated 21st June 1940, whereby he stayed an application by Oswald Vernon Forbes made to this Court for the grant to him of probate of the will of his mother, Adelaide Elizabeth Forbes, and a codicil alleged to have been made with reference to the will. The order was as follows:

"The application is stayed sine die with liberty to bring it on upon notice to the other parties in the event of the probate granted by the Lucknow Court being hereafter revoked."

There was also an interim order restraining the executor and executrix of the said will — of which probate had been granted by the Oudh Chief Court at Lucknow — from distributing the estate in such a manner that persons having rights under the codicil may be adversely affected. The interim order restraining distribution was stated to hold good until 1st July 1940. The facts leading up to this application are as follows : The deceased Adelaide Elizabeth Forbes was a widow, who died at Dehra Dun in the United Provinces whilst on her way to Mussoorie on 6th June 1939. She had resided for some time previous to her death at "Dilkusha House", Lucknow, in the province of Oudh and had immovable property in the province of Oudh and moveable property consisting mainly of money and shares in companies. Altogether the property was stated to be valued at about nine lakhs of rupees, eight lakhs of this was situate in province of Oudh and about one lakh, consisting of money and shares in companies, was held by the deceased's banks or other agents in Calcutta. The deceased had three children, namely Oswald Vernon Forbes, the present applicant, Mrs. Violet Geraldine Peterson, a married daughter, and Mrs. Esme Earle, another married daughter. The deceased made a will on 23rd January 1938, whereby she devised and bequeathed one-third of her estate to the applicant Oswald Vernon Forbes, one-third of her estate to Mrs. Violet Geraldine Peterson, and the other one-third to her other daughter Mrs. Esme Earle for life with the remainder to her children. The applicant and Mrs. Peterson were named as executors in that will.

It is alleged that on 1st June 1939, that is five days before her death, the deceased executed a codicil to the said will whereby Mrs. Peterson was removed from the office of executor under the will and Mr. F. O. O'Neill a barrister substituted in her place. The codicil also purported to reduce Mrs. Peterson's share from one-third to one-sixth and increase the share of Oswald Vernon Forbes, the applicant, from one-third to one-half. On 23rd June 1939, Mr. Stewart, an official of the Imperial Bank at Lucknow who was a witness to the will, swore an affidavit before the Commissioner of Affidavits, Chief Court of Oudh, verifying the will and stating that he saw the testatrix sign it. On 27th June 1939, Murli Dhar Raumiar and N. N. Shivpuri, who were witnesses to the codicil, swore affidavits before the Deputy Registrar of the Chief Court of Oudh stating that they saw the deceased sign the codicil. We are told that the will and codicil had both come into the hands of Oswald Forbes and that the codicil was 'produced' by him on 4th July 1939. On 11th July 1939, Mrs. Peterson applied to the Chief Court of Oudh at Lucknow for grant of probate of the will and on 12th July she asked for a summons against Oswald Forbes and Mr. O'Neill for production of the will and codicil. On the same date, namely 12th July, upon an application by Mrs. Peterson in the Oudh Court under S. 276, Succession Act, the following order was made :

"Let citations issue to Messrs. O. V. Forbes and F. O. O'Neill, Munshi S. Aziz-un-Nabi and B. Shayama Charan. As it is said that the original will and codicil are in the possession of Mr. Forbes or Mr. O'Neill, it is ordered under S. 267 (1), Succession Act, that these gentlemen be required to produce the said will and codicil. Let the citation to Mr. Forbes issue immediately."

The summons was served on Mr. O'Neill, who wrote on the back of it :

"The two documents noted overleaf, viz., the will of Mrs. A. E. Forbes dated 23rd January 1938 and the codicil executed by Mrs. A. E. Forbes, dated 1st June 1939, were handed over to Mr. O. V. Forbes many days ago for transmission to Calcutta and are not now in my possession . . . ."

On the back of summons was also written :

"I regret that I am unable to produce either the will or the codicil noted overleaf as neither document is now in my possession."

"Both documents are in Calcutta in connexion with my application for probate made in Calcutta."

O. V. Forbes, 17th July 1939.

On 25th July 1939, Mrs. Peterson applied at Lucknow for the case to be proceeded with and for the issue of citations on Oswald Forbes and Mr. O'Neill, and the Oudh Court ordered : "Let citations issue as ordered before." On 26th July, Mrs. Peterson filed a caveat in the Calcutta High Court. It should be noted that at that time no proceedings had been started in the Calcutta High Court in respect of the probate. On 3rd August, Oswald Forbes applied in the Calcutta High Court for grant of probate of the will and codicil; from a stamp on the face of the application it appears that it was handed in to the Court on 28th July. On 9th August Mrs. Peterson's attorneys filed an affidavit in the Calcutta High Court in support of the caveat. On 12th August, Mrs. Peterson took out a summons in the Calcutta High Court for stay of the High Court's proceedings in respect of the probate. On 23rd August, Oswald Forbes took out a summons to have the matter set down as a contentious cause and on 29th August 1939, the High Court set down the matter as a contentious cause. On 30th August 1939, Mrs. Peterson made an application before Panckridge J. in the Calcutta High Court to stay the Calcutta proceedings under S. 10, Civil P. C., and also on the ground that the application of Mr. Forbes for probate did not comply with the requirements of S. 279 (1), Succession Act, in that it did not state that (to the best of his belief) no application had been made to any other Court for probate of the same will.

Panckridge J. dismissed the application for stay with the result that probate proceedings in the Calcutta High Court went on. There were thus on 30th August two sets of proceedings for probate going on at the same time, namely (a) in the Oudh Court for probate of the will and (b) in the Calcutta High Court for probate of the will and codicil. On 26th September, Oswald Forbes signed a vakalatnama in favour of a Mr. Walford who is a barrister, practising in the Oudh Court. In that vakalatnama Oswald Forbes appointed Mr. Walford as his vakil in the Oudh Court probate proceedings and stated that as regards the acts done by Mr. Walford "all these when done and performed by him shall be acceptable or admissible to me as acts done by me personally."

On the same date, namely 26th September, Mrs. Peterson made an application to the Oudh Court for the appointment of a receiver; this was opposed by Mr. Forbes and Mr. O'Neill who applied for a stay of the Oudh Court's proceedings under S. 10, Civil P. C. The Oudh Court made no order on the application for the appointment of a receiver but fixed an early date for the hearing of the probate proceedings. On 13th October in further proceedings at the Oudh Court Mr. Stewart, who had previously sworn an affidavit in support of the will, gave verbal evidence in Court stating that he witnessed the signature of the deceased on the will dated 23rd January 1938. Counsel for the caveator

(Mr. O'Neill) stated that he was not prepared to cross-examine the witness at that stage. On the same date, namely 13th October, Mr. O'Neill gave evidence in the Oudh Court stating that he signed a caveat dated 13th October 1939, in respect of the will and that he intended to oppose the application for probate and on that account had filed the caveat. He admitted the genuineness of the will but stated "I propound the codicil in opposition to the will." It must be noted that Mr. O. V. Forbes has never been a formal party to the proceedings at the Oudh Court. On 18th October, the Oudh Court framed this issue—"Was the codicil dated 1st June 1939—propounded by the caveator—executed by Mrs. A. E. Forbes whilst of a sound disposing mind?" On 20th November 1939, Mr. O'Neill signed a vakalatnama in favour of Mr. Walford and on the back of the vakalatnama was this endorsement :

"All fees to be paid by Mr. O. V. Forbes and not by me. I agree to this.

F. Owen O'Neill. O. V. Forbes.
20th November 1939. 28th November 1939."

On 24th November, Mr. Walford applied to the Oudh Court for an adjournment to enable him to produce his evidence and the learned Judge appointed 30th November as the day for the hearing of the matter stating :

"I shall be sitting alone on Thursday next, 30th November. The caveator must be ready with his evidence and the documents which he wishes to prove on that date. Mr. Walford draws my attention to the difficulty of getting the documents in question from the Calcutta High Court. The office will furnish Mr. Walford with any letter that he requires."

On 27th November 1939, Mr. Walford handed in a note to the Oudh Court stating that Mr. O. V. Forbes had assured him that the money for procuring the attendance of witnesses from Calcutta would be sent to them. On 30th November, Mr. Walford applied to the Oudh Court for the attendance of the two witnesses to the codicil—Raumiar and Shivpuri. On 30th November 1939, Yorke J. of the Oudh Court granted probate of the will dated 23rd January 1938, to Mrs. Peterson "with effect throughout British India" and in the course of his order he said :

"As the caveator has failed to produce his evidence and there is no evidence before me which affords any support to the grounds for the refusal of grant of probate set forth in the caveat and affidavit, I must hold that the caveator has failed to satisfy the Court that the codicil said to be dated 1st June 1939, propounded by the caveator was executed by Mrs. A. E. Forbes while of a sound disposing mind. The caveator has in fact failed to prove the codicil at all, and there is nothing before the Court except the original will which it is common ground between the parties, was duly executed by the late Mrs. Forbes."

On 8th April 1940, there was an appeal to a Bench of the Chief Court of Oudh by Mr. O'Neill against the grant of probate of the will and that appeal was dismissed. In the course of the judgment the learned Judges said :

"We may mention that on 13th October 1939, Mr. L. C. Bose, Superintendent, Testamentary Department, Calcutta High Court, brought the original will and codicil to this Court and Mr. O'Neill was present in Court and his statement was recorded on oath on that date. If he wanted to prove the codicil, it could have been detained."

On 30th April 1940, Mrs. Peterson applied to the Calcutta High Court for an order that the issue relating to the maintainability of the present suit in this Court in view of the proceedings and judgment of the Chief Court of Oudh be tried as a preliminary issue before any other issues are tried in the case. That application was opposed by Mr. Forbes who is the only person that has applied for the grant of probate of the will and codicil in the Calcutta High Court and Ameer Ali J. made the order which is now appealed against. The present position is that probate of the will of Mrs. Forbes has been granted to Mrs. Peterson in the Oudh Chief Court by a Judge thereof and that grant has been confirmed by a Bench of that Court on appeal; Mr. O'Neill was a party to those proceedings and further was cited there and was present. He is clearly bound by the grant made by the Oudh Chief Court. Mr. O.V. Forbes was not a party to the Oudh Court proceedings, but was undoubtedly taking an interest in them as he was represented by his counsel and was financing Mr. O'Neill in his activities there. Moreover, he was cited like Mr. O'Neill and has acknowledged in an affidavit in these proceedings that he received the citations. We have not before us the citations to either Mr. Forbes or Mr. O'Neill, but one form of citation is mentioned in the Succession Act, viz., "to come and see the proceedings before the grant of probate (S. 283, sub-s. (1) (c))." The effect of the citation is set by Mookerjee and Beachcroft JJ. in 19 C. W. N. 747[1] at p. 749 :

"It need not be disputed that if a party is cognizant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened."

Both Mr. Forbes and Mr. O'Neill will have to face that doctrine if they go again to the Oudh Chief Court and ask for a grant of probate in respect of the will and the codicil; but the consequence of their application to that Court I leave to that Court if such an application is made. The question is: should Mr. Forbes under the citation as related above be allowed to make a similar application to this Court? If this Court should go further with the present application and it is decided in Mr. Forbes' favour it would mean that a grant of probate of the will and the codicil might be made to Mr. Forbes. There would then be probate in the Oudh Court of the will in favour of Mrs. Peterson and probate in this Court of the will and codicil to Mr. Forbes : in that event Mrs. Peterson could not safely execute the testatrix's will as authorized by the Oudh Court, nor could Mr. Forbes as authorized by this Court; so that the testatrix's will whether expressed in the will alone or in the will read with the codicil might never be executed. That would frustrate the testatrix's intention; it would be an absurd position. Mr. Forbes says that whatever the consequences, he is in law entitled to go on, since, the deceased left property in the jurisdiction of this Court and we have under S. 270, Succession Act, jurisdiction to grant probate, and that we must hear and determine this application for grant of probate, whether it results in an impasse or a conflict between this Court and the Chief Court of Oudh. I am satisfied that the Oudh Chief Court is a High Court within the meaning of S. 273, Succession Act, (*see* the General Clauses Act, 1897,

1. ('15) 2 A.I.R. 1915 Cal. 393 : 28 I.C. 574 : 21 C.L.J. 287 : 19 C.W.N. 747, Dwijendra Nath v. Goloke Nath.

S. 3 (24), and the Oudh Courts Act, 1925) and had jurisdiction to grant probate of this will "with effect throughout British India." That grant can in my view only he revoked or annulled by the Oudh Chief Court or the Privy Council, and until so revoked or annulled it stands good. I also think that since part of the property of the deceased is lying in Calcutta, the Calcutta High Court would have jurisdiction in a proper case to make a grant of probate of a testamentary document left by the deceased—*see* S. 270, Succession Act. Whether we are bound to exercise such jurisdiction in this case is another matter.

Section 271, Succession Act, provides that :

"When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district . . . .

This Court has at least the discretion given by the Act to the Judge of a district. The deceased testatrix resided at Lucknow in the Oudh Province. It has never been suggested that she lived at any time in Calcutta. It is contended that Panckridge J. on 30th August 1939, exercised his discretion in this application and permitted it to go on, and that it must go on. What Panckridge J. did was to exercise his discretion on the facts as they existed on 30th August. At that time both sets of proceedings—those in the Oudh Court and those in the Calcutta High Court — were proceedings and nothing had been finally determined in either. I cannot agree that this Court is deprived of its discretion under S. 271 because Panckridge J. exercised it on 30th August 1939, so as to permit the Calcutta proceedings to go on. In my view that discretion is exercisable by the Court whenever the Court is placed in the position of having to decide what order is to be made upon the application for probate of the will and codicil. Certainly no Judge would exercise it to the contrary effect whilst the facts remained the same. When Ameer Ali J. heard the application now in question the Oudh Chief Court had granted probate of the will to Mrs. Peterson and an appellate bench of that Court had confirmed the grant after giving Mr. Forbes full opportunity to see and hear the proceedings and propound the codicil—which he failed to do. I am not sure that Mr. Forbes after his citation and consequent behaviour in the Oudh Chief Court is not estopped in this Court from proceeding further; but I will deal with the matter on broader grounds. At present there is every prospect of a conflict between the Oudh Court, which is indubitably seised of the matter, and this Court.

In (1908) 77 L. J. Ch. 824[2] at pp. 828, 829 there were simultaneous proceedings in the Supreme Court of Nova Scotia and in the Chancery Court of the Palatine of Lancashire for the winding up of a partnership arranged in England to work mines in Nova Scotia. The Palatine Court restrained the plaintiff in the Nova Scotia proceedings from prosecuting those proceedings and that plaintiff appealed to the Court of Appeal in England against that injunction. The Court of Appeal dissolved the injunction and in doing so discussed the comity of Courts in such circumstances. Farwell L. J. at pp. 828 and 829 said :

"The existence of concurrent jurisdiction render very necessary the observance of a comity between those jurisdictions the disregard of which would lead to most unfortunate friction. Two points appear to me to be usual in considering whether the Court should have regard and defer to a jurisdiction with which it may come into conflict or whether the Court can fairly expect that other jurisdiction to defer to it. One is priority in time, and the other is the extent of the relief asked for or obtainable in the other jurisdiction."

Kennedy L. J. said at p. 829 :

"In my opinion it is very important for the public weal to avoid, wherever it is possible to avoid, any real, and even any apparent conflict of jurisdiction between two equally competent tribunals."

And later—

"In this case, apart from the inconvenience, I myself attach great value to a perfect exercise of comity in these matters . . . . . and speaking with great respect, I regret that the Vice Chancellor thought it right to allow any proceedings to go on in his own Court, and more than that at a certain stage to grant an injunction against the plaintiff in the Colonial Court, to restrain him from pursuing that which was the more natural and at least equally convenient Court."

In the present proceedings the Oudh Chief Court was the more natural and more convenient Court. The deceased never lived in Calcutta but lived and died in the jurisdiction of the Oudh Court; all her immovable property and 8/9ths of her moveable property was in that Court's jurisdiction; the other 1/9th was in Calcutta but could be transferred from Calcutta to Lucknow with very little effort and trouble. Again the Oudh Court proceedings were the first to be started and they have been finally determined as far as it was possible to determine them finally without Mr. Forbes' assistance which he deliberately withheld. By S. 2 (b), Succession Act, a "codicil" is "an instrument made in relation to a will, and explaining, altering or adding to its dispositions and shall be deemed to form part of the will." Probate of this will has been granted by the Oudh Court. In (1883) 8 P. D. 167,[3] Sir James Hannen, the President of the Probate Court in England, dismissed an application to prove in London the codicil to a will made in Antigua by a lady who had a house in Antigua and one in England in these words :

"It is the practice of this Court to require that codicils must be proved in the Court from which the probate of the will has been obtained. I must therefore refuse this motion, and leave the applicant to obtain probate of the codicil at Antigua."

This decision may not bind this Court which has to administer probate matters in accordance with the provisions of the Indian Statute law, but it is a good guide. Mr. Forbes could have obtained all the relief he was entitled to in the Oudh Court, but deliberately neglected to pursue his claim there. He may so far as this Court is concerned again apply to the Oudh Court: whether he is successful is a matter for the Oudh Court. I am satisfied that Ameer Ali J., exercising the discretion which he has under the Succession Act, and also exercising his right to observe the comity of Courts, was correct in making the order appealed from. This appeal must be dismissed with costs against Mr. O. V. Forbes personally. Certified for two counsel.

PANCKRIDGE J. — I concur in the decree to be made dismissing the appeal. In my opinion the learned Judge would have been fully entitled to answer the issue : "Are these proceedings barred

2. (1908) 77 L.J.Ch. 824, Jopson v. James.

3. (1883) 8 P. D. 167 : 52 L. J. P. 93 : 31 W. R. 956, In the goods of Miller.

by res judicata or principles analogous thereto ?" in the affirmative, and thereupon to dismiss the petition for probate of the will and codicil. Indeed I think this would have been the more logical course, in view of the opinion expressed by him that the probate granted by the Chief Court was unrevoked, and, as far as the appellant was concerned, was unrevocable. When it is sought to justify some more than usually astonishing proposition with regard to the probate law of India, the observations of Sir Arthur Wilson in 33 Cal. 116[4] at page 129 repeated in 7 Pat. 221[5] at page 223, are relied on. But when I asked Mr. S. M. Bose for the appellant whether he contended that in view of the latter case the statement of the law in 19 C. W. N. 747[1] at p. 749 must be considered as incorrect, he replied that such was not his contention. In that case the Court stated :

"It need not be disputed that if a party is cognizant of the proceedings for probate or letters of administration and chooses to stand by and allow the proceedings to be concluded in his absence he will not be allowed to come in afterwards and have the grant revoked or the proceedings re-opened. This principle has been repeatedly recognized in this Court."

The learned Judges also expressed the opinion that this is in accord with the rule followed in England. I see no reason to doubt that in a case like the present one, when the situation is not complicated by the existence of an infant or of a pardanashin beneficiary, the law in India is substantially the same on this point as in England. The latter is thus summarized in Tristram and Coote's Probate Practice, Edn. 18, p. 397 :

"With these exceptions (the existence of a later will and fraud), probate in solemn form cannot be impeached by any person who has been a party to the action whether as plaintiff, defendant, intervener, or party cited, or who has been privy thereto. And it is to be observed that a person having an interest need not be a party to a probate action to be bound by its result. If he was cognizant of it and was content to stand aside while others contested the action, he is precluded from re-opening the case."

Further, although I should hold that the Chief Court of Oudh is a High Court for the purposes of the Succession Act, and that "civil proceedings" in S. 3(24), General Clauses Act, 1897, is used in contradistinction to criminal proceedings, and includes testamentary proceedings, yet even if the Chief Court of Oudh be not a High Court, and if accordingly the grant of the Chief Court is not covered by the proviso to S. 273, in my opinion, the grant of probate made by it is, until revoked or annulled, conclusive proof, certainly as against those cited if not against all the world, that the grantee has established his title as executor of the deceased's last will and testament.

Where the Court granting the probate is not a High Court, the grant is not effective with respect to assets beyond the limits of the province in which the Court is situated; but this only means that with regard to the other assets the grantee must apply to the appropriate Court for a grant of letters of administration with the will annexed, to which in my opinion he has an indisputable right. It can never have been the intention of the Legislature to sanction a system so productive of inconvenience and embarrassment as one under which competent grants are possible.

G.N./R.K. *Appeal dismissed.*

4. ('06) 33 Cal. 116 : 32 I. A. 244 : 8 Sar. 839 : 9 C. W. N. 938 : 1 C. L. J. 594 (P.C.), Kurrutulain Bahadur v. Nuzbat-ud-Dowla Abbas Hossein Khan.
5. ('28) 15 A. I. R. 1928 P. C. 2 : 107 I. C. 14 : 7 Pat. 221 : 55 I.A. 18 (P.C.), Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.

C. P. C. —
(d) ('40) Chitaley, S. 10, N. 2 Pts. 1 and 5.
('41) Mulla, Page 33, Note : "Scope and object of the section."

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LODGE AND ROXBURGH JJ.

Chairman Tollygunj Municipality — *First Party*

v.

M. Masiah Ahmed — *Second Party.*

Criminal Ref. No. 137 of 1941, Decided on 25th November 1941.

Bengal Municipal Act (15 of 1932), Ss. 3 (54) and 330 — S. 3 (54) is exhaustive—Order under S. 330 passed by Magistrate to whom District Magistrate has not delegated duties under Act is without jurisdiction—S. 529, Criminal P. C., does not strictly apply—Even if Criminal Procedure Code was to be applied S. 530 and not S. 529 would be applicable.

The definition of a "Magistrate" in S. 3 (54), is exhaustive and therefore an order under S. 330 passed by a Magistrate to whom the District Magistrate has not made over any duties under the Act is without jurisdiction and must be set aside. Section 529, Criminal P. C., strictly speaking cannot apply to such an order inasmuch as it does not refer specifically to action taken under the Bengal Municipal Act. But even if the provisions of Criminal Procedure Code are considered and applied as far as possible to proceedings under the Bengal Municipal Act, S. 530 would be the proper section to apply rather than S. 529. [P 289 C 1]

Sudhanshu Sekhar Mukherjee, Priti Bhusan Barman and Madhu Sudan Dutt — In support of Reference.

Abul Quasem No. 2— In opposition to Reference.

LODGE J. — This is a reference under S. 438, Criminal P. C., by the Sessions Judge of 24-Parganas. The material facts are as follows : An application was made at the instance of the Chairman of the Tollygunj Municipality for an order under S. 330, Bengal Municipal Act of 1932. The application was made to the Sub-Divisional Officer of Alipore and was by him transferred to Mr. H. C. Barori, a Magistrate of the First Class, for disposal. Mr. Barori after hearing the parties passed an order for demolition under S.330, Bengal Municipal Act, on 29th May 1941. The learned Sessions Judge has recommended that this order be set aside for the reason that the Magistrate, who passed the order, had no jurisdiction to do so. Section 3 (54), Bengal Municipal Act, reads as follows :

" 'Magistrate' includes the District Magistrate, the Magistrate in charge of a division of the district, in which division a municipality is constituted, and every Magistrate of the First Class subordinate to the District Magistrate to whom the District Magistrate may have made over any duties under this Act."

It is conceded that Mr. H. C. Barori is not a Magistrate to whom the District Magistrate has made over any duties under this Act. If, therefore, S. 3 (54) is an exhaustive definition of the term "Magistrate" as used in the Bengal Municipal Act, it is clear that Mr. H. C. Barori had no jurisdiction to pass an order under S. 330 of the Act. It has been contended on behalf of the municipality that as S. 3 (54) uses the word "includes," the definition is not exhaustive and other Magistrates are also included in the definition. If this contention were correct, it would mean that any Magistrate whether of the first class, or second class or even third class would also be included in the term "Magistrate" and would have all the powers conferred upon a Magistrate under the Act. We are unable to accept this contention and we are therefore of opinion that the definition in S. 3 (54) is exhaustive. Such being the case, we are of opinion that Mr. H. C. Barori was not a Magistrate entitled to pass an order under S. 330, Bengal Municipal Act.

It has further been contended on behalf of the Municipality that even if Mr. Barori had no jurisdiction to pass the order complained of, still inasmuch as he did it in good faith, these proceedings should not be set aside merely on the ground that he was not empowered to pass the order ; and our attention was drawn to S. 529, Criminal P. C. Section 529 does not refer specifically to action taken under the Bengal Municipal Act and therefore strictly speaking has no application. But, even if the provisions of the Criminal Procedure Code are considered and applied as far as possible to proceedings under the Municipal Act, in our opinion S. 530 would be the proper section to apply rather than S. 529. In our opinion, the order of the Magistrate passed was without jurisdiction and is liable to be set aside. We therefore accept the reference and set aside the order of demolition passed by Mr. H. C. Barori on 29th May 1941.

ROXBURGH J. — I agree.

G.N./R.K. *Reference accepted.*

Cr. P. C. —
('41) Chitaley, S. 529, N. 1 and S. 530, N. 1.
('41) Mitra Page 1746, N. 1399.

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HENDERSON J.

Probodh Chandra Haldar and another — Defendants — Petitioners

v.

Bani Charan Kundu and another — Plaintiffs and others — Defendants, Pro forma — Opposite Party.

Civil Rule No. 1822 of 1940, Decided on 11th August 1941, issued against judgment and decree of Sub-Judge, First Court, Pabna, D/- 30-8-1940.

Bengal Agricultural Debtors' Act (7 of 1936), S. 52 — S. 52 must be strictly construed — Proceedings referred to in S. 52 need not be bona fide — Time during which proceedings continued — Meaning of — Plaintiff's application under Act dismissed — Review application also dismissed but allowed on appeal and case dismissed second time — Time between dismissal of case and filing of review application and between dismissal of review and filing of appeal must be excluded under S. 52.

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Section 52 should be strictly construed. Section 52 does not require that the proceedings referred to therein should be bona fide. The time during which the proceedings continued means any period during which something in connection with the proceedings was going on. It does not include a period during which nothing was pending on the file at all. [P 290 C 1]

The last date for filing the suit was 27th February 1939. On 20th February 1939, the plaintiff applied to a Debt Settlement Board and an order of dismissal was passed on 12th September 1939. On 19th September 1939, when the claim had become barred, the plaintiff filed a review application which was dismissed but was allowed in appeal and the case was dismissed (for the second time) on 18th June 1940. The suit was filed on that day :

Held that the period between the dismissal of the case and the filing of the application for review and the period between the dismissal of the review application and the filing of appeal must be excluded under S. 52. [P 290 C 1]

Amaresh Chandra Roy — for Petitioners.

Surajit Chandra Lahiri — for Opposite Party.

ORDER. — This rule has been obtained by the defendants and raises a difficult point of limitation which involves an interpretation of S. 52, Bengal Agricultural Debtors' Act. The suit is to recover money due on an admitted account (Mablakbandi). It is common ground that the last date for filing the suit was 27th February 1939. On 20th February 1939, when there were still six days to go, the plaintiffs applied to a Debt Settlement Board at Chatmohar. A similar application was made by the defendants to a Debt Settlement Board at Malgram on 4th April 1939. The two cases were consolidated in the office of the Board at Malgram on 8th August 1939. An order of dismissal was passed on 12th September 1939. On 19th September 1939, when the claim had become barred, the plaintiffs filed a review application. This application was allowed by the appellate officers and this case was dismissed (for the second time) on 18th June 1940. The present suit was filed on that day. The plaintiffs rely upon S. 52, Bengal Agricultural Debtors' Act, to save limitation. The relevant words are these :

"The time during which such proceedings continued and the time during which the person interested in such debt was debarred by any provision of this Act from making or instituting the suit shall be excluded."

Now, the plaintiffs were not debarred from instituting their suit on any day between 13th and 18th September, inclusive. They can, therefore, only succeed if they can show that these dates are included in the time during which the proceedings continued. In opposing the rule, Mr Lahiri contended that the proceedings continued from 20th February 1939, until 18th June 1940, when the application was finally dismissed. In this case the proceedings have been unusually protracted. First of all, there were the ordinary proceedings which culminated in the dismissal of the case. Then there was a review ending in dismissal. Then there was an appeal. As a result the review was restored and the petition was again finally rejected. Now, this interpretation is certainly possible and it is necessary to examine it. Now there is no period of limitation for an application for review under S. 44 of the Act. One extraordinary and apparently mischievous result of this interpretation would be that a creditor can revive a time-barred debt merely by pushing in a

review application and then allowing it quietly to be dismissed for default. To get over the difficulty, Mr. Lahiri suggested that the proceedings referred to in S. 52 are bona fide proceedings. In my judgment, it is impossible to read any such qualification into the section. Either the proceedings continued during these crucial days or they did not. In my opinion, this interpretation ought only to be given effect to even if any other interpretation would render the second provision redundant. As a matter of fact, the second provision is wider in its effect than the former. In this connection a reference may be made to S. 35 which in certain circumstances bars proceedings in a Court although there were no proceedings pending before a Board.

In my judgment, the section should be strictly construed. The time during which these proceedings continued means any period during which something in connection with the proceedings was going on. It does not include a period during which nothing was pending on the file at all. On this interpretation it makes no difference whether the original proceedings, the review matter, the appeal and the rehearing are to be considered separate proceedings or one continuous proceeding from start to finish. I would, therefore, exclude both the period between the dismissal of the case and the filing of the application for review and the period between the dismissal of the review application and the filing of the appeal. The result is that the rule must be made absolute and the decree of the lower Court is set aside. I, however, make no order as to costs.

G.N./R.K. *Rule made absolute.*

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HENDERSON J.

Satish Chandra Nag — Judgment-debtor — Appellant

v.

Silchar Co-operative Town Bank Ltd.— Decree-holder — Respondent.

Appeal No. 166 of 1940, Decided on 20th June 1941, from appellate order of Dist. Judge, Silchar, D/- 3rd June 1940.

Co-operative Societies Act (1912), S. 43 (1) — Even in case of mortgage in favour of Society award made by Registrar is not mortgage decree — *A* mortgaging land without huts standing thereon to *B* and then mortgaging same with huts to Co-operative Bank — *B* obtaining mortgage decree and purchasing land in execution thereof — Bank applying to Registrar under Act, obtaining award and in execution thereof putting huts to sale — Bank making bid and withdrawing it and allowing execution case to be dismissed for default — Bank applying subsequently for attachment of *A*'s salary—*A*'s claim under S. 47, Civil P. C., for value of huts held untenable — Award held not mortgage decree — Even otherwise *A*'s claim held must fail as huts were removed by his brother at his instigation and with his connivance.

Even in the case of a mortgage in favour of the Society, an award made by the Registrar can in no sense be a mortgage decree. Under S. 43 (1), the dispute referred to the Registrar must be a dispute between the members of the Society and the Committee. The Registrar has no power to decide disputed claims of priority or to make a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. [P 291 C 1]

A, mortgaged certain land to *B*. The huts standing on the land were not included in the mortgage. Subsequently *A* mortgaged the same land along with the huts to the Co-operative Bank. *B* obtained a decree on his mortgage and purchased the property in execution thereof. The Bank applied to the Registrar of the Co-operative Credit Societies and obtained an award and in execution thereof applied for the sale of the huts and offered a bid of Rupees 200. *A*'s brother then filed a petition asking for a stay of further proceedings on the ground that he was the real owner of the huts and that he had instituted a title suit to establish his right. The Bank promptly withdrew its offer and declined to bid and the execution case was finally dismissed for default. The Bank then applied for attachment of *A*'s salary. On the objection of *A* under S. 47, Civil P. C., that he should be given credit for the value of the huts on the ground that the huts had disappeared owing to the default of the Bank as it failed to redeem the prior mortgage and to preserve the land as security for its debt and in the first execution proceedings after making an inadequate bid had allowed the execution case to be dismissed for default :

Held that (1) since under the terms of the award the Bank was first to put up to sale not the property but *A*'s equity of redemption, the award in no sense could be said to be a mortgage decree ; [P 291 C 1]

(2) *A* could not claim the value of the huts inasmuch as the Bank owed no duty to *A* to redeem the prior mortgage but was entitled to do so if it thought it desirable to protect its own interest and the loss of the land was no more due to Bank's failure to redeem than it was due to *A*'s failure to redeem. Nor did the Bank owe any duty to *A* to offer any sum or to bid at all ; [P 291 C 1]

(3) Even if the Bank had been guilty of the neglect of any duty which it owed to *A*, the latter's claim must fail, in view of the fact that the huts were actually removed by *A*'s brother at his own instigation and with his connivance. [P 291 C 2]

Paresh Lal Shome and Satyendra Kishore Ghose — for Appellant.

Priya Nath Dutta — for Respondent.

JUDGMENT. — This appeal is by the judgment-debtor. A certain property was mortgaged by the appellant in favour of the Cachar Marine Fire and Life Insurance Company. Certain huts, the property of the appellant, standing on the land were not included in the mortgage. The appellant then executed a second mortgage in favour of the respondent. This mortgage included the huts. The first mortgagee instituted a proper mortgage suit and obtained a decree. Neither the appellant nor the respondent exercised their right to redeem and the property was purchased by the first mortgagee in execution of the decree. The result of this was that the huts, instead of being standing structures became worth nothing more than materials. The respondent did not institute any suit but applied to the Registrar of the Co-operative Credit Societies and obtained an award. He then put the award into execution in the Court of the Munsif. He first of all applied for the sale of the huts. This application was dismissed for default. The present application is for execution by attachment of the salary of the appellant. The appellant then

filed an objection under S. 47, Civil P. C. That objection, as now pressed is that the appellant should be given credit for Rs. 400 for the value of the huts.

It appears that the respondent applied to the Registrar under the Rules made by the Local Government under the provisions of S. 43 (l) of Act 2 of 1912. Those rules are not before me. It was not disputed, however, in the Munsif's Court and it must be taken that the respondent was either allowed or compelled by those rules to apply to the Registrar and similarly he was entitled under those rules to enforce the award by execution in the Munsif's Court. Now, if the rules made under the Act have this effect, I can see no escape from the conclusion that, even if there be a mortgage in favour of the Society, the award made by the Registrar can in no sense be a mortgage decree. Under S. 43 (l), the dispute referred to the Registrar must be a dispute between the members of the Society and the Committee. The Registrar has no power to decide disputed claims of priority or to make a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. It is further clear from the award itself that under the terms of the award the respondent must first put up to sale not the property but the appellant's equity of redemption. Thus, in no sense could it be said that the award which is now being executed is a mortgage decree. The relevant part of the award is in these terms :

"If the right, title and interest of the defendant in the property set out and described in the schedule below is sold and if the sale proceeds should be found insufficient to discharge the dues the subsequent interest balance will be realised according to law."

It is clear then that under the terms of the award the appellant had the right to demand that the huts be put up to sale first. It may be noted that the huts are the only property set out in the schedule to the award. Now when the present execution case was filed, the huts had ceased to exist and it was no longer possible to bring them to sale. The appellant's case is that they are worth Rs. 400 which is based upon the valuation made by the respondents in the sale proclamation in the first execution case. His case further is that the huts had disappeared owing to the default of the respondent and he is therefore entitled to be credited with their value in the execution proceedings. In support of that case, he relied upon two facts: first, that the respondent did not redeem the prior mortgage and thereby preserve the land as a security for the present debt, and second, that in the former execution proceedings the respondent having made an inadequate bid of Rs. 200 eventually withdrew it and finally allowed the execution case to be dismissed, for default. Both the Courts below held that neither of these facts gives him any claim to an allowance for the value of the huts. I will deal with the former first. It is enough to say that the respondent owes no duty to the appellant to redeem the prior mortgage. He was certainly entitled to do so if he thought it desirable to protect his own interest. The loss of the land was no more due to the failure of the respondent to redeem than it was to the failure of the appellant himself to redeem. This claim only requires to be put forward to be rejected.

The facts with regard to the second point are as follows. The respondent offered a bid of Rs. 200. The appellant's brother then filed a petition asking for a stay of further proceedings on the ground that he was the real owner of the huts and that he had instituted a title suit to establish his right. The respondent promptly withdrew his offer and declined to bid. No other offers were forthcoming. Here again, the respondent owes no duty to the appellant to offer any particular sum or even to bid at all. But supposing he did, the Munsif was right in holding that he was justified in withdrawing his bid. Bitter experience had shown him that the appellant is a thoroughly unscrupulous man who would stop at nothing to evade the payment of his debts. As soon as the brother's petition was filed, it became apparent that the old device of a claim by a relation was being resorted to. I am not at all surprised that the respondent hastily withdrew his bid. Finally, even if the respondent had been guilty of the neglect of any duty which he owed to the appellant, the latter's claim must fail, in view of the finding of the learned Judge to the effect that the huts were actually removed by the appellant's brother at his own instigation and with his connivance. The objection was, therefore, properly rejected. The appeal is dismissed with costs. Hearing fee is assessed at three gold mohurs.

G.N./R.K. *Appeal dismissed.*

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HENDERSON J.

Firm Sarada Prosad De — Petitioner

v.

Bhut Nath Mallik — Opposite Party.

Civil Revn. Petn. No. 1511 of 1940, Decided on 5th March 1941, against order of Small Causes Court Judge, Sealdah, D/- 27th August 1940.

(a) Contract—On 4th December 1939 defendant contracting to purchase from plaintiff fourteen bags of coriander seeds at Rs. 13-8-0 per maund—Plaintiff delivering bags to defendant on 6th December 1939 as per contract—On 5th December 1939 Government Notification fixing maximum retail price of coriander seeds at 4 annas a seer—Effect of notification on contract—Plaintiff held entitled to recover price at contract rate—S. 56, Contract Act, held inapplicable — Doctrine of "frustration of venture" held did not apply.

The defendant contracted on 4th December 1939 to purchase fourteen bags of coriander seeds from the plaintiff at the rate of Rs. 13-8-0 per maund. In pursuance of this contract, the bags were delivered by the plaintiff to the defendant on 6th December. On 5th December, there was a notification by the Government of Bengal, fixing the maximum retail price for the sale of coriander seeds at 4 annas a seer. The plaintiff sued to recover sale price at the contract rate :

Held that (1) the notification dealt with retail prices only and there was nothing in it to prevent the plaintiff from recovering at the contract rate ; [P 292 C 1]

(2) at the time when the contract was made there was no regulation of prices in force and the question of the consideration being unlawful did not arise ; [P 292 C 1]

(3) the case did not fall within the actual terms of S. 56, Contract Act, since the notification did not make it impossible or unlawful for the defendant to pay for the goods ; [P 292 C 1]

(4) the doctrine of frustration of venture did not apply to the case. Moreover, it would not be of any

assistance to the defendant because firstly he did not refuse to take delivery and then plead that the contract was void and secondly the notification only affected retail prices in Bengal and the defendant could export at any price he pleased and therefore the loss if any to the defendant could not be said to be due to the notification. [P 292 C 1, 2]

(b) Contract — Doctrine of "frustration of venture" explained.

The doctrine of "frustration of venture" is based not upon the existence of any actual impossibility in fact, but upon the existence, in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. [P 292 C 1]

Jitendra Nath Ghosh — for Petitioner.

Gopendra Nath Das and Kshetra Mohan Chatterjee — for Opposite Party.

ORDER. — This is a rule calling upon the plaintiff to show cause why a decree of the Small Cause Court Judge at Sealdah should not be set aside. The relevant facts are as follows : The petitioners contracted through a broker Kali Nath Chakravarti, on 4th December 1939, to purchase 14 bags of coriander seeds at the rate of Rs. 13-8-0, per maund. In pursuance of this contract, the bags were delivered by the plaintiff to the defendants on 6th December. On 5th December, there was a notification by the Government of Bengal, fixing the maximum retail price for the sale of coriander seeds at 4 annas a seer. The suit has been decreed in the Court below. The two grounds, upon which the rule was issued, raise the question of the effect of this notification on the contract. Three arguments have been put forward by Mr. Ghose in support of his contention that the suit has been wrongly decreed. In the first place, it was argued that the plaintiff is debarred from recovering a higher price than that fixed in the notification. On this point, the learned Judge was clearly right. The notification deals with retail prices only and there is nothing in it to prevent the plaintiff from recovering at the contract rate. In the second place, it was suggested that the consideration for the contract was unlawful. But at the time when the contract was made there was no regulation of prices in force and the question of the consideration being unlawful does not arise. Thirdly, it was contended that the contract became void under S. 56, Contract Act. Clearly the case is not within the actual terms of the section The notification did not make it impossible or unlawful for the defendants to pay for the goods. Mr. Ghose relied rather on the doctrine known as "frustration of venture." Although it is not necessary to decide this point, on the facts in the present case, the question was fully argued and I propose to express my opinion on it.

This doctrine is based not upon the existence of any actual impossibility in fact, but upon the existence, in the circumstances of the case, of an implied condition. In order to justify such an inference, the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended. I am certainly not prepared to infer the existence of any such condition in the present case. When the contract was made the Defence of India Act was in force and the Government had power to regulate prices. There was no reasonable ground for supposing that that power would remain a dead letter. In these circumstances, the parties might have inserted an express condition that the contract would become void in the event of the Government regulating prices. When this was not done, it would be most dangerous to imply any such condition. The defendants took the risk that Government action might lead to a fall in prices just as they took the risk that any other event might lead to such a fall. The doctrine however would not be of any assistance to the defendants in the present case. In the first place, they did not refuse to take delivery and then plead that the contract was void. In the present petition, there is a story of an offer by the defendants to return the goods. But in the written statement there was no such offer. The defendants cannot obviously retain the goods and at the same time refuse to pay for them. The learned Judge was probably right when he thought that this plea was a mere device to evade payment. Then, in the second place, the Government notification only affects retail prices in Bengal. The defendants could export at any price they pleased. It is therefore impossible to say that the loss, if any, caused to the defendants was in any way due to the Government notification. The rule is accordingly discharged with costs; hearing fee two gold mohurs.

G.N./R.K. *Rule discharged.*

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HENDERSON J.

Nazar Mahammad Khan and another — Decree-holders—Appellants

v.

J. O. Browne—Judgment-debtor — Respondent.

Appeal No. 105 of 1941, Decided on 4th August 1941, from appellate order of Sub-Judge, First Court, Comilla, D/- 13th February 1941.

Provident Funds Act (1925), S. 3 (1)—Provident fund of subscriber becomes attachable as soon as it is paid to him — Railway servant, *R* on retirement filling necessary form asking for payment of his provident fund money—Railway authorities requesting Reserve Bank to send cheque to Thomas Cook and Sons, Calcutta — *R's* decree-holder obtaining order on Thomas Cook attaching money—Thomas Cook sending cheque to railway authorities on ground that *R* had no account with them — Money held by railway in suspense account — Application by decree-holder for attachment—Whether money was paid to subscriber—Test.

The provident fund money of a subscriber is liable to attachment as soon as it is paid over to the subscriber : 44 C.W.N. 637, *Rel. on*; ('20) 7 A.I.R. 1920 Bom. 58, *Ref.* [P 293 C 1]

After his retirement *R*, a railway servant filled in the necessary form asking for payment of the money due to him on his account in the Provident Fund. The railway authorities requested the Reserve Bank to send a cheque to Messrs. Thomas Cook & Sons, Calcutta. The subscriber's decree-holder obtained an order on Messrs. Thomas Cook & Sons attaching the money. Messrs Thomas Cook & Sons in the meantime had returned the cheque to the railway authorities alleging that the subscriber had no account with them and was unknown to them. The money was then held by the railway authorities in

a suspense account and the decree-holder applied in execution for its attachment :

Held that the test for determining whether the money had been paid to the subscriber was whether the railway had obtained a valid discharge. The railway authorities were discharged if, in asking the Reserve Bank to send the cheque to Messrs. Thomas Cook & Sons, they were acting in accordance with the instructions given by *R* : ('16) 3 A. I. R. 1916 All. 336, *Ref.* [P 293 C 1]

S. M. Bose, Chandra Sekhar Sen and Ajit Kumar Dutta — for Appellants.

O. R. Surhita and M. M. Effendi — for Respondent.

JUDGMENT. — This appeal is by the decree-holders. The question for determination is whether certain money belonging to the respondent is liable to attachment. The following facts are not disputed. The respondent is a retired railway servant. After his retirement he filled in the necessary form asking for payment of the money due to him on his account in the Provident Fund. The railway authorities requested the Reserve Bank to send a cheque to Messrs. Thomas Cook & Sons, Calcutta. The appellants, who have apparently a spy somewhere in the railway office, obtained an order from the Munsif, Chandpur, on Messrs. Thomas Cook & Sons attaching the money. Messrs. Thomas Cook & Sons in the meantime had returned the cheque to the railway authorities alleging that the respondent had no account with them and was unknown to them. The money is now held by the railway authorities in a suspense account. The appellants have applied in execution for its attachment. The respondent filed an objection under S. 47, Civil P. C., which was dismissed by the Munsif and allowed by the Subordinate Judge.

The case proceeded upon the basis that the money is liable to attachment as soon as it is paid over to the subscriber. But in the course of the argument the case in 44 Bom. 673,[1] was referred to. If the matter were res integra, I should probably be disposed to take the view taken by the learned Judges in that case, as giving effect to the provisions of the Act. In view however of the current of judicial opinion, it is not possible for me to take that view, sitting singly. In this connexion I may refer to the decision of McNair J. in 44 C. W. N. 637.[2] The decision of the present appeal will depend upon whether the money has been paid to the respondent. In my judgment the test to apply is whether the railway has obtained a valid discharge. Mr. Bose contended that the railway is discharged as soon as the instructions of the subscriber have been complied with. In this connexion, he referred to the decision in A.I.R. 1916 All. 336.[3] In that case the money was paid to the Post Office at the subscriber's request to be remitted to him by money-order. The learned Judge held that the post office was acting as the agent of the judgment-debtor and the railway was discharged. In my judgment the railway authorities were discharged if, in asking the Reserve Bank to send the cheque to Messrs. Thomas Cook & Sons, they were acting in accordance with the instructions given by the respondent.

This case, therefore, depends upon the question of fact on which the learned Judges in the Courts below have differed in their opinion. It is difficult to place any interpretation upon the words actually used by the respondent when he filled up the form. On the one hand, Mr. Surhita argued that it was a request to the railway authorities to give the respondent a draft in favour of himself on Messrs. Thomas Cook & Sons. The contention of the appellants on the other hand is that it was a request to the railway to send the money to Messrs. Thomas Cook & Sons. Now, I do not propose to say anything on that question of fact beyond this that the evidence is so scanty that it would be impossible to form any definite opinion except on the view that the respondent was deliberately avoiding the witness-box. On that view, I should have no hesitation in allowing the appeal. Mr. Surhita, however, says that the respondent is perfectly willing to give evidence. The judgment of the learned Subordinate Judge cannot be regarded as a satisfactory judgment of reversal. He entirely ignores the main reason given by the Munsif for his decision that is to say, the erasure of the words 'to me' and 'to the following address' in the printed form. Prima facie it would be very difficult to reconcile that erasure with the respondent's case. Mr. Surhita says that his instructions are that the words 'to me' were not erased by the respondent at all. That, however, is a matter upon which instructions are quite useless and the evidence of the respondent himself on oath is necessary.

Then, again if I have understood the Subordinate Judge correctly, he interpreted the evidence of the head clerk of the Provident Fund section, who was cited by both sides, examined on behalf of the respondent and cross-examined by both sides, to be that the railway authorities knew that they were flouting the instructions of the respondent and that their reason for doing so was that there was no branch of Messrs. Thomas Cook & Sons in Chittagong. There is nothing in the actual deposition which would justify him in going as far as that. There is one other matter of some importance. Mr. Bose suggested that the action of Messrs. Thomas Cook & Sons in returning the cheque was a mere dodge, done in collusion with the respondent. Of course, if that is so, the respondent's case is at an end. Here again, however, the evidence is quite insufficient to form any opinion one way or the other. The order of the lower appellate Court is therefore set aside and he is directed to come to a finding after taking evidence on the point whether in sending the cheque to Messrs. Thomas Cook & Sons, the railway authorities were acting on the instructions of the respondent. If they were, he will dismiss the appeal; otherwise he will allow it. Both sides will be at liberty to adduce evidence and to apply for permission for the examination on commission of such witnesses they think necessary. This judgment will govern the four connected revisional applications. Costs in this Court will abide the result and there will be one consolidated hearing-fee of five gold mohurs.

G.N./R.K. *Order set aside.*

C. P. C. —
('40) Chitaley, S. 60, N. 19 Pt. 5.
('41) Mulla, Page 247 Pt. (h).

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1. ('20) 7 A. I. R. 1920 Bom. 58 : 56 I. C. 450 : 44 Bom. 673 : 22 Bom. L.R. 322, Nagindas Bhukhandas v. Bhai Gulabdas.
2. ('40) 44 C.W.N. 637, Baramdeo Pandey v. Mrs. Fay Smith.
3. ('16) 3 A. I. R. 1916 All. 336 : 33 I. C. 723 : 14 A.L.J. 236, H. W. Parmer v. Cawasjee.

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B. K. MUKHERJEA AND SEN JJ.

Navajiban Insurance Co. Ltd. — *Petitioner*

v.

Superintendent of Insurance, Government of India, Department of Commerce, New Delhi — *Opposite Party.*

Civil Rule No. 564 of 1941, Decided on 27th August 1941, an application for setting aside order of Dist. Judge, Jalpaiguri, D/- 5th April 1941.

Insurance Act (1938), S. 7 (1) (3) and (1) (e)— As entire deposit of three lacs under S. 7 (1) can be divided into two parts, instalments permitted under S. 7 (3) can be similarly divided— S. 7 (1) (e) explained—Insurer need not deposit full amount under S. 7 (1) before claiming refund under S. 9.

As the entire deposit of rupees three lacs by an insurer carrying on life insurance and miscellaneous insurance business as required under S. 7 (1) is to be divided into two parts, the instalments permitted under S. 7 (3) are susceptible of similar division and, it would be quite proper to allocate one-third of such instalments to the miscellaneous insurance business and the remaining two-thirds to the life insurance. Section 7 (1) (e) does not mean that unless the full amount of rupees three lacs is deposited by the insurer no allocation or apportionment of the amount is possible and no particular portion of it can be set apart or ear-marked, for the life insurance business. Therefore it is not necessary that an insurer should deposit the full amount as is required under S. 7 (1) before he can present an application for refund under S. 9. [P 294 C 2; P 295 C 1]

The Insurance Company which had been carrying on business in life insurance as well as miscellaneous insurance business, discontinued the miscellaneous insurance business under S. 52 of the Act from November 1940. The company had deposited the sum of Rs. 1,50,000 in three instalments in respect of the combined business upto January 1940. After the miscellaneous insurance was discontinued, the company filed an application for refund of the sum of Rs. 50,000 in respect of the miscellaneous business :

Held that the company was entitled to the refund of the sum claimed provided its liabilities in respect of the discontinued business were satisfied or fully provided for. [P 295 C 1]

Santosh Kumar Basu and Ajoy Kumar Basu— for Petitioner.

Sir A. K. Roy, (Advocate-General), Sushil Chandra Sen and Sanat Kumar Chatterji — for Opposite Party.

B. K. MUKHERJEA J.—This rule is directed against an order of the District Judge of Jalpaiguri dated 5th April 1941, rejecting an application of the petitioner for refund of deposit under S. 9, Insurance Act. The petitioner company carries on, at present, the business of life insurance. Before this, it had been doing in addition to that business in miscellaneous insurance under which policies were issued under table *M* of the company. This miscellaneous business was based upon the "dividing principle" and under S. 52, Insurance Act, it had to be stopped within the period of three years from the date of the commencement of the Act. The petitioner discontinued this business from November 1940. Under S. 7 (1) (e), Insurance Act, the total amount that has got to be deposited by the insurer who carries on a combined business of this sort is three lacs of rupees out of which two lacs of rupees are regarded as the deposit for the life insurance business alone. Under sub.s. (3) of the section the insurer has the right to deposit this amount in certain instalments. The petitioner company, as is admitted, has deposited the sum of Rs. 1,50,000 in three instalments in respect of the combined business up to January 1940. On 2nd January 1941 after this miscellaneous insurance was discontinued, the company filed an application before the District Judge of Jalpaiguri under S. 9, Insurance Act, for refund of the sum of Rs. 50,000 which, it was stated, was in deposit in the Reserve Bank of India in respect of this miscellaneous business. This application was opposed by the Superintendent of Insurance, Government of India, who is the opposite party before us, on a three-fold ground. It was contended in the first place that the deposit contemplated by S. 9 was a deposit of the full amount as laid down in S. 7 (1), Insurance Act, and no application for refund of a part of such deposit was maintainable in law. The second ground taken was that as the liabilities in respect of the miscellaneous business were not satisfied or otherwise provided for, no order could be made under S. 9. The last point raised was that there was no provision in S. 7, Insurance Act, under which the instalments of deposit made in respect of a combined business could be split up and certain specified share allotted out of it to any particular business.

The learned District Judge overruled the last contention of the opposite party but gave effect to the other two. The result was that the application under S. 9, Insurance Act, was dismissed. It is against this order that the present rule has been obtained. The first point that requires consideration in this rule is whether S. 9, Insurance Act, is at all attracted to the facts of this case when the insurer had deposited not the whole but only a portion of the amount as laid down in S. 7. In the opinion of the District Judge, the word deposit in S. 9 can mean only the entire deposit as is referred to in S. 7 (1) and it does not contemplate an instalment of the deposit. The learned Advocate-General who appears for the opposite party has not attempted to support the decision of the District Judge on that ground, and he has presented his case before us in a some what different manner. His contention in substance is, that under S. 9, Insurance Act, the insurer can obtain refund of so much of the deposit as does not relate to the class of insurance which he continues to carry on. In the present case, it is said that as the petitioner has not deposited the full amount of three lacs of rupees or at any rate any thing in excess of two lacs of rupees, it is not possible to say that any part of the amount now lying in deposit relates to the life insurance business which the company is still carrying on and, in these circumstances, no claim for refund can be entertained. We do not think we can accept this contention as sound. It seems to us that on this point the view taken by the District Judge is right, viz., that as the entire deposit of rupees three lacs as required under S. 7 (1) is to be divided into two parts the instalments permitted under sub-s. (3) are susceptible of similar division and it would be quite proper to allocate one-third of such instalments to the miscellaneous insurance business and the remaining two-thirds to the life insurance. This follows from the provisions of S. 7 itself as well as of the other sections of the Act. The deposit that is

required from an insurer under S. 7 (1), Insurance Act, is only in respect of the insurance business that is actually carried on in British India. If it is purely life insurance business, the amount to be deposited is rupees two lacs. If, on the other hand, miscellaneous insurance business is combined with life insurance the deposit is increased to rupees three lacs; but S. 7 (1) (e) expressly lays down that out of this, rupees two lacs should be regarded as deposit for life insurance business. This clause does not in our opinion mean, as is suggested by the learned Advocate-General, that unless the full amount of rupees three lacs is deposited by the insurer no allocation or apportionment of the amount is possible and no particular portion of it can be set apart or ear-marked for the life insurance business. It is quite open to an insurer to start a combined business and then to discontinue one class of insurance. Under S. 52, Insurance Act, it is compulsory on the insurer to stop certain kinds of insurance work. It would be, in our opinion, extremely unreasonable to hold that although he cannot carry on a certain kind of work and has got to discontinue it, he will still be bound to make deposits in respect of both kinds of business; and unless and until the full amount is deposited no separation of funds is permissible. It is not disputed that if the business of the petitioner is taken to be purely a life insurance business, the amount that would remain after allowing the refund would be an adequate deposit in accordance with the provisions of S. 7, Insurance Act. As regards the miscellaneous insurance business that has been discontinued, it is the duty of the Court to see that all liabilities in respect of the same are either satisfied or fully provided for. In the circumstances, we have no hesitation in holding that it is not necessary that the petitioner should deposit the full amount as is required under S. 7 (1), Insurance Act, before he can present an application for refund under S. 9 of the Act.

The next point for our consideration is as to whether the liabilities in respect of the discontinued business have been fully satisfied or otherwise provided for. No order for refund can certainly be made unless this condition is fulfilled. This matter, it must be noted, was not properly investigated by the Court below. The company, it appears, made a proposal for setting apart the sum of Rs. 25,000 for the purpose of meeting the liabilities of the policy-holders in respect of the miscellaneous business. The learned Judge remarked in his judgment that without proper audit by an auditor it was not possible to say as to whether this amount was sufficient to meet all these liabilities. In this Court we had the matter investigated more fully by a qualified actuary and his report is now before us. The actuary reports that the total number of policies under the heading of miscellaneous insurance in force on 30th November 1940 was 775. Out of these, 678 policies were subsequently satisfied, leaving 97 policies which are unsatisfied at the present day. The actuary has further found that 74 policies matured into claims before November 1940 and out of these, claims of 65 policy-holders are still to be paid, the amount due to them being Rs. 1656-11-0. As regards the 97 policy-holders mentioned above, the actuary suggested that the premiums contributed by them should be refunded less a percentage of 12½ per cent. for management and other incidental expenses of the business. We agree with the learned Advocate-General that the entire premiums of these policy-holders should be refunded without any deduction whatsoever.

The position therefore is that a sum of Rs. 10,000 will have to be set apart for the purpose of meeting the liabilities in respect of this miscellaneous business. The Reserve Bank of India will also be entitled to deduct from the amount of Rs. 50,000 lying with them, the further sum of Rs. 25,000 due in respect of the life insurance business which was payable on 1st January last. We direct therefore that the opposite party should retain the sum of Rs. 35,000 in all, Rs. 10,000 for the purpose of satisfying the liabilities of the miscellaneous business that is discontinued and Rs. 25,000 as the last instalment of deposit in respect of the life insurance business and refund the balance of Rs. 15,000 to the petitioner. The rule is made absolute in these terms. There will be no order as to costs in this rule.

SEN J. — I agree.

G.N./R.K. *Order accordingly.*

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EDGLEY AND BISWAS JJ.

Radha Charan Saha — Defendant 1 — Appellant

v.

Sree Sree Iswar Joykali Bigraha represented by Shebaits Mukunda Kumar Choudhury & others — Respondents.

Appeal No. 1739 of 1938, Decided on 11th August 1941, from appellate decree of Sub-Judge, First Court, Dacca, D/- 10th September 1938.

(a) Civil P. C. (1908), O. 1, R. 1 — Suit by some of shebaits — Other shebaits unwilling to join as plaintiffs impleaded as defendants — Procedure is proper.

The underlying principle with reference to the procedure to be followed when a deity sues through some only of its shebaits, is that all the shebaits must be impleaded whether as plaintiffs or as defendants in order to insure that, in adjudicating upon the matter before it, the Court will not overlook some aspect of the case which may affect the interests of the endowment. Where some of the shebaits express their unwillingness to join as plaintiffs and therefore are impleaded as defendants, no objection can be taken to the procedure : *Case law referred.* [P 296 C 2]

(b) Religious Endowment — Management — Ordinarily shebaits must act as body or person authorized should act — But some of shebaits can act without consent of others provided the latter are disqualified or have done something detrimental to interests of deity — Ejectment notice by some of shebaits—Other shebaits not associating in notice but not proved to be disqualified or to have done anything detrimental to deity—Notice is invalid.

Ordinarily the management of the deity's properties must be transacted either by the shebaits as a body or by a person duly authorized for this purpose. Circumstances might possibly arise in connexion with the administration of debutter property, in which, in the interests of the deity some of the shebaits might properly act without the consent of the others, for instance, in a case in which some of the shebaits had temporarily disqualified themselves by their conduct from acting as shebaits for some particular purpose. In such cases, however, if the validity of the particular act were subsequently questioned in a Court of justice, the onus would lie

heavily upon the shebaits who purported to act on behalf of the deity to show that the other shebaits had either disqualified themselves from acting in that capacity or had done something which was detrimental to the best interests of the estate. Hence, where an ejectment notice has been sent by only some of the shebaits and it is not shown that the other shebaits were either disqualified temporarily from acting as shebaits or had done anything detrimental to the interest of the deity, the notice is invalid. The mere fact that the other shebaits did not wish to be associated with the ejectment notice would not be sufficient to validate the ejectment notice. [P 297 C 1, 2]

Dr. Basak, Gopal Chandra Das and Bhuban Mohan Saha — for Appellant.

Girija Prasanna Sanyal and Arabinda Nath Lahiri — for Respondents.

Amiruddin Ahmed for Abul Quasem — for Deputy Registrar.

EDGLEY J. — Defendant 1, Radha Charan Saha, is the appellant in this case in the suit out of which this appeal arises. The plaintiffs who are some of the shebaits of a deity known as Sree Sree Iswar Joykali Bigraha, sought to evict the principal defendant after having served him with a notice to quit. They also claimed arrears of rent. Two of the shebaits did not associate themselves with the service of the notice to quit although it was alleged that they had been requested to do so. These persons were, therefore, impleaded as pro forma defendants. Further, it may be mentioned that three of the other shebaits who originally consented to the notice subsequently retracted their consent after the institution of the suit and were transferred from the category of plaintiffs to that of the pro forma defendants. The defence of the principal defendant was to the effect that the suit was not maintainable because it had been instituted by some of the shebaits, and that the notice was invalid as two of the shebaits did not associate themselves therewith and it related only to a portion of the tenancy.

The first Court held that the plaintiffs' claim for ejectment must fail, but the learned Munsif gave the plaintiffs a partial decree for rent to the extent of Rs. 184-4-0. The plaintiffs appealed to the lower appellate Court and the learned Subordinate Judge held that the plaintiffs' suit was maintainable, that the notice to quit was valid and that the plaintiffs were entitled to khas possession of the tenancy by evicting the principal defendant from the same. Radha Charan Saha, defendant 1, has now appealed to this Court. The learned advocate for the appellant maintains that the plaintiffs' suit was not maintainable as it had been instituted on behalf of the deity by some of the shebaits only. He further contends that the ejectment notice was invalid by reason of the fact that two of the shebaits were not associated therewith and that, in any event, this notice related only to a portion of the tenancy. With regard to the first of these points the general rule was formulated in a recent judgment of this Court in 45 C. W. N. 709.[1] It was there laid down that :

"All the trustees or shebaits should, if possible, join as co-plaintiffs in a suit which is brought on behalf of the deity, and only such of them should be made defendants as are unwilling to be joined as co-plaintiffs or have done some act precluding them from being plaintiffs."

This view was also adopted by Pal J. in a later decision in 45 C. W. N. 932.[2] The same view had been taken in several earlier decisions of this Court, 11 Cal. 338;[3] 5 C. L. J. 527[4] and 27 C. L. J. 605.[5] The last mentioned case was cited with approval by the Judicial Committee of the Privy Council in 61 I. A. 35.[6] In view of the fact that two of the shebaits did not wish to join in the institution of the suit, the plaintiffs appear to have adopted a proper course in impleading these persons as defendants and no objection can be taken to the procedure which was adopted in transferring three other shebaits to the category of defendants after they had expressed their unwillingness to be associated with the plaintiffs in connexion with this matter. It was open to any of these defendants at any time during the course of the trial to ask that they might be transferred to the category of plaintiffs and, further, they had an opportunity to raise any defence which they might consider necessary for the purpose of protecting the interests of the deity. It follows therefore that the deity was fully represented in the suit and that Dr. Basak's first objection with regard to its maintainability must fail. The underlying principle with reference to the procedure to be followed when a deity sues through some only of its shebaits seems to be that all the shebaits must be impleaded whether as plaintiffs or as defendants in order to insure that, in adjudicating upon the matter before it, the Court will not overlook some aspect of the case which may affect the interests of the endowment. It is, however, difficult to apply this principle in matters affecting the general management of an endowment before a suit with reference thereto is actually instituted. Persons who transact business with the debutter estate must ordinarily proceed in the assumption that those shebaits with whom they enter into some contractual relationship have been vested with proper authority by their co-shebaits and that they represent the endowment. Adequate remedies are open to shebaits who consider that the interests of the deity are likely to suffer by obstructive or dishonest conduct on the part of their colleagues. If in the absence of a special clause to that effect in the deed of endowment, the majority of the shebaits might assume authority to perform some act in connexion with the administration of the estate merely by inviting the minority to associate themselves with such act, confusion would arise and persons who had entered into contracts with the majority might find themselves involved in litigation at the instance of the minority who might claim to be the true representatives of the deity. The adoption of such a procedure might therefore be detrimental in many cases not only to the interests of the actual parties to a contract but to those of the deity itself.

Dr. Basak contends that the ejectment notice

1. ('41) 28 A. I. R. 1941 Cal. 562 : 197 I. C. 763 : I. L. R. (1941) 2 Cal. 128 : 73 C. L. J. 453 : 45 C. W. N. 709, Nirmal Chandra v. Jyoti Prosad.
2. ('42) 29 A. I. R. 1942 Cal. 99 : I. L. R. (1941) 2 Cal. 477 : 74 C. L. J. 13 : 45 C. W. N. 932, Tarit Bhusan Rai v. Iswar Sridhar Salagram Shila Thakur.
3. ('85) 11 Cal. 338, Bechu Lal v. Oliullah.
4. ('07) 5 C. L. J. 527, Kokilasari Dasi v. Rudranand Goswami.
5. ('18) 5 A. I. R. 1918 Cal. 810 : 41 I.C. 837 : 27 C. L. J. 605, Norendra Nath v. Atul Chandra.
6. ('34) 21 A.I.R. 1934 P.C. 58 : 147 I.C. 884 : 61 Cal. 313 : 61 I.A. 35 (P.C.), Baraboni Coal Concern, Ltd. v. Gokulananda Mohanta Thakur.

must be regarded as invalid because it is clear from its terms and the facts found that the shebaits were not acting as a body with reference thereto. In support of this contention, he places some reliance on two recent decisions of this Court in 45 C. W. N. 665,[7] and (Original Side Appeal) Appeal From Original Decree No. 3 of 1941[8] arising out of Suit No. 896 of 1935 decided on 30th July 1941. The former case related to the recovery of some debutter property which had been alienated by one of the shebaits and, in this connexion, Mukherjea J. pointed out that

"the trustees or shebaits, when they are more than one, form, as it were, but one body in the eye of law. The deity is represented by all of them acting together and no one shebait can be said to represent the idol in part or to possess any specific interest in any share of the idol's property."

The latter case does not appear to be of much assistance to Dr. Basak as the main point decided therein was that a shebait could not change the line of succession to the shebaitship, at any rate, without obtaining the consent of the other members of his family. The question whether the unanimous consent of such persons would be necessary was expressly left open. Dr. Basak further contends that shebaits should be regarded in the same position as cosharer landlords and that, on the principle laid down by this Court in 7 Cal. 414,[9] where a tenant has been put into possession of ijmali property with the consent of all the cosharers, no one or more of the cosharers can turn the tenant out without the consent of the others. Of course, shebaits are not the landlords of debutter properties the ownership of which is vested in the deity itself. At the same time, they speak for the deity on earth and are the managers of the debutter estate. Ordinarily, the management of the deity's properties must be transacted either by the shebaits as a body or by a person duly authorized for this purpose. It is arguable that circumstances might possibly arise in connexion with the administration of debutter property, in which in the interests of the deity some of the shebaits might properly act without the consent of the others, for instance, in a case in which some of the shebaits had temporarily disqualified themselves by their conduct from acting as shebaits for some particular purpose. In such cases, however, if the validity of the particular act were subsequently questioned in a Court of Justice, the onus would lie heavily upon the shebaits who purported to act on behalf of the deity to show that the other shebaits had either disqualified themselves from acting in that capacity or had done something which was detrimental to the best interests of the estate. Whether in such circumstances some of the shebaits might act alone on behalf of the deity is a question which we are not called upon to decide in the present case, because, with reference to the issue of the ejectment notice against the principal defendant, it certainly cannot be said that the plaintiffs have shown that the two shebaits who were not associated with the notice were either disqualified temporarily from acting as shebaits or had done anything detrimental to the interest of the deity. All that they have been able to show, as far as these two gentlemen were concerned, is that they did not wish to be associated with the ejectment notice. In our view, this fact alone would not be sufficient to validate an ejectment notice issued by some of the shebaits only. We must therefore hold that the ejectment notice was invalid. In view of the above findings no further question arises on the point whether or not the notice only related to a portion of the tenancy. The result is that the plaintiffs' suit for ejectment must fail. The appeal is allowed. The decision of the lower appellate Court is set aside and that of the Court of first instance is restored. Having regard to the circumstances of the case we make no order with regard to costs.

BISWAS J. — I agree.

K.S./R.K. *Appeal allowed.*

C. P. C. —
(a) ('40) Chitaley, O. 1, R. 1, Note 7 Pts. 1, 2 and 6.
('41) Mulla, Page 495 Pt. (c).
Hindu law —
(b) ('40) Mulla, Page 479 S. 413.
('38) Gour, Page 833 "Management of endowments" S. 271 Page 848 S. 275.
T. P. Act —
('34) Mulla, Page 590 Pt. (c).
('36) Mitra, P. 579 Note 558.

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DERBYSHIRE C. J. AND PANCKRIDGE J.

In re Magniram Bangor & Co.

Income-tax References Nos. 6 and 7 of 1938, Decided on 19th February 1941.

(a) Income-tax Act—Interpretation—English cases.

Cases arising under the English Income-tax Act can be looked to for guidance but they are not authorities in respect of cases brought under the Indian Income-tax Act. [P 299 C 1]

*** (b) Income-tax Act (1922), S. 10 (2) (ix) — Expenditure incurred to defend suit in order to prevent liability arising in future cannot be deducted.**

The only deduction allowable under S. 10 (2) (ix) is that which is incurred solely for the purpose of earning such profits or gains. The profits or gains in question are those for the year previous to the year of assessment. Therefore expenditure incurred in defending a suit to prevent a liability arising in future cannot be deducted. [P 298 C 2; P 299 C 2]

(Per Panckridge J.)—Such an expenditure is of a capital nature. [P 300 C 1]

S. N. Banerjee and A. C. Sen — for Assessees.

Ramesh Chandra Pal and B. Pal — for Income-tax Department.

DERBYSHIRE C. J.—The question submitted by the Commissioner of Income-tax is :

"Whether in view of the facts and circumstances of the case the sum of rupees two lakhs fifteen thousand one hundred and seventy six incurred for the purpose mentioned in the said Rule Nisi is an allowance within the provisions of S. 10 (2) (ix), Income-tax Act, being Act 11 of 1922 ?"

The assessee is a registered firm carrying on business in Calcutta. Its business includes—dealing in stocks and shares, silver and gold and money-lending. It also has a cloth agency and owns a jute press. In the firm's accounts under the heading 'business' a deduction was made of a sum of Rs. 2,24,707 on account of litigation expenses. This

7. ('41) 45 C.W.N. 665, Iswar Lakshi Durga Har Tatneswar v. Surendra Nath.
8. Appeal From Original Decree No. 3 of 1941, Issur Raj Rajeswar Jiu v. Benode Behary Seal.
9. ('81) 7 Cal. 414: 9 C.L.R. 76, Radha Proshad v. Esuf.

sum was made up of a somewhat smaller sum of a Rs. 2,15,176 which was spent on a particular civil suit and also other legal charges making up the balance of Rs. 2,24,707. We are only concerned with the item of Rs. 2,15,176. That was money spent by way of legal expenses in defending a suit which was brought against the assessees in the Court of the Subordinate Judge at Purulia in Bihar. That suit arose out of a transaction which this firm along with one Kedar Nath Daga had in the year 1921 with a firm called Siddons & Co. Siddons & Co., apparently consisted of Samuel Henry Siddons, who is described as a merchant, and Rasa Raj Biswas, also described as a merchant. Siddons & Co., took a lease some time previous to 1921 from the Raja of Panchkote of certain coal bearing lands in Bihar. They granted prospecting licenses to certain persons and received therefor selami and were due to receive rents and royalties. b Siddons & Co. borrowed a sum of about rupees ten lakhs from the assessees and Daga jointly and, in order to secure this loan, Siddons & Co., executed two documents on 31st March 1921. The first of these documents was in the nature of a mortgage deed in which the assessees and Daga were described as the mortgagees and Siddons & Co., as the mortgagors.

Siddons & Co., purported to mortgage to the mortgagees a 14 annas share of the net selami and royalty which was then payable or might thereafter become due and payable to the mortgagors in respect of the prospecting and mining leases which the mortgagors had granted or might grant in the future. The net selami or royalty was to be computed after deduction of ten per cent. of the gross receipts as expenses and after payment of rent and royalty to the superior landlord, the Raja of Panchkote. c The mortgagors were to pay to the mortgagees interest at seven per cent. on the money advanced and the mortgagors were also to transfer and assign to the mortgagees absolutely the remaining two annas share of all selamis and royalties to be received by them. The second document of that date was described as a deed of assignment and it purported to transfer and assign to the assessees and Daga the two annas share of the selami and royalties absolutely. Apparently, the mortgagors did not repay the money lent or the interest covenanted for, and on 29th August 1922, the mortgagees—the assessees and Daga instituted Suit No. 238 of 1922 in the Court of the Subordinate Judge at Asansol for the recovery of Rs. 10,51,449-13-0 due on the mortgage. They also asked for a declaration of the plaintiffs' title to the two annas share of the property referred to above. That suit ended on 3rd d July 1923, in a compromise decree. One of the terms of the compromise was the declaration of the mortgagees' title to the two annas share mentioned in the deed of assignment. Apparently, that decree was infructuous. Messrs. Siddons & Co., failed to make any payment under it to the mortgagees and the mortgagees thought so little of their prospects of getting anything under it that in 1923 the present assessees wrote off their share of the loan as irrecoverable and valueless. Apparently, Mr. Daga took no further interest in the matter. Messrs. Siddons & Co., disappeared; apparently one of the partners, if not both, was adjudicated insolvent. The result was that Messrs. Siddons & Co., paid no rents and royalties to their superior landlord, the Raja of Panchkote, and he in 1923 brought a suit in the Court of the Subordinate Judge of Purulia in Bihar for the recovery of the sum of Rs. 11,73,309 in respect of rents and royalties.

The present assessees were joined as one of the defendants in the suit on the ground that Messrs. Siddons & Co., had conveyed and assigned to them along with Daga their rights under an undivided two annas share in the properties in question and the Raja claimed that the assessees and Daga were, under the deed of assignment of 31st March 1921 liable to pay rents and royalties which were due to him originally from Messrs. Siddons & Co. The assessees apparently were the only effective defendants and they contested the matter in the Purulia Court with success. Their out-of-pocket costs in so contesting were extremely heavy and amounted to the sum previously mentioned, namely, Rs. 2,15,176. The assessees contended that this sum was deductible from the income, profits and gains under S. 10 (2) (ix), Income-tax Act of 1922 in the assessment made on 23rd March 1937 in respect of the previous year 1936-1937. The Income-tax Officer, the appellate officer, and the Commissioner negatived f this claim and the assessees thereupon applied to this Court for a rule upon the Commissioner to state a case under S. 66 (2).

The rule was granted and a case was stated. When the case came before this Bench consisting then of Nasim Ali J., and myself, we expressed surprise that the assessees as successful defendants in the Purulia case should have found it necessary to pay out-of-pocket costs amounting to Rupees 2,15,176, and before proceeding further we remitted the case to the Commissioner of Income-tax with a direction that he should enquire as to whether this sum of money had in truth and in fact been spent as costs. The Commissioner held the enquiry directed and found to his satisfaction that it had. The Commissioner had ample means to make a proper enquiry and I have no doubt that he did. For my own part I can only express surprise and g concern that a successful litigant in the Court of a Subordinate Judge should be put to such an expense in connexion with a case of this kind. However that is beyond the scope of the reference. The only question is, was the sum in question properly deductible from the income and so not assessable to tax by reason of S. 10 (2) (ix), Income-tax Act of 1922? The words of that section are as follows :

"Such profits or gains shall be computed after making the following allowances, namely. . . . (ix) any expenditure (not being in the nature of capital expenditure) incurred soley for the purpose of earning such profits or gains."

The assessees contend that the expenditure was incurred because they were sued under a contract which they had made in the course of their busi- h ness; the contract arose out of their business, and for the purposes of their business, and it was necessary, in order to avoid further losses in their business, that they should defend the suit. Now, that may be and probably is perfectly correct. But no provision of the Income-tax Act to which we have been referred provides in terms for a deduction in respect of expenditure incurred that way. The only deduction allowable is that which is incurred solely for the purpose of earning such profits or gains. Now, the profits or gains in question are those for the year previous to the year of assessment. The assessees' defence in this suit had nothing to do with the earning of any profits or gains in the year previous to assessment or in any year at all prior to the year of assessment. The suit was fought and the expenditure was incurred to prevent a liability arising in future. We have been referred to cases

arising under the English Income-tax Acts. One looks to those for guidance, but, as has been pointed out frequently, they are not authorities in respect of cases brought under the Indian Income-tax Acts. We have been referred to a case decided by the English Court of Appeal in 1939 : 8 I.T.R.Sup. 41.[1] That was a case under Sch. D, Cases I and II, R. 2, English Income-tax Act of 1918. That provision of law is :

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation."

There "money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation" covers a much wider field than the words in S. 10 (2) (ix), Indian Income-tax Act, "expenditure incurred solely for the purpose of earning such profits or gains." I cannot therefore accept the case in 8 I.T.R.Sup. 41[1] as a guide in this particular case, much less an authority which could bind us. That was a case which was decided in favour of the assessee.

We have also been referred to another case under similar provisions (1906) A.C. 448,[2] namely, R. 3, Case I, and R. 1, Cases I and II of Sch. D, S. 100 of 5 & 6 Vict. c. 35. That was a case decided in favour of the Income-tax authorities. We have also been referred to a case which came before the Privy Council on an appeal from New Zealand, namely (1923) A. C. 145[3] at p. 149. That was a case under S. 86, sub-s. 1 (a), Land and Income-tax Act, 1916, of New Zealand which provides that "no deduction (i. e. for expenses) is to be made in respect of expenditure not exclusively incurred in the production of the assessable income." A brewery company in New Zealand spent money on publishing anti-prohibition literature just before a poll in which the issue was whether there should be prohibition or not. It was obviously money spent in the interests of the Company. But it was held that the Company — Ward and Company, Limited—was not entitled to make deduction of the expenses incurred under the rule mentioned. The judgment of the Privy Council was delivered by Lord Cave and I should like to cite a passage from it.

"The conclusion of the Court of Appeal upon this point is contained in the following passage in the judgment of that Court : 'The question, therefore, is : Was the expenditure under consideration exclusively incurred in the production of the assessable income, for unless it was so, the Act expressly prohibits its deduction from such income. This question must, we think, be answered in the negative. We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the Company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connexion with such struggle as part of the profits assessable to income-tax. These aspects of the matter are clearly and forcibly set out in the contentions of the Company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands."

Then Lord Cave went on :

"The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place either in the balance sheet or in the profit and loss account of the appellants; but this is not enough to take it out of the prohibition in S. 86, sub-s. 1 (a), of the Act. For that purpose it must have been incurred for the direct purpose of producing profits. The conclusion may appear to bear hardly upon the appellants ; but, if so, a remedy must be found in an amendment of the law, the terms of which are reasonably clear."

"It is only necessary to add that the decisions on the English Income-tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

That decision is not binding upon us. It is not even a precedent. I would, however, remark that the wording of S. 10 (2) (ix) approximate more closely to that of S. 86 (1) (a), New Zealand Act, than it does to Sch. D, Cases I and II, R. 3, English Income-tax Act of 1918. Be that as it may, we have only to consider the facts of the present case and apply to them the law of the Indian Income-tax Act. In my view, it cannot be said that this expenditure of Rs. 2,15,176 incurred in 1936 and 1937 in defending the suit brought by the Raja of Panchkote in respect of a contract made some 16 or 17 years before with a third party, which contract had been written off as valueless in 1923 can in any way be regarded as expenditure incurred solely for the purpose of earning the profits and gains which were earned in the year 1936-1937 in respect of which the assessment is made. It was money spent to prevent losses in the future—quite a different thing which the Income-tax Act has not provided for. That being so, in my view, the question propounded by the Commissioner of Income-tax in this case must be answered in the negative, namely that the expenses in question is not an expenditure allowable against profits under S. 10 (2) (ix), Income-tax Act of 1922. No order is made as to costs. This order will govern the other reference, namely Reference No. 7 of 1938, Re : Narsingdas Bangor.

PANCKRIDGE J.—I agree. In my opinion the facts clearly show that the reason why the assessees were willing to incur this very considerable expenditure on the litigation, with which we have been

1. (1939) 8 I.T.R.Sup. 41 : (1939) 1 All.E R. 337 : 22 Tax. Cas. 479 : 83 S.J. 212, G. Scammell and Nephew, Ltd. v. Rowles.
2. (1906) 1906 A.C. 448 : 75 L.J.K.B. 864: 95 L.T. 241 : 5 Tax.Cas. 215 : 22 T. L. R. 754, Strong & Co. Ltd. v. Woodfield.
3. (1923) 1923 A. C. 145 : 92 L. J. P. C. 33 : 128 L. T. 436 : 39 T. L. R. 90, Ward & Co., Ltd. v. Commissioner of Taxes.

dealing, was that they desired to dispose once for all of the claim of the Raja for rent and royalty against them, as assignees of the original grantees of the mining leases. They fully realised that, if the Raja succeeded in the suit instituted against them, similar proceedings to which they would have no defence, would follow periodically. That was, I think, the reason why they were prepared to finance the litigation on so lavish a scale. In these circumstances, it appears to me that the expenditure was of a capital nature, and for this reason, as well as for the other reasons which have fallen from my Lord, the Chief Justice, I agree with the answer which he holds should be given to the question propounded by the Commissioner of Income-tax.

K.S./R.K. *Question answered.*

A. I. R. (29) 1942 Calcutta 300

AMEER ALI J.

Naraindas Bhaduri — Plaintiff

v.

Satyanarain Bhaduri and others — Defendants.

Suit No. 174 of 1931, Decided on 28th May 1941.

(a) Partition—"Gross" and "net" partitions — Distinction — Merits and demerits considered — Net partition is general rule — Specimen set of accounts showing manner in which net partition should be managed indicated — Adjustment of costs and accounts how to be made.

"Gross" partition means a partition in which the costs of partition are not dealt with in the partition by the Commissioner but left to be adjusted after the partition between the parties and the attorneys. "Net" partition is one in which costs are dealt with by the Commissioner and taken out of the estate before the partition is concluded, the net shares only being divided and allotted to the parties. "Net" partitions are the general rule. [P 301 C 1]

[Merits and demerits of "gross" and "net" partitions considered. Specimen set of accounts showing the manner in which a net partition should be managed indicated. Manner of adjustment of costs and advances stated.] [P 302 C 2 ; P 303 C 1]

(b) Partition — Partition is one and indivisible—Without bringing in receiver's account no final return can be made — Classified statement of accounts to be maintained by receiver and Commissioner, stated.

Partition is one and indivisible, and without bringing in, and sorting out the receiver's account no final return can be made. The receiver's accounts must be kept in a manner which enables the Commissioner to make up his return without superhuman effort. [P 301 C 2]

[Classified statement of accounts to be maintained by receiver and Commissioner, stated.] [P 301 C 1]

(c) Partition — Preliminary decree — Form and contents indicated.

The form and contents of a preliminary decree in a partition suit indicated. The preliminary decree should be complete and when it is so there is no necessity of writs of commission issued. [P 303 C 1, 2]

R. K. Deb — for Plaintiff.

P. C. Dutt — for Defendants.

JUDGMENT. — For convenience I propose to divide my judgment as follows : (A) Preliminary observations ; (B) Bhaduri v. Bhaduri, No. 174 of 1931, Mr. S. K. Basu's partition, specimen accounts and final return; (C) Costs and payments on account; (D) Preliminary decree.

(A) *Preliminary observations* : On 20th July 1939 there were in the list three cases of partition of the aggregate age of 66 years. One of these cases, Mt. Mahmuda Bibi v. Mt. Nainoo Bibi and others, Suit No. 1221 of 1916, afforded an interesting study. The original Commissioner Mr. Mitter who died pending the partition was one of the ablest officers of this Court and an expert in partition. Yet such was the condition of this partition in 1939, mainly by reason of orders obtained from the Court and advances made to parties and to their attorneys on account of costs that it was found absolutely impossible to bring it to an end in a regular manner. The eight or ten attorneys acting fully realised the impossibility to which I have referred and it was only with their assistance and consent to a rough and ready division of what remained that the matter could at all be concluded. Our senior partition suit pending, Bannerjee v. Mukherjee, Suit No. 145 of 1900, is forty-one years old. The plaintiff is himself an attorney of this Court and the main defendant another attorney is 73 of age. Two Commissioners have been buried. The status and respectability of the parties precludes in this case the possibility of wilful obstruction, and indicates for this chronic paralysis some cause other than the rapacity of lawyers or perversity of parties. Such other cause exists. As I hope to explain our system is so designed that even with the best of Commissioners, the most disinterested attorneys and the most reasonable of parties, no partition can ever be closed. I refer especially to the ridiculous dilemma of Commissioner, precluded from making up and filing his final return because the costs have not been taxed, and the attorneys precluded or inhibited from taxing their bills because of the general rule "no taxation without completion." A failure to realise such anomalies has exaggerated their effects, and prevented the application of remedies.

Moreover, apart from such anomalies, there has been, I suggest, a very general failure to appreciate the peculiarities of our system such as it is, and consequently on the part of Commissioners and others concerned, a failure to work the machinery in the only way in which it can be worked. I hope to explain and justify the above criticism. Partitions may remain at a stand still. Not so, Nature. In most of the old partitions now pending we have lost two, often three, Commissioners. Or should the Commissioner survive, the parties die, and procreate so that the suit is never fully or properly constituted. Living Commissioners seek escape from the situation by one of two devices, (a) they either partition and retain some balance in hand which involves a series of ever diminishing partitions, on the La Fontaine principle or (b) like Mr. S. K. Basu in Bhaduri v. Bhaduri, Suit No. 174 of 1931, estimate the amount of costs, extract undertakings, put in a return on that basis and then leave it to Providence, the parties and the attorneys' accounts clerks thereafter to make an adjustment, which in my experience never takes place.

Before I deal with Bhaduri v. Bhaduri, I mention in advance the main features of our existing system, and for convenience give a name to the two distinct species of partition in vogue. (i) Apart from the Registrar and partitions under a certain figure, private Commissioners. (ii) Theoretical control of

Court. (iii) "Gross" and "net" partitions. By "gross" partition I mean a partition in which the costs of partition are not dealt with in the partition by the Commissioner but left to be adjusted after the partition between the parties and the attorneys. By "net" partition I mean one in which costs are dealt with by the Commissioner and taken out of the estate before the partition is concluded, the net shares only being divided and allotted to the parties. "Net" partitions are and have been for a considerable number of years the general rule.

(B) Bhaduri v. Bhaduri, Suit No. 174 of 1931, only ten years old. This is a simple case of one house sold in June 1934 but the partition not yet completed. I propose to discover why not ; and to discuss how it could and should have been completed. The facts are as follows : One house ; three parties or sets of parties, shares ½, 7/16 and 1/16 ; property sold on 30th June 1934 to the 7/16 party for Rs. 13,250. The Commissioner from time to time in accordance with the usual practice made advances to the parties. On 24th September 1934, he estimated the total costs at Rs. 2800, took undertakings, paid the three attorneys three quarters of the estimated amount and retained Rs. 698-15-0. In the absence of taxation, it was the only thing he could do. On this basis he submitted a return in July 1938. It is not and could not be a final return. The parties and their attorneys did nothing. This petition was filed in May 1941 by the solicitors for the plaintiffs asking for an order on the Commissioner to divide the balance in his hands and confirmation of the return. In para. (15) with sweet simplicity the petition states that "the solicitors for the parties have not got their bills taxed up till now." So oblivious are attorneys to the obvious ; that a system of net partition cannot be carried out unless the costs are ascertained prior to the final return.

The affidavit in opposition by the attorney for the second party is an excellent example of the art of obstruction. It refers to all the deaths that have taken place and the necessity of substitution. It then contends that the matter cannot be proceeded with. It then contends that "a large sum of money is payable to Mr. Raj Kumar Basu for costs," and that "the amount should not be distributed by the Commissioner of partition unless his costs have been taxed and paid." This is not client's affidavit and the costs of this affidavit must in no event be borne by the client: nor will they be received by the attorney out of the estate. I propose now to indicate the course which should have been adopted. There should have been and must now be an ascertainment of costs. I will direct my officer to check the bills and if he thinks right to assess the costs at the figure estimated by Mr. S. K. Basu, namely Rs. 2800. Proceeding on the basis of aggregate costs Rs. 2800 my own officer, Mr. S. Banerjee and the Special Officer Rai Sahib U. N. Maitra have worked out a specimen set of accounts on the actual figures in this partition showing the manner in which a net partition should be managed. It is a simple case and, therefore, all the more useful for the purpose of demonstration. Five accounts have been prepared—(I) Property account, (II) Cash account, (III) Parties' ledger account, (IV) Costs adjustment account, (V) Costs pool accounts.

I. Property account: On the credit side should be the receipts and on the debit side the amounts credited to the parties in respect of their shares.

II. Cash account : All receipts and disbursements should find place in such account with the respective references to the other accounts, for instance, payment to the pool account.

III. The ledger account should show on the credit side the share of the sale proceeds with which each party is credited, on the debit side the amounts paid to the parties or on their account, as for instance, in this case the amounts paid to the mortgagee of the plaintiff. On the debit side also, should be debited the share of the pooled costs payble by each party. The matter will be plain from the specimen account.

IV. Costs adjustment account : On one side, the costs of the partition which have to be dealt with by the Commissioner. First, costs of the Commissioner. Then the ascertained party and party costs of each party. On the other side of the account the liability of the parties for the aggregate of the said costs. It must be remembered that according to our system, good or bad, to be continued or not to be continued, there is a pool. The costs are thrown into a pool, ("lumped" is the expression used by attorneys) and then the liability for those cost is readjusted. That is the purpose of the costs adjustment account. For instance, in this simple case the pool is 2800 including Commissioner's costs 400. The first 8/16 party's bill of costs is 1100, he is to pay 1400. The second 7/16 party's own bill of costs is 800, he is to pay 1225. The third 1/16 party's bill of costs is 500 but he only pays 175.

V. The costs pool account is designed mainly to meet the difficulties of advances to the parties and to the parties' solicitors. On one side should appear the amounts payable by the parties in respect of pooled costs. On the other side must be brought in all advances to the solicitors in respect of such costs. Theoretically the attorneys are bringing back all such advances before they can be paid out the total amount of their bills. Also on this side must appear the actual amounts payable and paid to the solicitors before the final return is filed. If such accounts are kept, it should be a simple matter to draw up the final return. This, instead of reciting the matter in a narrative form can be of a formal nature attaching the five accounts mentioned, or in the case of lengthy accounts, abstracts.

Before I leave the matter of accounts, let me refer to partitions with both receiver and Commissioner especially the case when the receiver and the Commissioner are different persons. The pending suit : Musst. Abdulla Md v. Kassim A. Md., Suit No. 1543 of 1933, is an admirable example. Grand confusion, and immobility is achieved by failure to realise that the partition is one and indivisible, and that without bringing in, and sorting out the receiver's account no final return can be made. In the case referred to, the receiver's accounts are already of 8 or 9 years. They are voluminous, and assorted. On the expenditure side are large advances to the parties and still larger advances to the attorneys. From what I have seen, it seems likely that in some cases the net shares have already been overdrawn. The point is that in partition, at any rate, receiver's accounts must be kept in a manner which enables the Commissioner to make up his return, and this without superhuman effort. At present only running or 'didimas' accounts are kept. Indeed, the necessity of any other system is ignored. In the case of Musst. Abdulla Md. v. Kassim in which the Special Officer is assisting the Commissioner and the parties it will take days of careful work to ledgerise the receiver's accounts; and the same difficulty arises in Addy v. Addy, Suit Nos. 2024 and 2029 of 1935 (where in point of fact the Commissioners and receivers are the same). A ledger account is essential. A property ledger, with the income and expenditure in respect of each premises, desirable. Receivers in partition suits will

in future and so far as I am concerned, be required a to produce a classified statement of account from which the Commissioner can at once enter up his accounts, I. Property Account, II. Cash account, III. Parties' ledger account, IV. Costs adjustment account and V. Pool account.

A further impediment to conclusion must be appreciated, before it can be removed. Where the receiver and the Commissioner are different and even when the persons are the same, separate "receiver's costs" are incurred. There are often separate attorneys. Before the Commissioner can incorporate the results of the receivership in his return, such costs have to be ascertained. In future, therefore, receiver's costs must be taxed or assessed, and included in the receiver's classified statement of account above referred to.

(C) *Costs and Advances*: I now proceed to discuss the system generally. It will be observed that I b have begun with the accounts and final return. I shall work backwards to preliminary decree. The matter of costs and advances is of much greater importance than might be imagined. The costs of partition sometimes exceed the shares of the parties (known as "minus partitions"). In some cases the advances for costs made from time to time represent a very large proportion of the shares. In the pending partition, Mustapha Abdulla v. Kassim A. Md., the advances for costs already amount to Rs. 40,000 on an estate of about one and a half lack.

Apart from costs, in a partition lasting 10, 20 or 30 years it should be obvious that the parties may demand something. One of the commonest of demands is for a purpose which cannot in India be ignored—the marriage of daughters. Moreover unless such advances are made by the Commissioner or receiver it means that mortgagees of the parties c come in, and the state of that partition will be so much the worse. (*See* Mahmuda Bibi's case, where some parties mortgaged their shares to make advances to their attorneys. Out of one party's share on a mortgage for Rs. 16,000, some Rs. 80,000 was paid. In the case of two cosharers, the amount payable to the mortgagees exceeded the amount of their shares, which were considerable. I mention this to show the importance of this question of advances.)

Costs. — Various kinds of arrangement are made in partition suits with regard to costs. Those arrangements are found sometimes in the decree itself, sometimes in the writ, sometimes in the order appointing the receiver, e. g., Addy v. Addy (Suit No. 2024 of 1935). Sometimes they are not mentioned, but are implied as in Mookerjee v. Bannerjee. Generally speaking, the system adopted d is as follows : Costs prior to preliminary decree are usually left a matter between client and attorney, and are not for the Commissioner to deal with. But there are exceptions. *See* Addy v. Addy and other cases where by special order, or in the decree, payment of costs prior to the preliminary decree is made part of the duties of the Commissioner or receiver. This being the case any advances made, as they often are, by the receiver or Commissioner for costs incurred prior to the preliminary decree must be treated in the accounts as advances to the parties themselves. The same with payments on account of attorney and client costs of parties throughout the partition, because these do not come into pool. This shows the necessity of distinctly stating in the account in what respect and for what purposes each advance is being made. Without that final accounts can never be made up. For instance Mahmuda Bibi's case where the advances were made indiscriminately by consent, or for "settled costs" it was impossible for the Commissioner to e make up his final accounts.

Costs after preliminary decree. — (1) Costs of the Commissioner and of executing the commission are taken out of the assets before distribution and are debited to the parties in proportion to the value of their shares. This is clearly in accordance with Chap. 16, R. 18 (4) of our rules. (2) Parties' costs : Less clearly in accordance with Chap. 16, R. 18 (4) but certainly in accordance with immemorial user, these are also paid by the parties in proportion to the value of their respective shares. (3) Where the partition is a "net" partition, these parties' costs are taken out of the estate before it is divided.

Net partition. — This system is, I understand, preferred by the attorneys and is, as I have said, the general rule. It has, if successfully carried through to a final return within a reasonable time, advantages. It leaves the parties free of anxiety. If unf successfully worked, taking 20 to 40 years, it leaves the parties free of property. So far, the failures exceed the successes. My own view, however, for what it is worth is that the system should not be abandoned without attempt at improvement. It cannot work without (a) an understanding of the "pool system," (b) rapid ascertainment of costs prior to final return, (c) a thorough appreciation of the nature of advances, (d) a regular set of accounts, (e) vertebrate Commissioners, (f) co-operation between Court and Commissioner.

(e) and (f). The invertebracy of Commissioners is not congenital, but due largely to the degraded position to which they are reduced. Initiative and efficiency are resented, as tending to bring a good partition to a premature end. Nor have Commissioners been able to rely on the Court for encouragement and protection. In this respect the new rule g Chap. 38, R. 71, introduced at the instance of the Registrar, Original Side will help, by preventing "the parties," i.e., their solicitors slipping off to one Judge or another behind the back of the Commissioners and getting any kind of order regardless of the partition (as in Mahmuda Bibi's case). But more is required. It is not in my opinion possible for any Judge, however able, in a few minutes to pick up the thread of a complicated partition, and do justice to any particular application. I offer the suggestion that so far as practicable partitions and administrations should be dealt with in one Court. Further, that there should be for such matters an Officer, Assistant Registrar or Master, to serve as a connexion between Court and Commissioner, who will among other things see that matters come before the Judge at the proper time, in the proper form, and with the proper materials. Also to see h that when an order is made it is properly drawn up and made effective. At present this essential work has been undertaken unofficially by the Special Officer in addition to his accounts duties.

Gross partition again has its advantages and disadvantages. It should be quicker. Its disadvantages are (1) delayed taxation. Taxation in certain cases is not completed for 20 years or more after the division. It means that the parties are still under a cloud of uncertainty as to the ultimate result. They get a house or a bit of a house. They never know when it is going to dissolve into costs (party and party, pure attorney or purer attorney). (2) A charge for costs on the divided shares will certainly be sought and probably be granted. Where the costs in accordance with the usual practice are payable by the parties in proportion to their shares (i. e., re-adjustable) two results follow. (a) The

charge on each share will be general, i.e., in favour of the attorneys for all the parties. (b) There being no Commissioner or 'pool,' the adjustment and payment of costs involves a complicated process of cross-payment which for want of a better name I have called the cats-cradle system. This is illustrated by the following table based on the figures in Bhaduri's case without taking into account advances :

Attorney's Bills (Party&Party).	Plff. ½ sharer pays.	Deft. 1. 7/16 sharer.	Deft. 2. 1/16 sharer.
Plff. 1100	550	481.4	68.12
Deft. 1. 800	400	350	50
Deft. 2. 500	250	218.12	31.4
2400	1200	1050	150

This is a simple case. In a big partition with numerous shares, and many advances the adjustment becomes inconceivably complicated, and for this reason is seldom, if ever made. As regards (a), the general charge may operate most oppressively. The parties obtain no free title to their shares until completion of the whole process which may be indefinitely postponed by the obstruction or indifference of one party. For my part therefore I consider that in the case of "gross" partition, the usual practice should be abandoned, each party should pay his own costs, and the charge, if any, be by each party in favour only of his own attorney. In a gross partition the Commissioner is not concerned with paying costs. He is not in control of any pool. He has almost certainly made advances for costs. In gross partition all such advances must be treated and entered as advances to the parties.

(D) Preliminary decree : This is of first importance, both as to contents and as to form. There is no form in the Civil Procedure Code and the printed form available in the office of this Court is, in my opinion, inadequate. The result is that these partition decrees are largely a work of imagination. When applications are made, to discover the relevant portion and ascertain its effect requires time and labour which it is impossible to afford. The decree in Mookerjee v. Banerjee, Suit No.145 of 1900, may be taken as an example. It is not surprising that the suit has lasted 41 years. The same applies to the writs of commission issued. Speaking for myself, if the decree is complete, I do not appreciate the necessity of a writ; and the decree should be complete.

As to the form and contents of decree my proposals are as follows : I suggest first of all that the parties should be set out and numbered as in the mofussil, rather than in the High Court manner. It is not essential. It would be more convenient.

Clause (1) *Properties* : Declaration that the properties belonging to the estate are as set out in Sch. A. I deprecate reference to the plaint or other document. Alternatively, where the properties are not ascertained, then a declaration that the estate consists of properties found to belong to the estate as the result of the enquiry ordered in cl. (6).

Clause (2) *Shares* : Declaration of shares as in Sch. B. Where the shares are many, I prefer a schedule to the body of the decree. I suggest that that schedule should be in the form of a genealogical table numbering the parties according to cause title and showing the shares against each.

Clause (3) *Order for Partition, Division and Allotment.*

Clause (4) *Appointment of Commissioner* for the purpose of partition, upon the conditions and with the powers and duties set out in Sch. C. Schedule C, Part 1 to contain the Commissioners remuneration, security and so forth. Schedule C, Part 2 to contain a complete list of his general powers and duties. Schedule C, Part III to contain any special powers or duties peculiar to the case.

Clause(5)*Receiver*:Where a receiver is appointed, or has been appointed let this also be in the decree.

Clause (6) *Special Referee* : Where the Commissioner or another is Special Referee to take accounts, I suggest that these accounts directed should not be muddled up in the body of the decree, with the duties of the Commissioner. *See* the decree in Pal v. Pal. "It is ordered and directed that Mr. X as Special Referee will hold the enquiries and take accounts set out in Sch. D."

Clause (7) *Costs* : (1) Costs prior to preliminary decree; (2) Costs subsequent to preliminary decree : these to be paid by the Commissioner in accordance with the parties' share. They should be confined to the costs of the partition and to filing and confirming the return (i. e., excluding the parties costs of appearance on confirmation) so that the costs may be ascertained before the final return. (3) A provision for the ascertainment of costs before the filing of the return at the instance of the Commissioner.

Clause (8) *Conveyances and Documents* : The usual provisions relating to conveyances and documents of title, etc.

Clause (9) *Liberty to apply* including liberty to bring on the matter for further directions in the partition list at the instance of the Commissioner, or at the instance of any party with the Commissioner's consent or with the sanction of the Special Officer.

I will not dictate Sch. C, (powers and duties of the Commissioner) because that requires consideration. It should however include the following matters : power to equalize, power to examine persons and to call for documents, power to execute conveyances on behalf of the parties, power to appoint surveyors, and also as at present advised other matters such as powers to sell under the Partition Act or outside the Partition Act making it clear what procedure the Commissioner should follow. (That being a common source of trouble).

The order on the application in Bhaduri v. Bhaduri is as follows : (1) The aggregate costs incurred since the preliminary decree including the costs of the Commissioner, the costs of the filing of the return and obtaining information shall be assessed by my officer. (2) On such assessment the Commissioner will be good enough to make up his final return in the form suggested, i.e., formal return with the accounts annexed closing the partition. (3) He may place this before this Court without stamps. (4) The matter will be in the list on Friday 4 weeks hence for confirmation. (5) Should the costs fall short of Rs. 2800 the Commissioner will work out his final return on the basis indicated but with the necessary adjustment. (6) Direction upon the attorneys or the heirs of those who have not survived the partition to submit their bills to Mr. S. Banerjee within a week from now. (7) The Commissioner will also be good enough to supply a minute of the order for substitution required, upon which the necessary amendments will be made without any order being drawn up.

G.N./R.K. *Order accordingly.*

C. P. C. —

(c) ('40) Chitaley, O. 20, R. 18 Note 5.
('41) Mulla, Page 736 Note "Partition decree."

(SPECIMEN ACCOUNTS.)

Suit No. 174 of 1931.

Narayan Das Bhaduri

v.

Satya Narain Bhaduri & ors.

I. PROPERTY ACCOUNT.

Dr.	Rs.	As.	P.	Cr.	Rs.	As.	P.
To plaintiff ½ share	6625	0	0	By amount of sale price of Premises No. 56, Boloram Majumdar Street	13,250	0	0
" defendants 1-7, their 7/16th share	5796	14	0				
" defendants 8-11, 1/16th share	828	2	0				
	Rs. 13,250	0	0		Rs. 13,250	0	0

Suit No. 174 of 1931.

Narayan Das Bhaduri

v.

Satya Narain Bhaduri & ors.

II. CASH ACCOUNT.

Receipts :	Rs.	As.	P.	*Disbursements :*	Rs.	As.	P.
Account property :				*Account defendants 1-7*			
Amount of sale proceeds of Premises No. 56, Boloram Majumdar Street	13,250	0	0	Paid to defendants 1-7 their 7/16th share in the sale proceeds by adjustment	5796	14	0
Account defendants 1-7 :				*Account plaintiff :*			
Received from defendants 1-7 towards costs and taxes	1021	15	0	Paid to Sm. Shovamoyee Debi mortgagee	2112	0	0
				Account plaintiff :			
				Paid municipal taxes	21	15	0
				Account plaintiff :			
				Paid to plaintiff out of his share in the sale proceeds	3091	1	0
				Account defendants 8-11 :			
				Paid to defendants 8-10 out of their share in the sale proceeds	653	2	0
				Account Pool :			
				Amount advanced to plaintiff on account of cost of Messrs. Dutt & Sen in part	700	0	0
				Account Pool :			
				Ditto to defendants 1-7 on account of costs of Mr. R. K. Bose in part	525	0	0
				Account Pool :			
				Ditto to defendants 8-11 on account of costs of Mr. N. K. Dutt in part	375	0	0
				Account Pool :			
				Paid to self on account of my fees Rs. 200			
				Surveyor's fees Rs. 66			
				Clerk's pay Rs. 32	298	0	0
					Rs. 13,573	0	0
				Balance :	698	15	0
	Rs. 14,271	15	0		Rs. 14,271	15	0

Receipts :	Rs.	As.	P.	*Disbursements :*	Rs.	As.	P.
Balance brought forward	698	15	0	*Account Pool :*			
Account defendants 1-7 :				Amount paid to Messrs. Dutt & Sen in full payment of their taxed costs	1100	0	0
By amount repaid by defendants 1-7 being the excess amount paid to him	203	1	0	Amount paid to Mr. R K. Bose his taxed costs in full	800	0	0
Account Pool :				Amount paid to the heirs of Mr. N. K. Dutt his taxed costs in full	500	0	0
By amount advanced to plaintiff and defendants recovered by deduction from their respective attorney's bills	1600	0	0	Amount paid to Commissioner on account of ad valorem duty, etc.	102	0	0
	Rs. 2502	0	0		Rs. 2502	0	0

III. PARTIES LEDGER ACCOUNT.

A/C Plaintiff (½)

Dr.	Rs.	As.	P.	Cr.	Rs.	As.	P.
To amount paid to mortgagee	2112	0	0	By ½ share of sale proceeds	6625	0	0
„ Municipal Tax	21	15	0				
„ Paid to plaintiff	3091	1	0				
„ Share of costs pooled	1400	0	0				
Rs.	6625	0	0				

A/C Defendants 1-7 (7/16)

Dr.	Rs.	As.	P.	Cr.	Rs.	As.	P.
To amount paid by adjustment of sale price	5796	14	0	By share of sale proceeds	5796	14	0
„ Share of costs pooled	1225	0	0	„ Amount paid in cash	1021	15	0
					6818	13	0
				By balance (to be recovered)	203	1	0
Rs.	7021	14	0	Rs.	7021	14	0

A/C Defendants 8-11 (1/16)

Dr.	Rs.	As.	P.	Cr.	Rs.	As.	P.
To amount paid in cash	653	2	0	By share of sale proceeds	828	2	0
„ Share of costs pooled	175	0	0				
Rs.	828	2	0				

SUIT NO. 174 OF 1931.

Narayan Das Bhaduri

v.

Satya Narain Bhaduri & Ors.

IV. COST ADJUSTMENT ACCOUNT.

Total costs :	Rs.	As.	P.		Rs.	As.	P.
I. *Costs of Commissioner*							
His fees, Surveyor's fees & Clerk's pay 298							
Ad valorem duty 102	400	0	0	I. Plaintiff ½ share	1400	0	0
II. Taxed costs of Messrs. Dutt & Sen, Attorneys for the plaintiff	1100	0	0	II. Defendants 1-7 7/16th share	1225	0	0
III. Taxed costs of Mr. R. K. Bose, Attorney for defendants 1-7	800	0	0	III. Defendants 8-11 1/16th share	175	0	0
IV. Taxed costs of Mr. N. K. Dutt, Attorney for guardian ad litem of defendants 8-11	500	0	0				
Rs.	2800	0	0	Rs.	2800	0	0

V. POOL ACCOUNT.

Dr.	Rs.	As.	P.	Cr.	Rs.	As.	P.
To amount advanced to plaintiff on account of cost of his attorney Messrs. Dutt & Sen & Co.	700	0	0	By amount contributed by the plaintiff being his proportional share of costs.	1400	0	0
„ Ditto to Defendants 1 to 7 for costs of Mr. R. K. Bose attorney.	525	0	0	By amount contributed by defendants 1 to 7 being their share of costs.	1225	0	0
„ Ditto to Defendants 8 to 11 for costs of Mr. N. K. Dutt.	375	0	0	By amount contributed by defendants 8 to 11 being their share of costs.	175	0	0
„ Commissioner — account of partition costs.	298	0	0				
Rs.	1898	- 0	- 0	Rs.	2800	- 0	- 0
„ amount paid to Messrs. Dutt & Sen in full payment of their taxed costs.	1100	0	0	By amount advanced to plaintiff and defendants recovered from attorney's bill.			
				Plaintiff. Rs. 700			
„ amount paid to Mr. R. K. Bose in full payment of his cost.	800	0	0	Defendants 1 to 7. Rs. 525			
„ amount paid to heirs of Mr. N. K. Dutt in full payment of his taxed costs.	500	0	0	Defendants 8 to 11. Rs. 375:	1600	0	0
„ amount paid to commissioner ad-valorem duty, etc.	102	0	0				
Rs.	4400	- 0	- 0	Rs.	4400	- 0	- 0

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EDGLEY AND BISWAS JJ.

Shekendarali Meah — Judgment-debtor —Appellant

v.

Abdul Gafur Choudhury and others — Respondents.

Appeal No. 183 of 1939, Decided on 2nd May 1941, from original order of Sub-Judge, Second Court, Backergunge at Barisal, D/- 31st March 1939.

Civil P. C. (1908), O. 21, R. 17 — Execution petition registered — Apart from O. 21, R. 17 Court can amend petition — Amendment of list of properties when can be allowed — Execution petition in accordance with law — On objection by judgment-debtor himself Court discovering b **that attached properties could not be proceeded with—Decree-holder held entitled to file supplementary list of properties to be proceeded against.**

Apart from the provisions of O. 21, R. 17, amendments to application for execution may be made in suitable cases after the registration of such an application : ('32) 19 A. I. R. 1932 Cal. 766, *Rel. on*; 17 Cal. 631 (F. B.), *Disting.*; ('35) 22 A.I.R. 1935 Cal. 614, *Ref.* [P 307 C 1]

The law requires a decree-holder to indicate in his application for execution the various modes of execution, which he wishes the Court to adopt. He should also as far as possible indicate the properties of the judgment-debtors against which execution proceedings should be taken, it being understood that he should not take execution proceedings c against more items of property than he considers sufficient to satisfy his decree, provided the application for execution is in accordance with law and has been duly registered. If a subsequent application is filed for the purpose of amending the list of properties against which the decree-holder wishes to proceed, the Court is vested with a reasonable discretion, to deal with the matter according to the circumstances of the case. The acceptance of such a petition would result in effect in the amendment of the application for execution. Such an amendment should not be allowed if it has the effect of substantially altering the character of the execution proceedings. But where an execution application is made in accordance with law and on objection by the judgment-debtor himself it is discovered that execution could not proceed against the attached properties, it is open to the decree-holder to file a d further and supplementary petition asking the Court to proceed against the properties specified therein and the Court would exercise a reasonable discretion in accepting the supplementary petition : ('18) 5 A.I.R. 1918 Cal. 73, *Rel. on*; ('24) 11 A. I. R. 1924 Cal. 131 and ('38) 25 A.I.R. 1938 Cal. 162, *Expl.*; ('35) 22 A.I.R. 1935 Cal. 143, *Disting.* [P 307 C 2]

Jitendra Nath Guha and Satya Priya Ghosh — for Appellant.

Pannalal Chatterjee—for Deputy Registrar.

EDGLEY J. — One of the judgment-debtors is the appellant in this case and the appeal is directed against an order of Mr. Protap Chandra Sen Gupta, Subordinate Judge, Second Court, Backergunge, dated 31st March 1939, in which the learned Judge dismissed an objection raised by the judgment-debtors in the execution proceedings to the effect that the decree could no longer be executed having regard to the provisions of S. 48, Civil P. C.

It appears that the decree-holders had obtained a decree for rent against the judgment-debtors as e far back as 8th February 1924. This decree together with costs amounted to Rs. 6127-15-0. Thereafter, the usual steps were taken by the decree-holders to put this decree into execution and the record shows that the judgment-debtors placed every possible obstacle in the way of the decree-holders at various stages of the execution proceedings. The last execution case was instituted on 6th February 1936 by execution case No. 3 of 1936. By that time, the decree-holders had succeeded only in realising the sum of Rs. 250 from the judgment-debtors and the amount due to them, including interest on the decree amounted to Rs. 9865-10-0. In col. 10 of the application for execution the decree-holders asked that certain properties mentioned in the schedule might be put up for sale. They also asked for attachment of the moveable properties of the judgment-debtors and as a last resort for execution by f arrest of the judgment-debtors. In the last column of the application was included a list of properties against which the decree-holders wished to proceed. Admittedly, this application for execution was in accordance with law. During the course of the execution proceedings, some of the judgment-debtors put forward a claim in their capacity as mutwallis of the properties which it was sought to attach to the effect that these properties were exempt from attachment. This objection was allowed on 30th January 1937, and it appears that thereafter the decree-holders filed a suit under the provisions of O. 21, R. 63, Civil P. C. The sale of the attached moveable properties of the judgment-debtors only resulted in the realisation of a small sum towards the decretal dues, so the decree-holders filed a further list of properties in the possession of the judgment-debtors and asked for the permission of g the Court to proceed against these properties which were mentioned in a petition filed by the decree-holders on 10th November 1938. The judgment-debtors filed an objection under S. 47 of the Code with reference to this petition. The matter came on for hearing before the learned Subordinate Judge on 31st March 1939 and under his order the objection of the judgment-debtors was dismissed. As already stated, it is against the latter order that this appeal is directed.

The main point urged by the learned advocate for the appellant in this case is that the application made by the decree-holders on 10th November 1938 was in effect a fresh application for execution and was, therefore, time-barred having regard to the fact that the rent decree which it was sought to execute was passed as far back as 8th February 1924. h He also contends that, inasmuch as more than 12 years had elapsed from the date of the decree, it was not competent for the learned Subordinate Judge to treat the application as one for the amendment of the pending application for execution. As already stated, the application for execution of the decree which was filed on 6th February 1936 was admittedly an application in accordance with law. Therefore, we are not concerned with the question whether an application for execution which has been registered may be amended after the expiry of the prescribed period of limitation for the purpose of removing formal defects within the meaning of O. 21, Rr. 11 to 14, Civil P. C. That being the case, the principles laid down by a Full Bench of this Court in 17 Cal. 631[1] have no appli-

1. ('90) 17 Cal. 631 (F.B.), Asgar Ali v. Troilokya Nath.

cation. In this connection it was observed by Mitter J. in A. I. R. 1935 Cal. 614[2] that certain views expressed in 17 Cal. 631[1] have not met with approval in later cases of this Court. But be that as it may, it is clear that apart from the provisions of O. 21, R. 17, amendment to applications for execution may be made in suitable cases after the registration of such an application as was pointed out by Sir George Rankin, C. J. in 59 Cal. 1266.[3] In that case His Lordship observed :

"Now, because the rule requires a preliminary scrutiny of certain formalities before the petition can get upon the file, it is actually argued that that means that after it has got upon the file nobody can ever get his petition amended even with the leave of the Court—a thing which is almost ludicrous as an argument . . . . Under the Code, procedure is intended to be less, rather than more formal in the execution of a decree than in the case of the hearing of a suit ; and the executing Court need not have found difficulty in allowing him (i.e., the appellant) to amend his petition."

In my view the circumstances of the present case are in many respects similar to those of the case in 22 C.W.N. 540.[4] In that case the decree-holders sought to file a supplementary list of properties against which execution might be taken and it was contended that they could not do so having regard to the law of limitation. The learned Judges, however, observed :

"Here there was a list of properties, the application was one made in accordance with law and it was only on the objection taken by the judgment-debtors that it was discovered that against those properties execution could not proceed. We are not of opinion that in a case such as this the decree-holder should be confined to the properties he had originally specified and we think that it was open to him to ask the Court to proceed against the properties specified in his further and supplementary list."

The learned advocate for the appellant has placed some reliance upon the case in 50 Cal. 743.[5] In that case the decree-holder had asked for permission to be allowed to add several other properties to the list given in his original application. The learned Judges observed that the circumstances of the case were very different from those in 22 C.W.N. 540[4] and they declined to grant the decree-holder the relief which he sought. The reasons for this decision have not been stated clearly in the judgment but it is possible that the learned Judges considered that the decree-holder had not exercised proper care and diligence in drawing up his original application for execution. Another case upon which the learned advocate for the appellant relies is that in 60 C.L.J. 123.[6] That case is clearly distinguishable because as pointed out by the learned Judges, "all the reliefs that the decree-holder asked for in the application of 19th December 1931, were granted to him by the executing Court and all such properties as he desired to put up to sale for realising his decree were sold and nothing further remained to be granted on the basis of that application."

The only other case to which we were referred by the learned advocate for the appellant is that in 66 C.L.J. 57,[7] which was decided against the decree-holder on the principle that, by proceeding to attach certain moveable properties which had not been included in the original petition for execution, the decree-holder was seeking to depart substantially from the previous petition and the subsequent petition could not be regarded as a continuation of the execution originally initiated by him.

In my view, the following general principles may be deduced from the above cited cases. The law requires that a decree-holder in executing a decree should indicate in his application for execution the various modes of execution, which he wishes the Court to adopt. He should also as far as possible indicate the properties of the judgment-debtors against which execution proceedings should be taken, it being of course understood that he should not take execution proceedings against more items of property than he considers sufficient to satisfy his decree, provided the application for execution is in accordance with law and has been duly registered. If a subsequent application is filed for the purpose of amending the list of properties against which the decree-holder wishes to proceed, the Court is vested with a reasonable discretion, to deal with the matter according to the circumstances of the case. Of course, to accept such a petition would result in effect in the amendment of the application for execution. Such an amendment should not be allowed if it has the effect of substantially altering the character of the execution proceedings, but in a case such as that with which we are now dealing, in which it was discovered on the objection of the judgment-debtors themselves that execution could not proceed against the attached properties, I am of opinion that the Court would exercise a reasonable discretion in accepting a supplementary petition such as that which was filed by the decree-holders on 10th November 1938. In this view of the case, the decision of the learned Subordinate Judge must be affirmed and this appeal is dismissed. The only appearing respondents are the minors who are represented by the Deputy Registrar of this Court and as their costs have already been paid no further order with regard to costs is necessary.

BISWAS J. — I agree.

G.N./R.K. *Appeal dismissed.*

2. ('35) 22 A.I.R. 1935 Cal. 614 : 158 I.C. 556, Piramal Goenka v. Basanti Das Chatterji.
3. ('32) 19 A.I.R. 1932 Cal. 766 : 140 I.C. 747 : 59 Cal. 1266 : 55 C.L.J. 538 : 36 C.W.N. 618, Naurangilal v. Charubala Dasee.
4. ('18) 5 A.I.R. 1918 Cal. 73 : 44 I.C. 553 : 27 C.L.J. 398 : 22 C.W.N. 540, Gnanendra Kumar Roy v. Rishendra Kumar Roy.
5. ('24) 11 A.I.R. 1924 Cal. 131 : 74 I.C. 1017 : 50 Cal. 743, Hayatunnessa Choudhurani v. Achia Khatun.
6. ('35) 22 A.I.R. 1935 Cal. 143 : 154 I.C. 555 : 60 C.L.J. 123, Badri Narayan v. Dharmadas Pal.
7. ('38) 25 A. I. R. 1938 Cal. 162 : 174 I. C. 589 : 66 C. L. J. 57, Aziz Rahaman v. Bepin Behari.

C. P. C. —
('40) Chitaley, O. 21 R. 17 N. 3.
('41) Mulla, Page 776 pts. (j) (k) (m) and (n).

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BARTLEY AND LODGE JJ.

Emperor

v.

Ramjanam Singh — Accused.

Criminal Reference No. 101 of 1941, Decided on 13th November 1941.

Criminal P. C. (1898), S. 195 (5) and (1) (a)— Complaint under S. 195 (1) (a)—Withdrawal of —Revisional jurisdiction of High Court.

A complaint made under S. 195 (1) (a) can more properly be set aside under S. 195 (5) by an authority other than the High Court, that is, by any authority to which the public servant who made the complaint is subordinate and the High Court in its revisional jurisdiction will not interfere by ordering its withdrawal. [P 308 C 1]

S. C. Talukdar — for Accused.

BARTLEY J. — In our opinion this reference must be rejected. The learned Judge recommends that an order made by the Sub-Divisional Officer of Ranaghat summoning a certain person under S. 182, Penal Code, should be set aside by this Court.

Under S. 195, cl. (5), Criminal P. C., where a complaint is made, as in this case, under sub-s. (1), cl. (a), that complaint may be withdrawn by any authority to which the public servant who has made it, is subordinate. It seems clear therefore that the complaint which forms the subject-matter of this reference can be set aside by an authority other than this Court, and in the circumstances we see no reason to exercise a jurisdiction which should more properly be exercised by another authority. The reference is accordingly rejected.

LODGE J. — I agree.

G.N./R.K. *Reference rejected.*

Cr. P. C. —
('41) Chitaley, S. 195, N. 24 and S. 476B, N. 13.
('41) Mitra, Page 669, N. 634A.

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ROXBURGH J.

Province of Bengal — Defendant — Appellant

v.

Ramlal Oswal and another — Plaintiffs — Respondents.

Appeal No. 918 of 1939, Decided on 17th November 1941, from appellate decree of Sub-Judge, Jalpaiguri, D/- 11th February 1939.

Bengal Land Revenue Sales Act (11 of 1859), S. 6—Sale under Act — Notices under S. 6 through peon's carelessness improperly served in Munsif's Court instead of in District Judge's Court—Service of notices held irregular—Mere fact that plaintiff had brought suit to set aside sale held not sufficient to prove that sale resulted in substantial injury—Other evidence held sufficient to support finding—Finding held need not be interfered with in second appeal—Irregularity whether caused substantial injury —Question is usually one of inference—Circumstances of case held justified lower Court in its finding of fact that there was direct connexion between irregularity and injury—Finding held should not be interfered with in second appeal.

In the suit to set aside the sale held under the Act, the irregularity complained of was that the copy of the notice under S. 6 required to be served in the Court of the District Judge of Jalpaiguri was, in fact, served in the Court of the Munsif at a time when the District Judge himself was not in Jalpaiguri but was in one of the other stations of his judgeship. The Munsif of Jalpaiguri was by notification published in 1934, Judge's Registrar and papers required to be filed with the Judge were, during his absence to be filed with the Registrar. There was no evidence that notices required to be published in the Court of the District Judge should be published in the Court of the Munsif acting as his Registrar. The notices were served at the Court of the Munsif not owing to any notion that this was the correct procedure as he was the Judge's Registrar but they were so served owing to the carelessness of the peon who served the notices :

Held that there was an irregularity in the service of the notices. [P 309 C 1]

Held further that the mere fact that the plaintiff had brought the suit to set aside the sale was not sufficient to show that substantial injury was caused to the plaintiff by sale; nevertheless, since there was evidence to support that finding and to prove that there was sufficient profit from the tenure in suit to show that its value exceeded considerably the amount of Re. 1 for which it was purchased at the revenue sale by the Province of Bengal, there was no reason to interfere with that finding in second appeal. [P 309 C 1]

Held also that although no attempt was made to show that the failure to serve the notices properly at the Court of the District Judge had itself led to the substantial injury in the case due to paucity of bidders it was necessarily difficult to supply direct evidence to show that such irregularity had led to the injury. The point must usually be one of inference. The circumstances in the case were such that the first appellate Court might reasonably have come to the finding of fact to which it had come that there was a direct connexion between the two and therefore its finding should not be interfered with in second appeal. [P 309 C 1]

Bankim Chandra Banerjee for Rama Prosad Mukherjee — for Appellant.

Jatindra Mohan Chaudhury and Gopes Chandra Chatterji — for Respondents.

JUDGMENT. — This appeal arises out of an appellate decree setting aside a sale held under the Land Revenue Sales Act of 1859 on the ground that there had been material irregularity in the publication of notices under S. 6 of that Act which irregularity had caused substantial injury to the plaintiff. The trial Court had refused to set aside the sale. The irregularity complained of lies in the fact that the copy of the notice under S. 6 of the Act required to be served in the Court of the District Judge of Jalpaiguri was, in fact, served in the Court of the Munsif. It was so served at a time when the District Judge himself was not in Jalpaiguri but was in one of the other stations, Dinajpur or Jalpaiguri, of his judgeship. The Munsif of Jalpaiguri is, by notification published in 1934, Judge's Registrar and papers required to be filed with the Judge should, during his absence, be filed with the Registrar. No evidence was given to show that notices required to be published in the Court of the District Judge should be published in the Court of the Munsif acting as his Registrar. It may be noted that it appears from the judgment of the Commissioner who heard the application under the Act in this matter that the reason for his refusal to interfere was that such notices were to be so served at the Court of the Munsif. If that had really been the case, one would have expected a clear evidence to that effect. The only evidence that we have is the statement of the peon to the contrary

effect that such notices were served in the Court of the District Judge. It seems clear, as noted by the appellate Court in this case, that the notices were not served at the Court of the Munsif owing to any notion that this was the correct procedure as he was the Judge's Registrar but that they were so served owing to the carelessness of the peon who served the notices. I agree therefore with the finding of the appellate Court that there was an irregularity in the service of these notices.

The appellate Court has also found that substantial injury was caused to the plaintiff by this sale. Although I do not agree entirely with the reasons given by the learned Judge for this finding in so far as he states that the point would be established by the mere fact that the plaintiff has brought the present suit nevertheless there is evidence to support this finding and to prove that there was sufficient profit from the tenure in suit to show that its value exceeds considerably the amount of Re. 1 for which it was purchased at the revenue sale by the Province of Bengal and there is no reason for me to interfere with that finding. Lastly the main point of attack against the decision of the appellate Court is that there is no evidence to justify the finding in this case that the substantial injury in question had been caused by the irregularity in publication of notices. The plaintiff himself did not attempt to make a specific case on this line, for his case in the plaint as supported by the evidence was that no notice of any kind either under S. 6 or under S. 7 was served either on the land or in the Collectorate or in the Judge's Court and no attempt was made to show that although the notices under S. 6 were served at the Collectorate nevertheless the failure to serve the notices properly at the Court of the District Judge had itself led to the substantial injury in the case due to paucity of bidders. However that may be it is necessarily difficult to supply direct evidence to show that such irregularity had led to the injury. The point must usually be one of inference. The learned Subordinate Judge who heard the appeal has not indeed discussed the basis of his view that the irregularity had led to the injury but in my opinion the circumstances are such that he might reasonably in this case come to the finding of fact to which he has come that there was a direct connexion between the two, and the case does not seem to be one therefore in which his finding should be interfered with. The result is that the appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 309

BISWAS J.

Bhagirathmal Kanodia and another — Plaintiffs — Appellants

v.

For Jamini Ghose, shebait of Lakshmi Janardan Jiu Thakur, Bibhuti Bhusan Ghose and others — Respondents.

Appeals Nos. 1113 to 1115 of 1939, Decided on 25th November 1941, from appellate decrees of Dist. Judge, Midnapore, D/- 3rd March 1939.

(a) Landlord and tenant — Revenue free and rent free lands—Distinction between — Importance of such distinction explained.

The claim of a revenue-free title is different from a claim that the lands are held rent free. The latter proceeds on the assumption that the lands are included within the regularly assessed estate of the landlord but the tenants are still entitled to hold them without payment of rent to the zemindar. This is an important distinction and it will determine the question of the onus of proof. If the lands are claimed to be revenue-free, that is, lakheraj in the strict sense of the word, it will be for the plaintiffs to show before they can succeed in their suits that the lands are comprised within their estate. On the other hand, if the defence is only a plea of rent-free title, the onus of proof will lie on the defendants, who will have to prove when and how they or their predecessors relieved themselves of the obligation to pay rent : 14 M. I. A. 152 (P. C.) and ('22) 9 A. I. R. 1922 P. C. 272, *Rel. on.* [P 310 C 1]

(b) Evidence Act (1872), S. 90 — Scope — Presumption applies only to signature or hand-writing.

The presumption referred to in Sec. 90 is of a limited character and applies only to the signature or hand-writing. Where, however, there are no names of executant, scribe or witness, the section cannot avail to prove the document, merely because it happens to be more than 30 years old or is produced from custody which the Court may consider proper. [P 310 C 2]

(c) Evidence Act (1872), Ss. 35 and 74 — Applicability.

Sections 35 and 74 presuppose that the document which has been produced is really an extract from an official register. [P 310 C 2]

Gopendra Nath Das and Kshetra Mohan Chatterjee — for Appellants.

Nakuleswar Mukherjee and Nilmoni Goswami (in 1115) — for Respondents.

JUDGMENT. — These three appeals arise out of three suits which were tried together at the instance of the parties. The plaintiffs who are the appellants before me sued for assessment of rent of certain lands and for recovery of arrears of rent for four years as compensation for use and occupation of the lands by the defendants. The plaintiffs are purchasers at a mortgage sale of the interest of the zemindar in whose estate, according to them, the disputed lands are situated. They based their case mainly on the record of rights in which the defendants were recorded as tenure holders in respect of these lands and the lands were described as liable to assessment of rent. The suits were resisted by the defendants. The written statements show that their case was that the lands were the lakheraj lands of a deity Sri Sri Lakshmi Narayan Jew Thakur, and that the plaintiffs or their predecessors were consequently not entitled to rent. They pleaded that they had held these lands for a long series of years extending over more than 150 years without payment of rent. Both the Courts below gave effect to the contentions of the defendants and dismissed the suits. Hence the present appeals. In support of their case, the plaintiffs practically relied on the record of rights, whereas the defendants produced on their side an old document which has been referred to in the judgments of the Courts below as a 'sanad' bearing date 16th June 1794. The defendants also relied on a copy of a plaint and a summons as well as on certain receipts granted by a pattanidar of the mahal now held by the plaintiffs. Apart from the documentary evidence, there was oral evidence on either side, but there can be little doubt that the documentary evidence is the more

important. Looking at the judgments, it seems to me that neither of the Courts below had a very clear appreciation of the real defence which was set up. The learned advocate appearing for the defendants in this Court made it quite clear that the main case of his clients was that the disputed lands were lakheraj or revenue free lands; in other words, that they were excluded from the regularly assessed estate of the plaintiffs. The claim of a revenue-free title is obviously different from a claim that the lands are held rent-free. The latter proceeds on the assumption that the lands are included within the plaintiffs' estate, but the defendants are still entitled to hold them without payment of rent to the zamindar.

It is quite clear that this is an important distinction, which is bound to have a material bearing on the case. For one thing, it will determine the question of the onus of proof. If the lands are claimed to be revenue-free, that is, Lakheraj in the strict sense of the word, it will be for the plaintiffs to show before they can succeed in their suits that the lands are comprised within their estate. On the other hand, if the defence is only a plea of rent-free title, the onus of proof will lie on the defendants, who will have to prove when and how they or their predecessors relieved themselves of the obligation to pay rent. These propositions are now well settled. It was in fact laid down as far back as 1871 by the Judicial Committee in 14 M. I. A. 152[1] and that case has now gathered round it a respectable body of case law,—that where the plaintiff's case is that the lands in suit formed part of his mal lands, which the defendant claims as lakheraj the plaintiff is bound to give some evidence that the land was once mal; once the plaintiff has prima facie proved his case, the burden of proof is shifted on the defendant. As regards the other proposition, reference need be made only to a comparatively recent decision of the Judicial Committee in 49 I.A. 399,[2] where it was held that once a landlord has proved that land, which is claimed to be held rent-free, is within his regularly settled mahal, it lies upon those who so claim to show that they have been relieved of the obligation to pay rent, either by contract, or by some old grant recognized by the landlord.

There can be no doubt that it is open to the defendants in this case to repel the plaintiffs' claim either by showing that the lands are lakheraj, or by showing that though they are part of the plaintiffs' mahal, the defendants are entitled to hold them free of rent. But, as I have already explained, the burden of proof will vary according as the one line of defence is set up or the other.

On behalf of the defendants, as already pointed out, it is urged that their case has all along been that the lands were lakheraj. The plaintiffs are quite willing to accept that position. And so accepting it, they would rely on the entry in the record of rights, which is in their favour, as sufficient to discharge the onus of proof which would lie on them. The plaintiffs contend that the record of rights is evidence to show that the lands formed part of the plaintiffs' estate. It is pointed out that the defendants are recorded therein as tenure-holders under the plaintiffs' predecessors. They maintain that to establish their case it is not necessary to prove actual realisation of rent from the defendants; neither can the defendants rebut the presumption arising from the record of rights merely by showing non-payment of rent for any length of time. The plaintiffs conceded that if the defendants could produce any evidence like an extract from the Collectorate register showing that these lands were entered as revenue-free, that would conclude the matter. The defendants claim that the document which has been referred to as a sanad is really an official record of that character. That document is in Persian, and a Bengali translation of it was put in and is on the record. But it is not clear whether it is an extract from a Collectorate register, or merely purports to be a copy of an order for the issue of a confirmatory grant to one Maharam Bhanja, who, it has been found by the Courts, is the predecessor-in-interest of the present defendants. This document is certainly of very great importance from the defendants' point of view, and in order to decide this appeal on the basis of it, I consider it to be essential to have more information than is available as to its true character. It was produced no doubt from the custody of the Collector, but the record-keeper who produced it did not say whether it purported to be an extract from any official register. It does not bear the signature of any official. In fact it seems to me that in the absence of any signature or of the name of any person by whom the document purports to be written, it is not possible to admit it in evidence as an ancient document under the provisions of S. 90, Evidence Act. Section 90 says that where a document purporting to be 30 years old is produced from proper custody, the Court may presume that the signature and any other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to be duly executed and attested. The presumption referred to in this section is of a limited character and applies only to the signature or handwriting. Where, however, there are no names of executant, scribe or witness, I do not see how the section can avail to prove the document, merely because it happens to be more than 30 years old or is produced from custody which the Court may consider proper.

The defendants appreciate this difficulty and do not seek to justify the admissibility of this exhibit by reference to the provisions of S. 90. They maintain that it is a public document and rely on the combined effect of Ss. 35 and 74, Evidence Act, for the purpose of proving it. This, however, presupposes that the document which has been produced is really an extract from a register which the Collector maintained under the Regulations then in force; but, as I have said, I find it difficult on the record as it stands, to say whether it is really a document of that description. As regards the other documentary evidence on which the defendants rely, namely, the plaint and the summons which relate to the same suit as well as the receipts, it appears that these are of an equivocal character. Assuming that these are all admissible in evidence, I am still not sure that they can be regarded as sufficient or convincing evidence of the revenue-free character of the disputed lands. Putting aside for the moment the plaintiff's contention that the lands referred to in these documents have not been shown to be identical with those which are the subject-matter of dispute, it is still doubtful so far as the

1. ('70-72) 14 M.I.A. 152 : 8 Beng.L.R. 566 : 20 W.R. 459: 2 Sar 713: 2 Suther 484 (P.C.), Hurryhur Mookhopadhya v. Madub Chunder Baboo.
2. ('22) 9 A.I.R. 1922 P. C. 272 : 71 I. C. 984 : 2 Pat. 38 : 49 I.A. 399 (P. C.), Jagdeo Narain Singh v. Baldeo Singh.

statements in the plaint are concerned, whether they really support a case consistent with that which the defendants are now making. It is true that in one paragraph of the plaint the lands are referred to as Lakheraj, but the whole substance of the claim appears to be based on the supposition that the lands form part of the zemindary and do not constitute an independent revenue-free estate. The plaint is a plaint in a suit by a patnidar who is claiming to recover from the defendants certain cesses and embankment charges. If the lands were revenue-free, such cesses and embankment charges would be ordinarily payable by the holder of such lands direct to the Collector, and neither the zemindar nor the patnidar of the mahal within the local boundaries of which such lands may be situated will have a legal right to recover these dues from the holder. The learned advocate for the defendants has referred me to certain special provisions of the Cess Act regarding the district of Midnapore where the suit lands are situated, which might seem to confer on a person in the position of the plaintiff in that suit the right to collect such dues from the grantee of revenue-free lands. Even so, it does not appear that the Courts below considered the document from this point of view in order to see whether it really made a case inconsistent with that based on the sanad. As for the receipts, they are only in respect of payments which the defendants' predecessors are supposed to have made to the patnidar on account of such cesses and embankment charges.

From one point of view, these documents, instead of rebutting the case of the plaintiff, would rather go to support it. Mr. Das, on behalf of the plaintiffs, in fact, relies on them for the purpose of making out that on the defendants' own showing the disputed lands are included in the plaintiff's estate. If that be so, as I have already explained, it will be for the defendants to prove the circumstances under which they were discharged of the obligation to pay rent to the zemindar. The only evidence which has been adduced on this point, apart from the documents already referred to, is as regards non-payment of rent, but this carries the defendants nowhere on this part of their case.

I cannot help thinking that much of the unsatisfactory state of the evidence is due to insufficient appreciation of the distinction between a plea of revenue-free title and a plea of rent-free title. The judgments of the Courts below also suffer from a certain infirmity for not having kept this distinction in view. I think that in the circumstance of the case and for the ends of justice, the suits should be retried on a proper basis and after recasting the issues; but on the pleadings as they stand, it will be for the defendants to make up their mind finally whether they will adhere solely to the case that the lands are revenue-free, or, if the written statements so permit, whether they will also make a case in the alternative that even if the lands are comprised in the plaintiff's estate, the defendants have acquired the right to hold them free from payment of rent, either by reason of any grant, actual or presumed, or by adverse possession or otherwise. The parties will be at liberty to adduce further evidence. It is only fair that this should be allowed. Mr. Das, for instance, stated that his clients were all along under the impression that the case made by the defendants at the trial Court was on the basis that the lands were included in the plaintiff's mahal.

The result is that these appeals are allowed, the judgments and decrees of both the Courts are set aside and the suits remanded to the Court of first instance for re-trial in accordance with the directions contained in this judgment. The parties will be bound by the pleadings as they stand, but will be allowed to adduce further evidence after the issues have been recast according to the definite cases which are made on one side or the other. I should like to add that as the case is being remanded for re-trial, the Court below will be at liberty to put its own construction on the documents, and will not be bound by any expressions of opinion contained in this judgment. Costs will abide the result.

K.S./R.K. *Case remanded.*

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NASIM ALI AND PAL JJ.

Budhkaran Chaukhani and others — Defendants — Appellants

v.

Thakur Prosad Shah and another — Plaintiffs — Respondents.

Appeal No. 193 of 1938, Decided on 26th June 1941, from original decree of Special Sub-Judge, Assam Valley Districts at Dibrugarh, D/- 26th February 1938.

(a) Hindu law — Joint family — Necessity — Expression "for sake of family" is wide enough to include expenditure in interests of or for benefit of joint family—Whether alienation by karta was for "sake of family" or "benefit of estate" or "family interests" depends upon facts of each case — Tea garden source of income to joint family — Money necessary to maintain garden and factory — Karta borrowing loan on mortgage of tea garden — Expenditure of loan on garden held justified in family interests—Transaction held binding on members —Members are not liable personally.

The power to alienate joint family property conferred on the karta of a joint Hindu family, by Chap. 1, S. 1, Paras. 27, 28 and 29 of the Mitakshara is wide enough to include the case of expenditure made "in the interest and for the benefit" of the joint family. The expression "for the sake of the family" is wide enough to cover such cases of benefit: ('17) 4 A.I.R. 1917 P.C. 61; ('32) 19 A.I.R. 1932 P. C. 182 and 6 M. I. A. 393 (P. C.), *Rel. on*; *Case law referred.* [P 313 C 1; P 320 C 2]

The question whether the alienation by the karta of the joint Hindu family was "for the sake of the family" or "for the benefit of the estate" or "for family interests" depends on the facts of each particular case : ('17) 4 A. I. R. 1917 P. C. 33, *Rel. on.* [P 313 C 2; P 314 C 1]

Where for want of funds, the karta of a joint Hindu family is compelled to raise money for the purpose of maintaining the family tea garden and factory which was the source of income to the joint family by mortgaging the garden, the expenditure of the loan on the garden is justified in the interest of the family and all the members of the joint family are bound by the transaction. But the members are not liable personally for the loan. [P 315 C 1]

(b) Hindu law — Joint family — Father — Necessity—New business by karta is not necessary purpose—Father starting new business — Business adopted as family business — Minors even after attaining majority continuing to enjoy benefits of same and claiming it as their

joint business—Requirements of business must be deemed to be requirements of family.

The starting of a new business by the karta of a joint family is not a necessary purpose under the Hindu law : ('32) 19 A.I.R. 1932 P.C. 182, *Rel. on.* [P 314 C 1]

But where the father in a joint Hindu family starts a new business which is adopted as a family business, and the minors even after attaining majority continue to enjoy the benefits of the same and claim it as their joint business, the requirements of the business must be considered to be the requirements of the family and would be covered by verses 27 to 29 of Chap. 1 of the Mitakshara : ('27) 14 A. I. R. 1927 P. C. 121, *Ref.* [P 319 C 1]

(c) Hindu law—Debts—Necessity — Proof of —Account books—Non-production of — Inference — Mortgage by members of joint Hindu family—Plaintiff mortgagee alleging admission to him by defendant mortgagors that money borrowed was being spent on family tea garden and calling for account books from defendants to prove same—Defendants refusing to produce account books on flimsy grounds — Onus is on plaintiff to show that money raised was spent on garden—But in circumstances of case Court held entitled to presume that money was spent on family garden.

The plaintiff mortgagee alleged that defendants mortgagors, members of a joint family admitted to him that the money raised on the mortgage was being spent on the family tea garden and to prove the same called upon the defendants to produce their account books. The defendants, however, refused to produce the account books on flimsy grounds. It was open to the defendants to show that the plaintiff's allegation was false by producing the account books called for by the plaintiff. But they did not do so :

Held that although the onus to prove that the money raised was spent on the family garden was on the plaintiff but in the circumstances of the case the Court was entitled to presume from the non-production of the account books by the defendants, that the plaintiff's allegation that money was spent on family tea garden was true : ('17) 4 A.I.R. 1917 P. C. 6, *Rel. on.* [P 314 C 2; P 315 C 1]

(d) Hindu law—Administration of—It is not permissible to go beyond interpretations of Smrities by commentators to original Smritis (Per *Pal J.*).

The commentators, while professing to interpret the law laid down in the Smritis, really expounded the customs and usages which they found prevailing in the locality. Consequently, their interpretations have been accepted as authoritative and it is no longer permissible to the Court to go beyond such interpretations to the original Smriti texts : 12 M. I. A. 397 (P.C.), *Rel. on.* [P 315 C 2]

(e) Hindu law Father — Self-acquisition — Power to alienate moveable and immovable is unrestrained (Per *Pal J.*).

The father has unrestrained power of alienation in respect of his self-acquisitions, both moveable and immovable : 20 All. 267 (P. C.), *Rel. on.* [P 317 C 2]

(f) Hindu law —Alienation—Father—Powers of as manager of estate or guardian of infants —Father can make binding loan—His power of disposal of family property to satisfy or secure loan is not co-extensive with power to make binding loan — Power to dispose of family property is limited to occasions specified in Mitakshara, Chap. 1, verses 28 and 29 (Per *Pal J.*).

The power of the father or grandfather to make a binding loan is now well settled : ('24) 11 A. I. R. 1924 P. C. 50, *Rel. on.* [P 318 C 1]

His power of disposal of the property in satisfaction of or for the purpose of securing the loan taken by him is, however, not co-extensive with the power of making a binding loan. The power of disposal of the family property is limited to certain specified occasions, specified in Mitakshara, Chap. 1, S. 1, verses 28 and 29. Thus, the validating occasion for a loan made by father is much wider than that for creating a right in rem in respect of the joint family property : 6 M. I. A. 393 (P. C.), *Rel. on.* [P 318 C 1]

S. M. Bose, Ambica Pada Choudhury and Bhabesh N. Bose — for Appellants.

Dr. S. C. Basak, Sitaram Banerjee and Prosanta B. Gupta — for Respondents.

NASIM ALI J. — The facts which are not in dispute in this appeal are these : One Sitaram Chowkhani was the karta of a Mitakshara undivided joint Hindu family consisting of himself and his two sons. This family carried on a business under the name and style of "Sitaram Budhkaran" and acquired various properties including a tea estate known as Gograjan Tea Estate in Dibrugarh within the Province of Assam. Sitaram as karta of this joint family was in charge of the management of the joint family business "Sitaram Budhkaran" and other properties belonging to the joint family. On 28th September 1926, he borrowed Rs. 25,000 with interest at 10½ per cent. per annum from the plaintiffs on the mortgage of the Gograjan Tea Estate. In the mortgage bond (Ex. 1) he stated that he was the absolute owner of the said tea garden. The due date of payment of the mortgage money was 30th November 1927. On 19th March 1928, the mortgagor paid Rs. 2794-12-0 towards interest due on the mortgage debt. On 6th March 1934 the firm "Sitaram Budhkaran" wrote to the mortgagee a letter (Ex. 2) stating that they had not been able to make any arrangement for the payment of the mortgage money. Rs. 2000 was paid as interest for the loan on 5th June 1934. The mortgagor died on 15th February 1936. On 30th March 1936, his eldest son, defendant 1 on behalf of the firm "Sitaram Budhkaran" signed a memorandum of accounts (Exs. 6, 6 (1) and 6-B) acknowledging the liability under the said mortgage bond for a sum of Rs. 53,181 upto 30th March 1936 including interest at the stipulated rate after deduction of all payments made up to that date. On 1st June 1936, a letter (Ex. 3) was written by the firm "Sitaram Budhkaran" to the mortgagee informing them that they were trying to procure money for paying off the mortgage debt and that if they would succeed they would pay off the amount. On 4th December 1936, the firm "Sitaram Budhkaran" supplied to the mortgagee timber worth Rs. 103-3-3 and this amount was credited towards the interest on the mortgage debt. On 23rd December 1936, the mortgagees raised the present suit against the two sons of Sitaram Chowkhani (defendants 1 and 2) and the two sons of defendant 1 (defendants 3 and 4) for recovery of Rs. 25,000 as principal and Rupees 25,000 as interest on the basis of the mortgage bond executed in their favour by Sitaram Chowkhani on 28th September 1926.

The case of the plaintiff mortgagees is that Sitaram Chowkhani as karta of the joint family borrowed Rs. 25,000 from them on the bond in suit in the interest and for the benefit of the joint family. Defendant 2 did not appear. The suit was contested by defendant 1 on his own behalf and on behalf of his minor sons defendants 3 and 4. Their defence is that Sitaram Chowkhani did not borrow the money on the bond in suit in the interest or for the benefit of the joint family as alleged by the plaintiffs. Their case further is that he borrowed the said money not as karta of the joint family but in his personal capacity for the purchase of a tea estate called Molan Tea Estate in partnership with two other persons who were strangers to the family. The trial Judge has found that Sitaram Chowkhani borrowed Rs. 25,000 on the bond in suit as karta of the joint family and that the loan was taken in the interest and for the benefit of the joint family, that the mortgage was ratified by defendants 1 and 2 and that the plaintiffs were entitled to get Rupees 20,777-1-9 as interest after deducting the amount paid towards interest. He has accordingly passed a preliminary mortgage decree for Rs. 45,777-1-9 with proportionate costs. Hence this appeal by the defendants. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family is defined in the following verses of Chap. I, section 1 of the Mitakshara :

"27. Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although) the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth ; but he is subject to the control of his sons and the rest, in regard to the immovable estate whether acquired by himself or inherited from his father or other predecessor ; since it is ordained, "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet to be begotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

An exception to it follows :

"28. Even a single individual may conclude a donation, mortgage or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes."

"29. The meaning of that text is this : while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like : or while brothers are so and continue unseparated ; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."

The judgment of the Judicial Committee in 6 M. I. A. 393[1] was apparently founded on these verses (59 I. A. 300[2] at pp. 305, 308). The expression "in case of need" in this judgment may be traced to the words "during a season of distress" in verse 28 and the expression "for the benefit of the estate" to the words "for the sake of the family" in the said verse (Mulla's Hindu Law, Edn. 9, p. 275). In 44 I. A. 147[3] Lord Atkinson said :

"No indication was to be found in any one of them (6 M.I.A. 393[1] at p. 423, 2 I. A. 145,[4] 4 I. A. 52[5]) as to what is, in this connexion, the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not."

In 44 I. A. 126[6] Lord Shaw said :

"Under the law of the Mitakshara, the joint family property owned, as stated by all the members of the family as coparceners, cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by one coparcener of his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and its entirety stands free of it. The rule of the Mitakshara is clear (C. 1. s. 1. v. 27) ; even the father is subject to the control of his sons and the rent in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained 'though immovables or bipeds have been acquired by a man himself a gift or sale of them should not be made without convening all the sons.'

"The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or math, or in the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or in exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded."

The answer to the question as to whether the alienation by the karta of the joint family was

1. (1854-57) 6 M. I. A. 393: 18 W. R. 81: 2 Suther 29: 1 Sar 552 (P. C.), Hunooman Persaud Pandey v. Mt. Babooee Munraj Koonweree.
2. ('32) 19 A. I. R. 1932 P. C. 182 : 137 I. C. 781: 54 All. 564 : 59 I. A. 300 (P. C.), Benares Bank Ltd. v. Hari Narain.
3. ('17) 4 A. I. R. 1917 P. C. 33 : 39 I. C. 722 : 40 Mad. 709: 44 I. A. 147 (P. C.), Palaniappa Chetty v. Devasikamony Pandara.
4. ('74) 2 I. A. 145: 23 W. R. 253 : 14 Beng. L. R. 450 : 3 Sar. 449 : 3 Suther. 102 (P. C.), Prasanna Kumari Debya v. Golab Chand Baboo.
5. ('76-77) 2 Cal. 341 : 4 I. A. 52 : 3 Sar. 681 : 3 Suther. 375 (P. C.), Konwar Doorga Nath v. Ram Chunder Sen.
6. ('17) 4 A. I. R. 1917 P. C. 61 : 39 I. C. 280 : 39 All. 437 : 44 I.A. 126 (P. C.), Sahu Ram Chandra v. Bhup Singh.

"for the sake of the family" or "for the benefit of the estate" or "for family interests" would depend on the facts of each particular case. Exhibits 2, 6, 6 (1), 6 (b) and 3 show that the mortgagor and after his death defendant 1 treated the debt as the debt of their joint family business "Sitaram—Bodhkaran." This joint family business however was not an ancestral business of Sitaram. It was started by him while his eldest son (defendant 1) was a mere boy. At the time of the mortgage, defendant 1 was 24 years old and defendant 2 was 16 years old. A new business is not within the purview of verses 27 to 29 of Chap. 1 of the Mitakshara (59 I. A. 300[2] at p. 308).

In their plaint the mortgagees simply stated that the loan was taken in the interest and for the benefit of the joint family. How the loan benefited the joint family was not stated in the plaint. The defendants in their written statement denied the allegation of the plaintiffs that the loan was taken in the interest and for the benefit of the joint family. The issues in the suit were settled on 18th March 1937. On 9th November 1937, the plaintiffs summoned the defendants to produce in Court all the account books of the firm "Sitaram Bodhkaran" from 1923 to 1937 and the cash book of the mortgaged tea estate. On 19th November 1937, defendant 1 filed an application before the trial Judge stating that some of the account books were once removed from their shop by his father to his country home in Rajputana in connexion with a claim against one Dedraj Ramballav. On 20th November 1937, the plaintiffs filed an application before the trial Judge stating inter alia that the account books of the joint family concern "Sitaram Bodhkaran" would show that the amount of the mortgage bond was taken for the purposes and benefit of the joint family, that the defendants were in possession of these account books and that they were withholding them on flimsy excuses. On 22nd January 1938, the plaintiffs again applied to the trial Judge for an order upon the defendants to produce the account books before the hearing of this suit for their inspection. On 24th January 1938, the trial Judge ordered the defendants to produce the documents in Court for inspection of the plaintiffs. The defendants however did not produce these documents. The hearing of the suit commenced on 4th February 1938. On that date plaintiff 1 Thakur Prasad Shah gave his evidence. In his examination in chief he said : "The loan was taken to spend in the garden and on timber business and on their shop business." In cross-examination he stated :

"I did not ask for account from them to show how the money was spent by them nor did I look into their account. Sitaram and Bodhkaran (defendant 1) both said that they were spending the money in the garden."

Bothram gave his evidence on 8th February. In his evidence he did not deny the statement of plaintiff 1 that he told him that the money raised was being spent for the garden. He, however, in his evidence stated that the money raised by the mortgage was not spent on the tea garden. In his cross-examination defendant 1 admitted that the expenses incurred on the tea garden were entered in the books of their joint family business "Sitaram Bodhkaran" and that that business was still a running business. P. W. 4 who was admittedly the manager of the Gogarjan Tea Estate from 1925 to 1929 in his evidence said that all money for the garden (Gogarjan Tea Estate) was taken from Sitaram Bodhkaran firm. There cannot be any doubt therefore that the money spent for running the mortgaged tea garden was supplied from the joint family firm Sitaram Bodhkaran and was entered in the account books of this firm.

It can be reasonably inferred from Exs. 2, 6 and 3 that the sum of Rs. 25,000 which was borrowed by Sitaram was entered in the account books of the firm Sitaram Bodhkaran. Defendant 1 in his evidence stated that money required for running the mortgaged tea garden in the year 1926 was obtained from his cousins. This evidence shows that in 1926 they had not sufficient money for running the tea garden. The several applications filed by the plaintiff before the hearing of the suit clearly show that the defendants had sufficient notice of the plaintiff's case that the loan was spent for running the mortgaged tea garden. Apparently, the plaintiffs called for the cash book of the mortgaged tea garden and the account books of the firm Sitaram Bodhkaran to show the amount of money which was spent after the mortgage for running the tea garden and also to show the source from which that money came. The defendants in their written statement said that the money raised on the mortgage was spent for purchasing another tea garden, namely, Mullen Tea Estate. Defendant 1 in his evidence, however, simply stated that his father purchased the Mullen Tea Estate jointly with Surajmal and Hunuman Bux. He, however, did not say that the mortgage money was spent by his father for purchasing the Mullen Tea Estate. In his evidence defendant 1 said that in 1926 the expenses for running the mortgaged tea estate were met by loan from his cousins and that the money raised on the mortgage bond in suit was not spent for the mortgaged garden. The best evidence to substantiate these statements of defendant 1 are the account books called for by the plaintiffs from the defendants. Sitaram is dead. It has been already stated that Bodhkaran did not deny the statement of plaintiff 1 that he told him that the money was spent for the garden. In order to show that the admission by Sitaram and Bodhkaran to plaintiff 1 that the money was being spent for running the garden was true plaintiffs called for the account books from the defendants. The defendants, however, refused to produce the account books on flimsy grounds. The onus is no doubt on the plaintiffs to show that the money raised on the mortgage was spent for running the garden. In 44 I. A. 98[7] Lord Shaw said :

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that 'the math has regular fair day-books; they are not now before the Court; ledgers are also maintained in the math.' These ledgers and day books were in the possession of the defendants or those of them who were heads of the institution and they are not put

7. ('17) 4 A.I.R. 1917 P.C. 6: 39 I.C. 659: 40 Mad. 402 : 44 I. A. 98 (P.C.), Murugesam Pillai v. Gnanasambandha Pandara Sannadhi.

in evidence. The proposition that these defendants
a challenged was that the expenses incurred had been incurred for the math and were necessary for its purposes. The best assistance to a Court of justice would have been a scrutiny of these documents, and their Lordships feel free to conclude that if they had been by their entries confirmatory of the defendants's view the defendants would have brought them into Court."

The observations of Lord Shaw apply to the facts in the present case. Plaintiff 1 in his evidence said that both Sitaram and defendant 1 told him that the mortgage money was being spent by them for the tea garden. It was open to the defendants to show that this statement of plaintiff 1 was false by the production of the account books called for by the plaintiffs. They, however, did not do so. We have therefore no hesitation in believing the state-
b ment of plaintiff 1 that Sitaram and defendant 1 admitted that the money borrowed was being spent for the garden. From the withholding of the account books called for by the plaintiffs it would not be unreasonable to presume that if the account books had been produced that would have shown that the entire amount raised by the mortgage was spent for running the tea garden. In view of the facts and circumstances of this case, we are of opinion that the money raised with mortgage in suit was spent for running the mortgaged tea garden. This tea garden is admittedly a joint family property. The evidence of defendant 1 is that at the time of the mortgage, tea was being grown over 60 to 70 acres of land in this garden and that 500 to 550 maunds of tea were used to be manufactured in the garden factory. To maintain the garden and factory evidently money was neces-
c sary. Money being not available for maintaining the garden which was a source of income to the joint family Sitaram had to borrow money from the plaintiffs. We therefore hold that interests of the joint family justified the expenditure of the money raised by loan on the mortgage bond in suit and that all the members of the joint family are bound by this transaction. The trial Judge was therefore right in decreeing the suit.

In the decree passed by the trial Judge there is a direction that if the money realised by the sale of the mortgaged property be not sufficient for payment of the decretal amount plaintiff shall be at liberty to apply for a personal decree against the defendants for the balance. The learned advocate appearing for the plaintiff-respondents conceded that the defendants were not personally liable for the mortgage money and that the trial Judge was wrong
d in passing a personal decree against the defendants for the balance. The personal decree against the defendants is therefore set aside. Subject to this modification the decree of the trial Judge is affirmed and the appeal is dismissed with costs to the plaintiff-respondents. Hearing fee is assessed at 5 gold mohurs.

PAL J.—I agree that this appeal should be dismissed and I respectfully concur in the views of the law and of the fact taken by my learned brother. I would only add a few words. Property is not an institution having a fixed form constantly remaining the same. In reality it has assumed the most diverse forms and is still susceptible of great and unforeseen modifications. What is the best form of property at any given moment we can only learn from the study of man's nature, of his wants and sentiments and the ordinary consequences of his acts. In the Sanskrit language, in which etymo-
e logies often disclose a complete philosophy, the words for 'property' and 'ownership' are स्वत्व and स्वामित्व and these involve a certain relation between persons and things. It will serve no useful purpose to examine how far the Smriti texts relied on by Vijnaneshwara support the propositions laid down by him. As was pointed out by the Judicial Committee in 12 M. I. A. 397[8] at pp. 435-436 the duty of a Judge while administering Hindu law "is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities (Smritis), as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."

The commentators, while professing to interpret
f the law laid down in the Smritis, really expounded the customs and usages which they found prevailing in the locality. This is why their interpretations have been accepted as authoritative and it is no longer permissible to go beyond such interpretations to the original Smriti texts. The Smriti texts seem to refer to an age when property was still primarily and essentially a group affair. In its origin, its force, its continuance as property, it was still chiefly an exercise of group energy. The operation of a group function securing the attachment of the members is perhaps the most primary aspect of property which we can distinguish. It is an attribute of self-conscious persons to desire objective possessions in exclusion of all other possessing. Guarantee of this desire to a degree, and in certain forms, in enforcing as property certain claims to possession, is a part of the price which the group
g pays for its continuance as a group. When the family becomes certain and establishes itself its members take to the cultivation of land and later make the beginning of ownership, which appears as a collection of means suitable to the preservation and development of that collective body. Ownership in a family undergoes modification according to the nature and purpose of the family itself, which is an interpenetration of persons, a communion of sentiments, affections, ideas and wills. A sort of co-ownership is bound to arise in these circumstances. The sons, participators in the community, did not acquire upon the death of the father a new right but merely obtained greater freedom in the administration of the goods. In the family there are superiors and inferiors. The inequality does not render co-ownership impossible, but only makes the different members enjoy an unequal property right.
h To the father, that is to the head, belongs the decision of what are necessary or useful expenses of the family according to the norm of a wise control.

Vijnaneshwara bases 'property' on popular recognition and advocates what is known as जन्मस्वत्ववाद as distinguished from उपरमस्वत्ववाद. According to him everyone ought to have property as it is necessary for his support. For every man property is a condition of his existence and development. It is based on the actual nature of man, and should therefore be regarded as an original, absolute right which is not the result of any outward norm, such as occupation, labour or contract. The right springing directly from human nature, the title of being a man is sufficient to confer a right of property.

8. ('67-69) 12 M.I.A. 397: 10 W.R. 17: 1 Beng.L.R. 1 : 2 Suther 135 : 2 Sar. 361 (P.C.), Collector of Madura v. Mootoo Ramalinga.

Vijnaneshwara only limits his theory to a son and grandson and confines it within the compass of a family. The right of property includes the conditions and means for the acquisition, retention and employment of property and comprises at the same time the judicial actions given to the proper person for the exercise of ownership. After explaining how 'property' is based on popular recognition लोकप्रसिद्धमेवस्वत्वम्, Vijnaneshwara proceeds to examine whether property arises from birth or from the death of the prior owner. His conclusion is that property in the paternal (पैतृके) and grandpaternal पैतामह estate is by birth ; पैतृके पैतामहेच द्रव्ये जन्मनैवस्वत्वम् ।

Even then 'the father has independent power in the disposal of effects other than immovable for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of family, relief from distress and so forth ;

तथापि पितुरावश्यकेषु धर्मकृत्येषु वाचनिकेषु प्रसाददानकुटुम्बभरणापद्विमोक्षादिषु च स्थावरण्यतिरिक्तद्रव्यविनियोगे स्वातंत्र्यमिति स्थितम् ।

After propounding the proposition that property arises from birth in the paternal as well as in the grand-paternal estate, Vijnaneshwara proceeds to explain to what extent, in spite of such co-ownership in sons and grandsons, the property may be disposed of by the father, father, not as guardian of his sons, but as a co-owner. The co-owner has the duty and, therefore, the power to employ his wealth to satisfy individual needs and especially his own needs, and to employ his wealth for the development of his physical, intellectual and moral forces. The co-owner has the duty and therefore, the power to employ the property to the satisfaction of the needs of the family. But he is subject to the control of his sons and the rest in regard to immovable estate, whether acquired by himself or inherited from his father or other predecessor.

स्थावरे तु स्वार्जिते पित्रादिप्राप्ते च पुत्रादिपारतंत्र्यमेव । 'स्थावरं द्विपदं चैव यद्यपि स्वयमर्जितम्। असंभूय सुतान्सर्वान् न दानं न च विक्रयः॥ ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः । वृत्तिंच तेऽभिकाङ्क्षन्ति न दानं न च विक्रयः॥' इत्यादिस्मरणात् ।

Since it is ordained "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten and they who are still in the womb require the means of support, no gift or sale should, therefore, be made.

अस्यापवादः An exception to it follows :

'एकोऽपि स्थावरे कुर्याद्दानाधमनविक्रयम् । आपत्काले कुटुम्बार्थे धर्मार्थेच विशेषतः॥' इति ।

"Even a single individual may conclude a donation mortgage or sale of immovable property during a season of distress for the sake of family and especially for pious purposes."

अस्यार्थः The meaning of the text is this :

अप्राप्तव्यवहारेषु पुत्रेषु पौत्रेषु वाऽनुज्ञानादावसमर्थेषु भ्रातृषु वा तथाविधेष्वविभक्तेष्वपि सर्वकुटुम्बव्यापिन्यापादि तत्पोषणे वावश्यकर्तव्येषु च पितृश्राद्धादिषु स्थावरस्य दानाधमनविक्रयमेकोऽपि समर्थः कुर्यादिति ।

While the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable, may conclude a gift, hypothecation or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties such as the obsequies of the father or the like, make it unavoidable.

यत्तुमनुवचनम् — 'अविभक्ता विभक्ता वा सपिण्डाः' स्थावरे समाः। एको ह्यनीशः सर्वत्र दानाधमन विक्रये॥ इति ।

"Separated kinsmen, as those who are unseparated, are equal in respect of immovables ; for one has not power over the whole to make a gift, sale or mortgage".

तदप्यविभक्तेषु द्रव्यस्य मध्यस्थत्वादेकस्यानीश्वरत्वात् सर्वाभ्यनुज्ञावश्यं कार्य्या ।

This passage from Manu must be interpreted: "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common",

विभक्तेषु उत्तरकालं विभक्ताविभक्तसंशयव्युदासेन व्यवहारसौकर्याय सर्वाभ्यनुज्ञा ।

"But among separated kindred, the consent of all tends to the facility of the transaction by obviating any future doubt, whether they be separate or united."

न पुनरेकस्यानीश्वरत्वेन "It is not required, on account of any want of sufficient power in a single owner".

अतो विभक्तानुमतिव्यतिरेकेणापि व्यवहारः सिद्ध्यत्येवेति व्याख्येयम् ।

and the transaction is consequently valid even without the consent of separated kinsmen.

यदपि — 'स्वग्रामज्ञातिसामन्तदायादानुमतेन च हिरण्योदकदानेन षड्भिर्गच्छति मेदिनीति ।

In the text which expresses "Land passes by six formalities; by consent of townsmen, of kinsmen, of neighbours and of heirs and by gift of gold and of water".

तत्रापि ग्रामानुमतिः। 'प्रतिग्रहः प्रकाशः स्यात्स्थावरस्य विशेषतः' इति स्मरणात् व्यवहारप्रकाशनार्थमेवापेक्ष्यते न पुनर्ग्रामानुमत्या विना व्यवहारासिद्धिः ।

Consent of townsmen is required for the publicity of the transaction since it is provided that "acceptance of a gift, especially of land, should be public", but the contract is not invalid without their consent. The approbation of neighbours serves to obviate any dispute concerning the boundary. The use of the consent of kinsmen and of heirs has been explained.

पैतृके पैतामहे च, धने जन्मनैव स्वत्वेऽपि विशेषं 'भूर्या पितामहोपात्ता' इत्यत्र वक्ष्यामः ।

In respect of the right by birth, to the estate paternal or ancestral, we shall mention a distinction

under a subsequent text. (Section 53). Vijnaneshwara says that although property arises by birth in paternal as well as in grand-paternal estate, there is a distinctive peculiarity in dealing with them. The peculiarity referred to is explained by him later on while commenting on the sloka

भूर्या पितामहो पात्ता निबन्धो द्रव्यमेव वा। तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि॥

"For the ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody or in chattels (which belonged to him)." He says :

पितामहेन प्रतिग्रहविजयादिना लब्धं तत्र पितुः पुत्रस्य च स्वाम्यं लोकप्रसिद्धमिति कृत्वा विभागोऽस्ति।

In such property, which was acquired by the paternal grandfather, through acceptance of gifts or by conquest or other means (as commerce, agriculture or service) the ownership of father and son is notorious; and therefore partition does take place.

हि यस्मात्तत्सदृशं समानं तस्मान्न पितुरिच्छयैवविभागो नापि पितुर्भागद्वयम्।

For, or because, the right is equal or alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share.

* * * *

So likewise the grandson has a right of prohibition if his unseparated father is making a donation, or a sale, of effects inherited from the grandfather :

पित्रार्जिते न तु निषेधाधिकारः। तत्परतन्त्रत्वात्। अनुमतिस्तु कर्तव्या।

but he has no right of interference, if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependant.

तथा हि—पैतृके पैतामहे च स्वाम्यं यद्यपि जन्मनैव, तथापि पैतृके पितृपरतन्त्रत्वात् पितुश्चार्जकत्वेन प्राधान्यात् पित्रा विनियुज्यमाने स्वार्जिते द्रव्ये पुत्रेणानुमतिः कर्तव्या।

Consequently the difference is this: although he has a right by birth in his father's and his grandfather's property, still since he is dependent on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property.

पैतामहे तु द्वयोः स्वाम्यमविशिष्टमिति निषेधाधिकारोऽस्तीति विशेषः।

But since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property).

The propositions of law as propounded by Vijnaneshwara through the above texts seem to be the following: 1. It is certain that property in the paternal (पैतृक) as well as grand-paternal estate (पैतामहे) arises by birth: 2. Although property arises by birth in paternal as well as in grand-paternal estate, there is the following distinctive peculiarity in them:—(a) In regard to property derived from the grandfather, the father's right of alienation is restrained by the co-equal co-ownership of the son; (b) in regard to the properties acquired by the father himself the son has no right to object to the father's alienation but must acquiesce therein; (i) although he has a right by birth in his father's as well in grandfather's property, still, since he is dependent on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself the son must acquiesce in the father's disposal of his own acquired property; (ii) but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property.

From the above, two propositions of law seem to follow, viz., that the father's power of alienation without the concurrence of the son is absolutely unrestrained in respect of his self-acquired property and is absolutely restrained in respect of the grand-paternal properties. Both the propositions, however, would require some qualification, first, with regard to self-acquired immovables and, secondly, with regard to grand-paternal moveables:

(a) As regards the self-acquired immovable there is some apparent conflict in the rules given in the Mitakshara: According to Chap. 1, S. V, 10, since the father has a predominant interest as it was acquired by himself the son must acquiesce in the father's disposal of his own self-acquired property. This is quite general and does not make any distinction as to immovables. According to Chap. 1, S. 1, 27, however, the father is subject to the control of his sons in regard to the immovable estate though acquired by himself. This conflict is reconciled by reading the general rule as subject to the special rule regarding immovables. Thus, father's absolute power of alienation in his self-acquisition is limited to properties other than immovables. As regards immovables his power is restricted.

This is what seems to have been the view of Vijnaneshwara. But the rule has been understood in a different way by our Courts of law and it is now settled law that the father has unrestrained power in respect of his self-acquisitions, both moveable and immovable: 25 I. A. 54.[9] The passage in the Mitakshara prohibiting the alienation of his self-acquired immovable property by the father without the assent of the sons has been construed as laying down a rule founded merely on moral and religious considerations, carrying with it no legal obligation. Again while making his own deductions from the text :

'एकोऽपि स्थावरे कुर्याद्दानाधमनविक्रयम्। आपत्काले कुटुम्बार्थे धर्मार्थे च विशेषतः॥'

Vijnaneshwara is not expounding the position of a guardian of an infant or of a mere manager. He is discussing the right of disposal of a co-owner as such. Whatever be the practical value of the distinction, he was thinking here of the power of disposal of a co-owner and not of a manager or guardian of an infant. After propounding the proposition that property arises from birth in the paternal as well as in the grand-paternal estates Vijnaneshwara proceeds to explain to what extent in spite of such co-ownership in sons and grandsons, the property may be disposed of by the father, father, not as guardian of his son, but as a co-owner. Our courts of law, however, have developed a different set of proposition. But even if such a proposition be not in strict accordance with the Mitakshara view, it must be taken to be the settled law: *Communis error facit legem.* While examining

9. ('98) 20 All. 267 : 25 I.A. 54 : 7 Sar. 279 (P.C.), Balwant Singh v. Rani Kishori.

the decided cases on the point three things must be
a kept distinct : 1. The power of the father *(a)* as mere manager or guardian *(b)* as co-owner of the joint property. 2. The power of the father *(a)* to make a binding loan *(b)* to dispose of the joint property for the loan. 3. The validating occasion *(a)* for loan *(b)* for disposal of the joint property.

As regards the power of the father as the manager of the infant's share or as his guardian neither the Smriti texts nor the commentaries will be of much assistance. The Hindu Rishis made it a duty of the king to look after the infants' properties and consequently the legal position in this respect must be determined with reference to the principles of justice equity and good conscience. As regards the guardianship of an infant, the Hindu law vests it in the king as *parens patriæ*.

According to Manu :

b बालदायाधिकम् रिक्थम् तावद्राजानुपालयेत्। यावत् स स्यात् समावृत्तो यावच्चातीतशैशवः।

Manu VIII, 27

According to Gautama :

रक्ष्यं बालधनमाव्यवहारप्रापणात् समावृत्तेर्वा.

Gautam X, 48

Vasistha says :

राजा बालानाम् प्राप्तव्यवहारप्रापणात् आपत्काले तु तद्वत्।

The king might entrust others with the infants' affairs. According to Narada, of the persons competent to be the guardian, father is the fittest:

तयोरपि पिता श्रेयान् बीजप्राधान्यदर्शनात् अभावे बीजिनो माता तदभावे तु पूर्वजः

c The father has the first claim; after him comes the mother, and then comes the elder brother. His power as such guardian will be determined by the king and will extend to whatever may be deemed justly required for the benefit of the infant.

The power of the father as co-owner and as the managing co-owner is determined by the commentaries. The Mitakshara in Ch. 1 paras. 27 to 29 makes provisions in this respect. An examination of the decided cases will however disclose that these verses have been taken to contain the rules regarding the power of the father as manager of the estate or as guardian of the infant. The power of the father or grandfather to make a binding loan is now settled by the decision of the Judicial Committee in 51 I.A. 129.[10] His power of disposal of the property in satisfaction of or for the purpose of securing the
d loan taken by him is, however, not co-extensive with the power of making a binding loan. The power of disposal of the family property is limited to certain specified occasions, specified in Mitakshara, Chap. 1, S. 1, verses 28 and 29. From the above it is clear that the validating occasion for a loan made by the father is much wider than that for creating a right in rem in respect of the joint family property. In 6 M.I.A. 393[1] at p. 423, the Rt. Hon'ble Knight Bruce L. J. observed :

"The power of the manager for an infant heir to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona
e fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted mala fide, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing that the
f manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide
g creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

It should be remembered that in this case their Lordships were considering—(1) the binding effect of a mortgage bond executed by the Ranee in the character of guardian of the infant, (2) the binding nature of certain debts, antecedent to the bond. As regards the binding character of a debt as such, the text in the Mitakshara has no direct bearing. As regards the bond, the Ranee was not a co-owner or coparcener with the infant; consequently, strictly speaking, the texts of the Mitakshara in Chap. 1, S. 1 did not apply to this case and their Lordships did not refer to these texts. It has however been observed by the Judicial Committee in 59 I.A. 300[2] at p. 308 that the judgment in 6 M.I.A. 393[1] was founded apparently on these verses. In 59 I.A. 300,[2] the Rt. Hon'ble Sir Dinshah Mulla in delivering
h the judgment of the Judicial Committee observed :

"Next it was argued that a business started by the father as manager, even if new, must be regarded as ancestral. Their Lordships do not agree. It is in direct opposition to the ruling of the Board in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*.[11] The judgment in that case proceeded on the broad ground that the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him. That, no doubt, was a Dayabhaga case, but there is no distinction in principle on this subject between a case under the Dayabhaga and one under the Mitakshara. The power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belong-

10. ('24) 11 A.I.R. 1924 P.C. 50 : 77 I.C. 689 : 46 All. 95 : 51 I.A. 129 (P.C.), Brij Narain v. Mangla Prosad.

11. ('22) 9 A.I.R. 1922 P.C. 237 : 67 I. C. 124 : 49 I.A. 108 : 49 Cal. 560 (P.C.).

ing to the family is defined in verses 27 to 29, Chap. 1 of the Mitakshara. The judgment of the Board in 6 M. I. A. 393,[1] relied on by the bank, was founded apparently on those verses. A new business, their Lordships think, is not within the purview of those verses. It does not make any difference that the manager starting the new business is the father. Their Lordships find that the balance of authority in India is in accordance with this view."

It may be pointed out that these observations were made while considering the validity or otherwise of a mortgage, a part of the consideration for this being an item of loan for a new business (theka business) started by the father. The minor members who were minors also at the date of the mortgage contested the claim. The necessity created by the new business was considered as not a necessity contemplated by the verses. The question whether a father can start a fresh business or not, of course, is not covered by any text. In *Sanyasi Charan's case*,[11] their Lordships of the Judicial Committee had before them the question how far a coparcener can bind an infant by starting a new business. But in neither case it has been decided what will be the position if the business be adopted (as in the present) as a family business and the minors even after attaining majority continue to enjoy the benefit of the same and claim it as their joint business. In my judgment in such a case its requirements will be the requirements of the family and will be covered by the verses. In 54 I. A. 211[12] at page 216 Sir John Wallis observed :

"Where there is a joint family business, the manager, as already pointed out, has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business. The learned Judges of the High Court were of opinion that, as in this case the business had recently resulted in loss, the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of by sale. As regards the latter question, it is not clear that borrowing, probably at a high rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide. It was equally a question for the manager whether it would be better to raise more money or to close down the business and it would, in their Lordships' opinion, be unreasonable to require a lender or purchaser to go into questions of this kind, as to which he would rarely be in a position to form a sound opinion."

Vijnaneshwara explains the words "आपत्काले कुटुम्बार्थे and धर्मार्थे" thus :

अप्राप्तव्यवहारेषु पुत्रेषु पौत्रेषु वाऽनुज्ञानदानाद्वा असमर्थेषु भ्रातृषु वा तथाविधेष्वविभक्तेष्वपि (१) सर्वकुटुम्बव्यापिन्यामापदि (२) तत्पोषणे वा (३) अवश्यकर्तव्येषु च पितृश्राद्धादिषु स्थावरस्य दानाधमनाविक्रयमेकोऽपि समर्थः कुर्यादिति ।

The expression कुटुम्बार्थे explained by Vijnaneshwara as तत् (कुटुम्ब) पोषणे i. e., as required for maintaining the family, has somewhat been extended by judicial interpretation so as to include the cases of "benefit of the estate" or "benefit of the family." The expression literally construed would bear this meaning. Literally, it may mean "for the sake of the family" and might have been used to limit the power to the cases of family requirements as distinguished from the individual requirement of the head. The expression would embrace not only the case of immediate necessity but also of benefit. The present benefit is indeed a provision for future need. The Smriti text itself seems to be the product of an age when the problem had already arisen of combining the free use of power and individual initiative with their control in the interests of the family — of giving scope and yet preventing the evil arising from any possible irresponsibility. If the power of disposal is withdrawn from the cases of self-requirement of the co-owner but is extended to the cases of family requirements, the chance of its irresponsible exercise is eliminated to a great extent. The entire verse has now been taken to cover also the case of an expenditure for the family benefit. Thus, in 44 I.A. 126[6] at page 128, Lord Shaw in delivering the judgment of the Judicial Committee, observed :

"The mortgagor was the defendant Bhup Singh. His sons and grandsons were also defendants. Under the Mitakshara law they are, as members of a joint family, coparceners in the ownership of the property over which the mortgage was granted. It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by Courts of law on the exception to the principle that the principle itself has been apt to be forgotten."

"Under the law of Mitakshara the joint family property owned, as stated by all the members of the family as coparceners, cannot be the subject of a gift, sale, or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale, or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and its entirety stands free of it. The rule of the Mitakahara is clear (C. 1, S. 1, V. 27); even the father 'is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor, since it is ordained'; 'though immovables or bipeds have been acquired by a man himself a gift or sale of them should not be made without convening all the sons'."

The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or math, or in the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded.

12. ('27) 14 A. I. R. 1927 P. C. 121 : 101 I.C. 373: 8 Lah. 597 : 54 I. A. 211 (P. C.), Niamat Rai v. Dindayal.

"This view is in no way novel. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[13] Sir James Colvile said : "All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the coparceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required. But for the exception immediately to be noted, these two principles would cover the ground, and it would be clear that if the father of a family purported or presumed to mortgage or sell the joint family estate the mortgage or sale would be entirely ineffectual."

It may only be noticed here that the limited power of disposal given to father is looked upon by Vijnaneshwara himself as an exception to the fundamental principles. In 44 I. A. 147,[3] Lord Atkinson observed :

"It is necessary in order to ascertain the sense in which such general and elastic terms as 'necessity' and 'benefit of the estate' were used in these authorities to examine the facts in reference to which the terms were used. In the first case a certain mortgage executed by a Ranee in her character, as was found, of the guardian of her infant son and manager of his estates was impeached. By it those estates were charged with the payment of a debt due by the deceased father of the infant to the mortgagee and already secured upon the property, and also charged with the payment of a sum advanced by the mortgagee to be applied in payment of the arrears of revenue due to the Government in respect of these estates, and thus save them from sequestration. There was no suggestion that the debt of the infant's father was contracted for illegal or immoral purposes. It was not disputed that according to Hindu law a son is bound to pay his father's debts if not of that character and that the ancestral property descending to the son may be charged by him with payment of them. It is clear that no greater benefit could well be conferred upon an estate than to save it from extinction by sequestration; the payment of the arrears of revenue by the mortgagee was therefore in the nature of salvage expenditure. The case was not finally decided by the Board. It was sent back to the Court below for further inquiry on some of the many points raised; but to prevent a further miscarriage Knight Bruce L.J. thought it right to state the general principles to be applied to its final decision. His words so much relied upon run as follows : 'The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded.' He continues: 'Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and they do not think that under such circumstances he is bound to see to the application of the money."

This was the case of sale of an idol's property by its shebait and certainly the Mitakshara verses had no direct application. Referring to 2 I. A. 145[4] at p. 151, 4 I.A. 52[5] and 6 M.I.A. 393[1] at p. 423 Lord Atkinson observed :

"So that the only specific point touching the present case actually decided in these three authorities was this, that a debuttar estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connexion, the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation however of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not."

The three illustrations of benefit will be covered by the expression आपत्काले. In order to come within the other expression कुटुम्बार्थे it may rightly be contended that the occasion need not be similar to any of those enumerated by the Judicial Committee in this case. It has been pointed out above that the expression कुटुम्बार्थे can convey the meaning of 'for the sake of kutumba.' Vijnaneshwara himself however took it to mean तत्पोषणे 'required for maintaining the kutumba or members of the family'. All the three expressions, आपत्काले, कुटुम्बार्थे and धर्मार्थे according to Vijnaneshwara, convey the sense of 'necessity.' Father's power of disposal for the benefit of the estate" or the "benefit of the family" is an extension beyond what is conferred on him by the verse (Mitakshara, Chap. I, S. 1 paras. 27 to 29). A new content has thus been poured into the old norm expressed by the verse and, with due deference, I would say, very justly. The conditions of modern life are not the same as in the days of Vrihaspati or Vijnaneshwara and with all these changes it is difficult to turn a deaf ear to voices unless they come from the tomb. The relevant propositions that may be said to have been now established by the judicial decisions may thus be summarised : (1) The power defined in Chap. I, S. 1, paras. 27, 28 and 29, of the Mitakshara is now taken to be the power of the manager of a joint family governed by the Mitakshara law to alienate immovable property belonging to the family. (2) The decision of the Judicial Committee in 6 M.I.A. 393[1] is founded on these verses: 59 I. A. 300[2] at p. 305. (3) The power conferred by the verses is wide enough to include the case of expenditure made 'in the interest and for the benefit' of the joint family. The expression कुटुम्बार्थे which means 'for the sake of the family,' is wide enough to cover such cases of benefit.

In the case before us the plaintiff mortgagee asserts that Sitaram Chowkhani as karta of the joint family borrowed Rs. 25,000 from them on the bond in suit in the interest and for the benefit of

13. (80) 5 Cal. 148 : 6 I.A. 88 : 4 C.L.R. 226 : 3 Suther 589: 4 Sar. 1 (P.C.).

the joint family. The money borrowed was spent for the requirements of the mortgaged tea garden admittedly belonging to the joint family, and the interests of the family justified the expenditure. It has been established in this case that the family was in need of money for the purpose of the tea garden and it is also the case of the defendant that money had to be borrowed for this purpose. But his case is that it was borrowed from another source (viz., from his cousins). The Court below could not accept this defence story and we too have felt same difficulty.

G.N./R.K. *Appeal dismissed.*

Hindu Law —
(a) ('40) Mulla, Page 275, Pt. (q) and Page 276.
('38) Gour, Page 453, Pt. 6.
(b) ('40) Mulla, Page 260, Pts. (q), (r) and (s).
('38) Gour, Page 486, Pt. 5 and Page 487, Pt. 2.
(c) ('40) Mulla, Page 277, S. 244.
('38) Gour, Page 516, S. 153.
(d) ('40) Mulla, Page 10, Pts. (h) and (i).
('38) Gour, Page 49, Pt. 1.
(e) ('40) Mulla, Page 237, Pts. (p) and (q).
('38) Gour, Page 747, Pt. 8.
(f) ('40) Mulla, Page 292, S. 256; Page 356, S. 295.
('38) Gour, Page 499, Pt. 6 and Page 526, S. 159.

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* A. I. R. (29) 1942 Calcutta 321

B. K. MUKHERJEA AND BISWAS JJ.

Masrab Khan — Appellant

v.

Debnath Mali alias Abhu Mali and others — Respondents.

Appeal No. 258 of 1939, Decided on 11th August 1941, from appellate order of Sub-Judge, 3rd Court, Mymensingh, D/- 5th August 1939.

(a) Civil P. C. (1908), S. 37 — 'Includes' — Meaning and effect explained.

The word 'includes' as used in S. 37, though it extends the meaning of the expression "Court which passed the decree" in one sense, does in another sense restrict it, and the effect of the word is to exclude, under the circumstances specified in cl. (a) and cl. (b) of the section, the original Court and substitute for it another Court which for purposes of the section is to be regarded as the only Court which passed the decree: View of Garth C. J. in 6 Cal. 513, *Dissent.* [P 322 C 2]

(b) Civil P. C. (1908), S. 37 (b)—"Jurisdiction to execute it"—Meaning explained.

The expression "jurisdiction to execute it" as used in S. 37 (b), Civil P. C., does mean and include the competency of the Court to entertain an application for execution of the decree. Even, if in the circumstances of a particular case a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it. It still remains the competent Court for purposes of execution, though the decree-holder might have to apply for transmission of the decree to another Court for the purpose of obtaining the relief which he wants : 6 Cal. 513, *Rel. on.* [P 323 C 1]

(c) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 13 — Order under S. 13 (2) does not effect transfer of jurisdiction—S. 37, Civil P. C., does not apply.

An order under S. 13 (2), Civil Courts Act, does not effect a transfer of jurisdiction. It merely distributes, as a matter of convenience and with reference to certain local areas, the civil business amongst two or more Courts each of which has jurisdiction over the whole area. In such cases neither of the Courts would lose the jurisdiction which it acquired under S. 13 (1) of the Act and S. 37, Civil P. C., does not apply : 25 Cal. 315; 28 Cal. 238 and ('21) 8 A.I.R. 1921 Pat. 152, *Rel. on.* [P 323 C 1, 2]

(d) Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 13 (2)—Assignment of business under, is not transfer of business within S. 150, Civil P. C.

An assignment of business under S. 13 (2), Bengal Agra and Assam Civil Courts Act, is not a transfer of business within the meaning of S. 150, Civil P. C: ('22) 9 A.I.R. 1922 Cal. 41 and ('38) 25 A.I.R. 1938 Cal. 193, *Rel. on.* [P 323 C 2]

*** (e) Limitation Act (1908), Art. 182 (5) — Subsequent to mortgage decree area of mortgaged property assigned to another Court — Execution application filed in latter Court is not one made to proper Court and does not save limitation.**

Where subsequent to the passing of a mortgage decree, the area where the mortgaged property was situated was assigned to another Court under S. 13 (2), Bengal, Agra and Assam Courts Act, and the decree-holder filed an application for execution in the latter Court :

Held that the first Court did not cease to have jurisdiction to execute the decree by reason of the order under S. 13 (2), Civil Courts Act, and the latter Court could not consequently be regarded as the Court which passed the decree within the meaning of S. 37, Civil P. C. Nor could the decree-holder take advantage of S. 150, Civil P. C., as there was no transfer of business within meaning of that section. Therefore, it could not be said that the latter Court was competent to entertain the application for execution which was presented to it and the application filed in it not being to the proper Court would not save limitation : *Case law referred.* [P 323 C 2; P 324 C 1]

Ramendra Chandra Roy and Chandra Nath Mookerjee — for Appellant.

Birendra Kumar Dey — for Respondents.

B. K. MUKHERJEA J. — This appeal is on behalf of the decree-holder and it is directed against an appellate order of the Subordinate Judge, third Court, Mymensingh, dated 5th August 1939, reversing the order of the Munsif, First Court, Kishoreganj, made in a proceeding under S. 47, Civil P. C. The material facts lie within a narrow compass and are not disputed. The appellant obtained a mortgage decree against the defendants-respondents in the Court of the First Munsif at Kishoreganj and the decree was made final on 7th December 1932. The first application for execution was made on 3rd December 1935 and it was filed in the Court of the Second Munsif at Kishoreganj and not in that of the First Munsif which passed the decree, the ground alleged being that subsequent to the passing of the decree the particular area where the mortgaged property was situated was assigned to the Munsif, Second Court, under S. 13 (2), Bengal Agra and Assam Civil Courts Act. This application was dismissed for default on 10th December 1935 The present application for execution was presented in the Court of the First Munsif on 15th November 1938.

The whole controversy centres round the point as a to whether the first application for execution was an application made to the proper Court within the meaning of Art. 182, Cl. (5), Limitation Act. If it was, limitation would run from 10th December 1935 when the final order was made in the proceeding, and the present application would be in time. If not, the application must be held to be time-barred. The trial Court decided this point in favour of the decree-holder. The lower appellate Court has decided against him. The sole point for our consideration in this appeal is whether the view taken by the lower appellate Court is right. To determine this point it is necessary first of all to turn to the relevant provisions of the Code of Civil Procedure. Under S. 38 of the Code, a decree can be executed by the Court which passed the decree or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree', b and cl. (b) of that section lays down that the expression shall be deemed to include "where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

The only other relevant provision is contained in S. 150, Civil P. C., which runs as follows :

"Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred."

The decree-holder can succeed in saving limita- c tion in the present case, if he can make out either of two alternatives, namely that the Court of the Second Munsif of Kishoreganj was a Court which passed the decree within the meaning of S. 37 (b), Civil P. C., or that the business of the Court of the First Munsif was transferred to that of the Second Munsif as contemplated by S. 150 of the Code. So far as the first alternative is concerned, it is conceded by Mr. Roy who appears for the decree-holder that the Court of the First Munsif of Kishoreganj not only had not ceased to exist, but it was quite competent even now to entertain an application for execution of the decree which was passed by it. He contends, however, that as it could not sell the property which was no longer within its territorial jurisdiction, it must be deemed to have ceased to have jurisdiction to execute the decree within the meaning of S. 37 (b), Civil P. C., and as a mortgage d suit in respect of the same property would now have to be instituted in the Court of the Second Munsif, that Court must be regarded as the Court which passed the decree as contemplated by section 37 (b).

Mr. Roy's contention in substance is that the application for execution could be filed either in the Court of the First Munsif or in that of the Second Munsif, and in support of his contention he relies upon certain decisions of our Court which are to be found in 6 Cal. 513[1] and 28 Cal. 238.[2] In 6 Cal. 513,[1] there was a mortgage decree passed by the Court of the Munsif at Manbazar on 5th December 1876. On 5th December 1879, an application was made to the same Court which was then sitting at Burrabhazar for execution of the decree. In the e meantime the particular area in which the mortgaged property was situated had been removed from the Munsif of Manbazar to the Munsif of Katra. Objections were raised that the application for execution had not been made to the proper Court and that the execution creditor was bound to apply to the Munsif of Katra within whose jurisdiction the mortgaged property then was. This contention was given effect to by both the Courts below, but their decision was reversed on second appeal by a Division Bench of this Court, which held that the application for execution was rightly made to the Court of the Munsif at Manbazar. The decision itself is of no assistance to Mr. Roy, for, it would only support the contention that the Court of the First Munsif of Kishoreganj was still the proper Court to which his client could apply for execution of the decree. Mr. Roy, however, relies on certain f observations made by Garth C. J. in course of his judgment, which were to the effect that the Court of the Munsif of Katra could also be regarded as a Court which passed the decree within the meaning of S. 649 of the old Civil Procedure Code, which corresponds to S. 37 of the present Code. In construing S. 649 (now S. 37), Civil P. C., the learned Chief Justice observed as follows :

"This clause which explains the meaning of the expression 'the Court which passed the decree' does not exclude the Court which originally passed the decree, as being a Court to which the application should be made, but only includes another Court ; and I take the meaning of the clause to be this that when the Court which passed the decree had ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it had ceased to have jurisdiction to exe- g cute the decree, or to the Court which, if the suit wherein the decree was passed were instituted at the time of making the application to execute it, would have jurisdiction to try the suit."

As it was not necessary to decide for purposes of that case as to whether the Katra Court was a competent Court to which the application for execution could properly be made, these observations could rank only as obiter, though, coming from such a high authority, they are entitled to the greatest respect. It is pertinent, however, to point out that Field J., who sat with the learned Chief Justice did not endorse that view of the law, and, on the other hand, expressly held in course of his judgment that the Court at Manbazar did not cease to have jurisdiction to execute the decree within the meaning of S. 649 (now S. 37), Civil P. C., by reason of the alteration of the local limits of its juris- h diction. Speaking for ourselves, we find it somewhat difficult to accept the interpretation which Garth C. J. put upon S. 649, Civil P. C. It seems to us that the word 'includes' as used in the section, though it extends the meaning of the expression 'Court which passed the decree' in one sense, does in another sense restrict it, and that the effect of the word is to exclude, under the circumstances specified in cl. (a) and cl. (b) of the section, the original Court and substitute for it another Court which, for purposes of the section, is to be regarded as the only Court which passed the decree.

Thus, when a decree is passed in exercise of appellate jurisdiction as contemplated by cl. (a) of S. 37, it cannot be said that the word 'include' would not exclude the appellate Court which passed the decree and that both the original and the appellate Courts are proper Courts for execution, to either of which

1. ('81) 6 Cal. 513 : 7 C. L. J. 521, Lutchman Pandeh v. Muddun Mohan.
2. ('01) 28 Cal. 238 : 5 C. W. N. 150, Jahar v. Kamini Debi.

an application for execution of the decree could be made. Similarly, to bring a case within the purview of cl. (b) of the section, it is essential that the Court which originally passed the decree has ceased to exist or to have jurisdiction to execute it, and then only can the other Court, which would be entitled to try the suit if it was then instituted, be regarded as the Court which passed the decree. The other Court is substituted for and not added to the original Court. If the original Court has ceased to exist, no question arises of applying to it for purposes of execution. If it still exists, but has ceased to have jurisdiction to execute the decree, it is a contradiction in terms to say that it still remains a competent Court for purposes of execution. We cannot imagine how an application for execution could be made to the original Court, if it had ceased to have jurisdiction to execute the decree.

A distinction indeed has been drawn in some cases between executing a decree and entertaining an application for its execution (*vide* 35 C.W.N. 77[3]) and it has been said that even if the original Court cannot execute the decree in the sense that it cannot do it effectively by selling a property which is beyond its territorial jurisdiction, it can certainly entertain the application itself and then transmit the decree for execution to another Court. In our opinion, the expression 'jurisdiction to execute it' as used in S. 37 (b), Civil P. C., does mean and include the compentency of the Court to entertain an application for execution of the decree. Even, if in the circumstances of a particular case, a Court cannot effectively execute the decree, that would not mean that it has ceased to have jurisdiction to execute it. It still remains the competent Court for purposes of execution, though the decree-holder might have to apply for transmission of the decree to another Court for the purpose of obtaining the relief which he wants. This was the view taken by Field J. in 6 Cal. 513,[1] and in that view we respectfully agree.

But even assuming that the view taken by Garth C. J. is the proper view to take, it is well settled by decisions of this Court, including that in 28 Cal. 238,[2] upon which Mr. Roy himself relies, that a case like this, where there was a mere redistribution of civil business by the District Judge under S. 13 (2) of Act 12 of 1887, does not come within the purview of the rule enunciated by the learned Chief Justice. Under S. 13 (1), Bengal, Agra and Assam Civil Courts Act, it is the Local Government which can by notification in the official gazette fix and alter the local limits of the jurisdiction of any civil Court under the Act. The local limits thus fixed by the Local Government determine the jurisdiction of the Courts. Cl. (2) of S. 13 then provides that if the same local jurisdiction is assigned to two or more Subordinate Judges or to two or more Munsifs, the District Judge may assign to each of them such civil business cognizable by the Subordinate Judge or Munsif as the case may be as, subject to any general or special orders of the High Court, he thinks fit.

An order under S. 13 (2), Civil Courts Act, does not effect a transfer of jurisdiction. It merely distributes, as a matter of convenience and with reference to certain local areas, the civil business amongst two or more Courts each of which has jurisdiction over the whole area. In such cases neither of the Courts would lose the jurisdiction which it acquired under S. 13 (1) of the Act. This was the view taken by Sir Francis Maclean C. J. and Banerjee J. in 25 Cal. 315,[4] which was followed by another Division Bench in 28 Cal. 238.[2] The same view was accepted by the Patna High Court in 6 P.L.J. 304.[5]

In the present case, it is not disputed that the redistribution of local areas was made by the District Judge of Mymensingh under S. 13 (2), Civil Courts Act. This was only an arrangement for distribution of civil business in that particular sub-division. It cannot and has not disturbed or in any way curtailed the jurisdiction of the First Munsif of Kishoreganj over the entire area as determined by the Local Government under S. 13 (1), Civil Courts Act. It may be contended that the Court of the Second Munsif, also having jurisdiction over the same local area could entertain an application for execution of the decree. The answer is given by Banerjee J. in 25 Cal. 315.[4] The competency of the Second Munsif was not affected by the order under S. 13 (2), Civil Courts Act, but it was affected by S. 38, Civil P. C., which lays down that a decree could be executed only by the Court which passed it or the Court to which it was sent for execution. It is not necessary to say anything further with reference to the case in 28 Cal. 238[2] which was relied on by Mr. Roy. That case followed the opinion of Garth C. J. in 6 Cal 513,[1] but expressly laid down that S. 649 (now S. 37), Civil P. C., would not apply when there was no transfer of jurisdiction under S. 13 (1), Civil Courts Act, but only a redistribution of business under cl. (2) of S. 13 of the Act, This decision, therefore, far from supporting the contention of Mr. Roy is decidedly against him. Our conclusion, therefore, is that the Munsif, First Court of Kishoreganj did not cease to have jurisdiction to execute the decree by reason of the order of the District Judge under S.13 (2), Civil Courts Act, and the Court of the Second Munsif could not consequently be regarded as the Court which passed the decree within the meaning of that section.

The other point that requires consideration is as to whether the decree-holder can invoke the provisions of S. 150, Civil P. C., in his favour. Here also, we think that our answer must be in the negative. It was held by Chatterjee and Chotzner JJ. in 26 C.W.N. 216,[6] which was followed later on in 42 C.W.N. 167,[7] that an assignment of business under S. 13 (2), Bengal, Agra and Assam Civil Courts Act, is not a transfer of business within the meaning of S. 150, Civil P. C. In our opinion, this view is right. The effect of the order made by the District Judge in this case under S. 13 (2), Civil Courts Act, would be nothing else than that all business arising from a particular area subsequent to the order of the District Judge would have to be done by the Second Munsif and not by the First Munsif. There is nothing to show that the decree passed by the First Munsif or the execution thereof was transferred to the second Munsif. It is not also a case where on the removal of a particular Court

3. ('31) 18 A. I. R. 1931 Cal. 312 : 132 I. C. 149 : 58 Cal. 832 : 52 C.L.J. 569 : 35 C.W.N. 77, Sreenath Chakravarti v. Priyanath Bandopadhyay.

4. ('98) 25 Cal. 315, Kalipada Mukherji v. Dinanath.

5. ('21) 8 A.I.R. 1921 Pat. 152 : 62 I.C. 487 ; 6 Pat.L.J. 304 : 2 P.L.T. 374, Jagannath Prosad Singh v. Sheonandan Sahay.

6. ('22) 9 A.I.R. 1922 Cal. 41 : 70 I.C. 210 : 26 C.W.N. 216, Md. Kazem Ali v. Niamuddin Ahamed.

7. ('38) 25 A.I.R. 1938 Cal. 193 : 175 I.C. 204 : 42 C.W.N. 167, Jitendra Nath Pal v. Birendra Kishore Roy.

all the pending cases were transferred to another Court. In these circumstances, we think that the decree-holder cannot have the advantage of S. 150, Civil P. C., and it cannot be said that the Court of the Second Musif was competent to entertain the application for execution which was presented to it in December 1935. The result, therefore, is that we affirm the decision of the lower appellate Court and dismiss the appeal. There will be no order as to costs in this appeal.

BISWAS J. — I agree.

K.S./R.K. *Appeal dismissed.*

C. P. C. —

(a) ('40) Chitaley, S. 37, N. 2, Pt. 2.

(b) ('40) Chitaley, S. 37, N. 5, Pt. 7.
('41) Mulla, Page 161, Pt. (u).

(c) ('40) Chitaley, S. 37, N. 5 Pt. 4.
('41) Mulla, Page 161, Pt. (e).

(d) ('40) Chitaley, S. 150, N. 2, Pt. 9.
('41) Mulla, Page 475, Pt. (t).

Limitation Act —

(e) ('42) Chitaley, Art. 182, N. 91, Pts. 2 and 3,
('38) Rustomji, Page 1830, Pt. 1.

A. I. R. (29) 1942 Calcutta 324

SEN J.

Nabakumar Singh Dhudhuria and another

v.

Maharaja Jogindra Nath Roy.

Application in Suit No. 1 of 1935, Decided on 12th August 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 2 (22) — "Suit to which this Act applies," explained.

When a decree has been passed in a suit for the recovery of money (not being a mortgage suit) and the decree is not appealed from, the suit is finally disposed of and it can no longer be said to be pending even though the decree be not satisfied. Such a suit is therefore not a suit to which the Bengal Money-lenders Act applies : ('42) 29 A. I. R. 1942 Cal. 121, *Disting.* [P 324 C 2]

(b) Civil P. C. (1908), S. 47 — Application for reopening decree under Money-lenders Act is not one under S. 47.

An application for the reopening of a decree which has been passed and for the passing of a new decree giving the petitioner such relief under the Bengal Money-lenders Act as he is entitled to get has nothing to do with an application under S. 47 and therefore the provisions of that section cannot be called in aid for the purpose of converting that proceeding into a suit. [P 325 C 1]

(c) Bengal Money-lenders Act (10 of 1940), S. 36 — Scope.

An application for review can only be entertained in a suit to which the Act applies. [P 325 C 1]

S. N. Bannerji (Sr.) — for Applicant.

R. S. Bachawat — for Respondent.

ORDER. — This is an application by the judgment-debtor for relief under the Bengal Money-lenders Act. On 13th July 1928, the petitioner borrowed a sum of Rs. 30,000 from the respondents. Interest on the loan was 15 per cent. per annum with yearly rests. On 28th July 1928, he borrowed another sum of Rs. 20,000 from the same respondents at the same rate of interest. Thereafter the amounts due on these two loans were consolidated and a hatchitta was executed for Rs. 57,375 on 24th June 1930. Interest on the hatchitta was 15 per cent. per annum. From time to time, the hatchitta was renewed for progressively larger sums which represented the principal and accrued interest. On 2nd January 1935, the respondents instituted a suit for the recovery of Rs. 1,05,530-8-0 against the petitioner and on 16th August 1935 a consent decree was passed for the aforesaid sum, the decree bearing interest at 9 per cent. per annum. It was provided that the decretal amount would be paid in instalments and certain properties outside the jurisdiction of this Court were charged for the payment of the decretal amount. The petitioner points out that under the aforesaid decree the petitioner was made liable to pay more than twice the amount of the principal advanced and he claims to be relieved from the payment of any sum in excess of twice the principal of the original loan.

The respondents object that this application is not maintainable in as much as the suit in which this application has been made is not a suit to which this Act applies. The phrase "suit to which this Act applies" has been defined in S. 2 sub-section (22), Bengal Money-lenders Act, as "any suit or proceeding instituted or filed on or after the 1st day of January 1939, or pending on that date and includes a proceeding in execution." In my opinion the suit in which this decree has been passed is not a suit to which the Bengal Money-lenders Act applies, because it is not a suit which was filed on or after the 1st day of January 1939 or which was pending on that date and because there are at present no proceedings in execution of the decree passed in the suit. Mr. S. N. Banerjee on behalf of the petitioner argued that so long as the decree remains unsatisfied the suit must be considered as pending, and he referred me to the case in 45 C. W. N. 859,[1] where Edgley J., held that a mortgage suit in which a final decree has been passed must be considered to be a pending suit until the final decree has been fully satisfied. With great respect to the learned Judge I am unable to accept this view. In any case the present suit is not a mortgage suit. It is a suit for the recovery of money and in my opinion when a decree has been passed in such a suit and the decree is not appealed from the suit is finally disposed of and it can no longer be said to be pending even though the decree be not satisfied. This suit is therefore not a suit to which the Bengal Money-lenders Act applies. Now the relief prayed for can be granted to the petitioner only under S. 36, Bengal Money-lenders Act. That section says that relief can be granted in any suit to which the Act applies or in any suit brought by a borrower for relief under the section. I have already held that this is not a suit to which the Act applies. That being so, the petitioner can get relief only by way of a suit. In the present case there is no such suit, there is merely an application.

Mr. Banerjee on behalf of the petitioner suggests that this application should be treated not as one under the Bengal Money-lenders Act but as an application under S. 47, Civil P. C., and he says that once the application is treated as such there is no difficulty in the way of the Court dealing with the application as a suit. It is quite true that under S. 47, Civil P. C., the Court may, subject to any objection as to limitation or jurisdiction, treat

1. ('42) 29 A.I.R. 1942 Cal. 121 : I. L. R. (1941) 2 Cal 184 : 45 C. W. N. 859, Suresh Chandra Mukherjee v. Lal Mohan Chatterjee.

a proceeding under S. 47 as a suit. But I am unable to appreciate how this application can be held to be one under S. 47, Civil P. C. That section deals with questions relating to the execution, discharge or satisfaction of a decree. The present application is not one which relates to these matters, it is an application for the re-opening of a decree which has been passed and for the passing of a new decree giving the petitioner such relief under the Bengal Money-lenders Act as he is entitled to get. It has in my opinion nothing to do with an application under S. 47, Civil P. C., and therefore the provisions of that section cannot be called in aid for the purpose of converting this proceeding into a suit. I hold that the application is not maintainable and that it must accordingly be dismissed with costs. Learned Counsel on behalf of the respondents contended that apart from the defect of procedure the application should also be dismissed on the merits. I express no opinion regarding the merits of the application. The petitioner also filed a memorandum of review for greater safety. The application for review is dismissed on the same ground that such an application can only be entertained in a suit to which the Act applies. There will be no separate costs awarded for that application.

R.K. *Application dismissed.*

C. P. C. —

(b) ('40) Chitaley, S. 47, N. 82.

('41) Mulla, Page 177, Note : " Sub-section (2) : Court may treat suit as an application."

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* A. I. R. (29) 1942 Calcutta 325

SPECIAL BENCH

DERBYSHIRE C. J., AMEER ALI AND NASIM ALI JJ.

Noor Jehan Begum — Appellant

v.

Eugene Tiscenko — Respondent.

Appeal from the original decree No. 12 of 1941, Decided on 19th December 1941.

* (a) Divorce Act (1869), Ss. 2 and 7 — Divorce — Jurisdiction — Parties must seek relief in Courts of country in which they are domiciled—Parties of foreign domicile—Courts in India have no jurisdiction — Husband residing in Britain held could not be said to have submitted to jurisdiction of Calcutta High Court — Even if he had done so, it could not affect Court's jurisdiction. (Per *Special Bench*).

According to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. The only fair and satisfactory rule to adopt in the matter of jurisdiction is to insist upon parties in all cases referring their matrimonial differences to the Court of the country in which they are domiciled. Consequently, a person in India with a foreign domicile wishing to obtain dissolution of his marriage must seek the appropriate relief in the Court of the country in which he is domiciled. The Courts in India have no jurisdiction : 1895 A.C. 517, *Rel. on.* [P 327 C 1,2]

A was born in Poland. She married *B*, a Russian subject, in Berlin according to Civil rights. *A* subsequently came to India, embraced the Mahomedan faith, cabled to *B* who was in Britain to accept Islam and on his refusal to do so instituted a suit for the dissolution of her marriage at Calcutta where she had been residing since her coming to India. Notice of the suit was served on *B* in Britain, who acknowledged the receipt of the plaint and stated that he would put forward no defence. He did not enter appearance in suit nor took any steps in the proceedings :

Held that as *B* had never been domiciled in India and *A* on her marriage acquired her husband's domicile, the parties were not domiciled in India and therefore the Court had no jurisdiction to entertain the suit either in respect of dissolution of marriage or a declaration that the marriage status of the parties had been changed. [P 327 C 2]

Held further that *B* could not be said to have submitted to the jurisdiction of the Court and even if he had done so it would not have availed *A*, as jurisdiction in matters of divorce was not affected by consent : 1909 L.R.P. 123, *Rel. on.* [P 327 C 2]

(b) Specific Relief Act (1877), S. 42 — Scope — Words "legal character" include status of person — Suit for declaration that plaintiff's marriage with defendant is dissolved by her conversion to Islam is maintainable under S. 42 — Court's power to grant declaration is discretionary and will be used with caution — If declaration is sufficient to end dispute between parties Court should grant it — Cases where declaration may be made in matters of divorce stated — Plaintiff, seeking declaration of dissolution of her marriage, not domiciled in India — Defendant husband non-resident foreigner not submitting to Indian Court's jurisdiction — Declaration held would not end dispute between parties and hence should not be granted (Per *Nasim Ali J.*).

The words "legal character" in S. 42 are wide enough to include the status of a person. In order to entitle the plaintiff to bring a suit under S. 42 it is not necessary that the defendant should actually deny the piaintiff's legal character. If the defendant is interested to deny the plaintiff's legal character plaintiff may come to Court for a declaration that he or she is entitled to the legal character. If the claim which may be set up by the defendant is a hindrance to the plaintiff in the exercise of his or her rights or will expose him or her to liability if he or she disregard it he or she may come to Court for a declaraion that the claim which may be so set up by the defendant is not well founded. Consequently, a suit for a declaration that the plaintiff's marriage with the defendant was dissolved on her conversion to Islam is maintainable under S. 42. The power of the Court however to make the declaration is discretionary and will be used with caution. If the declaration sought for is useful and is sufficient to put a stop to the dispute between the parties the Court should make the declaration. [P 329 C 2]

When the jurisdiction of the Court is exercised according to the rules of international law its decree should be respected by the tribunals of every civilised country. In such a case the decree is useful and will put a stop to the dispute between the parties : 1895 A.C. 517, *Rel. on.* [P 329 C 2]

Where the Court of a country in which the spouses are domiciled is bound by the municipal law of that country to acknowledge the validity of divorce good according to the religious law of the person concerned it is bound to make a declaration that the marriage has been dissolved : 1924 A.C. 1007, *Rel. on.* [P 329 C 2]

There is no statute law by which the Courts in India are bound to acknowledge the validity of divorce according to the religious law of the plaintiff in a suit who is not domiciled in India. [P 329 C 2]

Consequently, where the plaintiff in a suit for declaration of dissolution of her marriage is not domiciled in India and the defendant husband is a non-resident foreigner and has not in any way submitted himself to the jurisdiction of the Court in India, the declaration sought for will not put a stop to the dispute between the parties and therefore it is not a fit case in which the Court in its discretion should grant the declaration sought for under section 42. [P 330 C 1]

(c) Divorce — Rule of personal law in India is not vitiated because it is inconsistent with English conception of marriage — There is no one personal law, law of domicile or territorial law in India—Hence principle of monogamous marriage cannot be introduced in India to vitiate personal law as being opposed to public policy (Per *Ameer Ali J.*).

Any rule of personal law in India is not vitiated because it is inconsistent with the English legal conception of marriage for purposes of divorce. It would be incorrect to say that there is no cause for divorce according to Moslem law, because Moslem law recognises as marriages unions which are not marriages according to Probate and Divorce Division in England. The principle of monogamous marriage cannot be introduced into India for the purpose of vitiating any rule of personal law—Hindu, Mahomedan, Buddhist, as being inconsistent with public policy. The policy of the British has been to leave the personal law of each community intact. Hence there is hardly a territorial law, or law of domicil in India, and therefore having no one personal law or law of the domicil or territorial law, there can be no one public policy or one good conscience. [P 328 C 2]

(d) Divorce — Jurisdiction — **Principle that Courts in India have no jurisdiction in matrimonial matters where parties are not domiciled in India—Scope** (*Obiter*, Per *Ameer Ali J.*).

The principle that the Courts in India have no jurisdiction in matrimonial matters when the parties are not domiciled in India does not affect the jurisdiction of the High Court in the ordinary case — a case not of status — where a part of cause of action has arisen within the jurisdiction and leave has been granted. Nor does it affect the general power of the High Court to grant declarations of a matrimonial character in cases of non-Christian marriages : 1924 A. C. 1007, *Expl. and approved.* [P 328 C 1]

(e) Divorce — Jurisdiction — Cause of action and jurisdiction are distinct — English Courts recognize foreign Court's decree with jurisdiction on ground not recognised by English law — They also recognise as good for India divorce granted in India without jurisdiction according to English principles (*Obiter*, Per *Ameer Ali J.*).

The question of cause or ground for divorce must be distinguished from the question of jurisdiction. The English Courts recognise a decree of a foreign Court, with jurisdiction, made upon a ground not recognised by English law. The English Court might recognise as good for India a divorce granted in India without jurisdiction according to English principles, but where the Indian Courts have assumed jurisdiction. [P 328 C 1]

S. N. Banerjee and M. N. Ghose — for Appellant.

S. M. Bose, J. A. Clough and S. K. Das — for Respondent.

S. M. Bose, amicus curiæ.

DERBYSHIRE C. J. — This is an appeal against the judgment of Edgley J., dated 3rd January 1941* dismissing the plaintiff's suit. The plaintiff asked for a declaration that her marriage with the defendant stands dissolved, alternatively a decree of dissolution of her marriage. The plaintiff-appellant, who sues as Noor Jehan Begum, was born in Poland. She married the defendant-respondent Eugene Tiscenko, a Russian subject (at present said to be residing at Edinburgh in Great Britain) on 20th May 1931, in Berlin according to civil rites. The parties lived together at various places in Europe until June 1938 and had one son Oleg. The plaintiff and the defendant last resided together in Rome from which place the plaintiff came to Calcutta while the defendant went to Edinburgh to qualify himself for a British Medical Degree. The plaintiff arrived in Calcutta on or about 1st September 1938 where she has resided ever since; the defendant has not joined her. The plaintiff states that her husband, the defendant, has not maintained her or her son since their arrival in India and that she has been living partly on her own earnings and partly on help received from her mother. The plaintiff further states that her married life with the defendant has been unhappy, and finding whilst in Calcutta, relief and solace in the teachings of Islam on 27th June 1940, of her own free will and after due deliberation, embraced the Islamic faith and took the name of Noor Jehan. The conversion took place at the Nakoda Mosque at No. 19, Chowringhee Road in Calcutta. Upon her conversion, the plaintiff states that she sent a cable to her husband on 28th June 1940 informing him of her conversion to Islam and requested him also to accept the Islamic faith. The telegram reads as follows :

"To

Tiscenko,

24, Montepelier Park, Edinburgh.

Have become Mohamedan. Call upon you become Mohamedan. Wire consent or refusal 19, Chowringhee Calcutta.

From Tiscenko."

On 2nd July 1940 a telegraphic message from the defendant was delivered to the plaintiff at her place of residence in Calcutta which runs as follows :

"My religious convictions unshakable. I refuse absolutely change my faith as you have done. Oleg must remain Greek Orthodox.

Tiscenko."

The plaintiff brought the present proceedings on 5th August 1940; the plaint was served by post on the defendant in Edinburgh. In reply to the service the defendant wrote the following letter to the plaintiff :

"24, Montepelier Park,
Edinburgh 10
19-9-40.

Dear Vera,

I received the papers and was amazed on reading their contents. I hope you fully realise how much you have asked of me. The future will prove whether you do or not.

For your sake and Oleg's I have acknowledged the receipt of the Writ and shall put forward no defence but I shall be glad to have your immediate assurance regarding costs. In this I trust you to

[*See ('41) 28 A.I.R. 1941 Cal. 582.]

fulfil your promise. I still hold all your correspondence.

Yours sincerely,
E. Tiscenko."

The suit first appeared in the undefended list and the learned Judge on 13th December 1940 pronounced a decree in her favour in Court, but the same day before the decree was drawn up and signed withdrew it on a further consideration of the matter. The matter then came on for further hearing on 20th December 1940 when at the Judge's request Mr. S. M. Bose, a former standing counsel appeared as amicus curiæ. After taking further evidence and hearing counsel for the plaintiff, and Mr. Bose, the learned Judge dismissed the plaintiff's suit. From that decision she now appeals. In these proceedings, Mr. S. M. Bose has again appeared as amicus curiæ at the request of the Court, and the Court is deeply indebted to him for his assistance. The learned Judge has accepted the plaintiff's bona fides in the matter of conversion. Having regard to the legal view I take of our jurisdiction in this case I make no comment on this finding, nor on the actions of the plaintiff since 27th June. The proceedings are not brought under Cl. 35 of the Letters Patent since the plaintiff does not profess the Christian religion. They apparently have been brought under Cl. 12 of the Letters Patent, that is to say in the exercise of the Court's ordinary civil jurisdiction. The first question is : Has the Court jurisdiction to grant the relief the plaintiff seeks ? She is seeking relief either by way of a declaration that her marriage with the defendant stands dissolved or in the alternative a decree for dissolution of her marriage. She also seeks the custody of her child. In (1895) A. C. 517,[1] an Englishman born and domiciled in England but living and working in Ceylon sought a dissolution of his marriage in a Court in Ceylon on the ground of the adultery of his wife. The wife contested the jurisdiction of the Court to entertain the proceedings. Eventually the matter came before the Privy Council. Lord Watson gave the judgment of the Board, and after reviewing all the then authorities and the pronouncement of several writers of authority on Private International law concluded with these words :

"Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in (1872) 2 P. & D. 442[2] which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce : 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another'."

In my opinion, this Court can do no other than exercise its jurisdiction in accordance with the principles so laid down. The wife's domicil is that of her husband. What the husband's domicil in this case is, is very difficult to say. He appears to have been born in a part of Russia which probably was included in Poland after the War of 1914-18 ; was married in Germany; obtained a passport at Nancy in France; and lived in Rome until he went to Edinburgh in June 1938 with the intention of qualifying there in medicine, his wife coming to India. His wife says he intended to join her in India. As he contemplated taking a British medical degree it may be that he intended settling in some part of the British Empire, but at the time of these proceedings he was in Edinburgh and, as far as one can gather, has never been nearer India than Rome a matter of some six thousand miles away. Again the defendant is not within the jurisdiction of this Court and never has been. Beyond acknowledging the receipt of the plaint to the Sheriff and writing the letter of 19th September 1940, to his wife, the defendant has had no contact with Calcutta or dealings here. He has not entered appearance in this suit or taken any steps in these proceedings. I am unable to draw the inference that the defendant has submitted to the jurisdiction of this Court. Even if he had done so, it would not have availed the plaintiff because as Cozens-Hardy, M. R., said in (1909) L. R. P. 123[3] at p. 131 : "The jurisdiction in matters of divorce is not affected by consent." Wherever Eugene Tiscenko, the plaintiff's husband is domiciled he is not domiciled in India, and never has been. As the plaintiff's domicile is that of her husband's she is not domiciled in India. As the parties are not domiciled in India, it is clear that we cannot entertain this suit either in respect of dissolution of marriage or a declaration that the marriage status of the parties has been changed. I therefore agree with the learned Judge that this Court has no jurisdiction to entertain these proceedings. Had I thought that the question of jurisdiction was open to some doubt I should have been prepared to deal with the rest of the judgment appealed from; but in my view there is no doubt that we have no jurisdiction in this matter. The rest of the judgment appealed from deals with certain matters upon which my learned brothers and I myself experienced some difficulties and doubts in places, and must be regarded as obiter dicta. This appeal must be dismissed. No order as to costs.

AMEER ALI J.—With regard to the first part of the case based on matrimonial jurisdiction as such dealt with in the learned Judge's judgment from pages 26 to 31 no question arises, nor has this part of the judgment been assailed. With regard to the second and main part of the case dealt with in the rest of the judgment, that is, the claim to a declaration as to status, I agree with my Lord the Chief Justice's view as to jurisdiction, i.e., that a Court has no jurisdiction under S. 42, Specific Relief Act, or, generally under Cl. 12 of the Charter to grant a declaration of the nature sought against this defendant. I agree further with the reasons

1. (1895) 1895 A.C. 517 : 64 L.J.P.C. 97 : 72 L. T. 873 : 11 R. 527, Le Mesurier v. Le Mesurier.
2. (1872) 2 P. & D. 442 : 27 L.T. 351, Wilson v. Wilson.
3. (1909) L.R.P. 123: 78 L.J.P. 62: 100 L.T. 557: 73 J.P. 193 : 53 S.J. 265 : 25 T.L.R. 291, Harriman v. Harriman.

stated by my Lord, namely, that this is, in effect, a though not in form, a decree dissolving marriage. One cannot declare the plaintiff's status without declaring the defendant's status and thus affecting the matrimonial relationship between the parties. The English Courts do not grant or recognise divorces where there is no domicil of the parties or, at any rate, of the husband. This convention is based upon a principle of quasi international law based on mutual toleration. The inference to be drawn from the decided cases relating to such declarations in India and the rulings of the Privy Council including 1924 A. C. 1007,[4] is that the same rule should be followed. The inference is negative; but in each of these cases the parties were domiciled and resident within the jurisdiction of the Courts.

I desire, however, to make the following reservations: (1) This decision does not affect the jurisdic- b tion of this Court in the ordinary case—a case not of status — where a part of the cause of action arises within the jurisdiction and leave has been granted. (2) I desire to reserve the general power of this Court to grant declarations of a matrimonial character in cases of non-Christian marriages. (3) I desire to distinguish the question of cause or ground for divorce from the question of jurisdiction. The English Courts do appear to recognize a decree of a foreign Court, with jurisdiction, made upon a ground not recognized by English law. (4) Lastly it appears that the English Court might recognize as good for India a divorce granted in India, without jurisdiction according to English principles, but where the Indian Courts have assumed jurisdiction. Those questions do not arise having regard to the fact that in this particular case the parties are domiciled without British India, and the defendant c is non-resident. In these circumstances, I agree with my Lord the Chief Justice, that in this unusual case, jurisdiction, and if not jurisdiction, discretion is an answer to the plaintiff's suit. It is therefore not necessary for this Court on appeal to discuss the several questions of substantive law on which the learned Judge, having invited argument, felt it his duty to rule. On the other hand, as one of the learned Judge's colleagues on the original side, who may at any time have to deal with the normal case and to whom the learned Judge's judgment will no doubt be cited, it is I think proper that, while expressing my appreciation of a statement of the law both exhaustive and elaborate, I should indicate the points on which I differ. With regard to jurisdiction, that is jurisdiction apart from divorce jurisdiction, the learned Judge's ruling is at p. 35, line 38. It appears to me to involve d points of substantive law, e. g., the portion of the sentence "and does not depend in any way upon the personal law of her religion," that being a matter of "cause" rather than jurisdiction. Nevertheless, so far as it is a ruling on jurisdiction based on absence of domicil and residence, I agree with it.

The three points of substantive law relied upon by the learned Judge are as follows: (1) The attraction or incidence of Moslem personal law to Moslems; (2) a point of Moslem procedure which becomes a point of substantive law; and lastly (3) obsolescence of Moslem personal law. With regard to the first point dealt with at pp. 33 and 34 the learned Judge has ruled that the domicile of the plaintiff prevents her acquiring, or prevents the attachment to her, of Moslem personal law. On this point I myself would desire to have further assistance before coming to the same opinion. The cases in *Bartlett* v. *Bartlett*[5] and 1924 A. C. 1007[4] I should like discussed. The second point that of Moslem procedure, is one upon which I should have adopted the view expressed in the course of argument by my learned brother Syed Nasim Ali J. On the third point I desire to say a little more. The major portion of the learned Judge's judgment is adorned with the phrases "justice, equity and good conscience," "public policy," "lifelong union," "indissoluble union," "monogamous marriage" and "Christian marriage." It seems to me that he has used these phrases to indicate two concepts, for which for purposes of analysis I have adopted the following symbols PP. = public policy, MM. = monogamous marriage. The view put forward by Mr. S. M. Bose and accepted by the learned Judge is that the relevant Moslem personal law is obsolete having regard to P. P. This ruling does affect the normal case, f which as I say any Judge on the original side may be called upon to consider, i. e., of persons domiciled in India.

I entirely agree that English Divorce law only recognizes for purposes of divorce a marriage which is a monogamous marriage. I cannot agree that this principle of M. M. is to be introduced into India for the purpose of vitiating any rule of personal law — Hindu, Mahomedan, Buddhist, as being inconsistent with P.P. It seems to me that the learned Judge by adopting this process has decided that there is no cause for divorce according to Moslem law, because Moslem law recognizes as marriages unions which are not marriages according to Probate and Divorce Division in England. I am unable to agree with this reasoning. I cannot see why any rule of personal law in India is to be vitiated because it is inconsistent with the English legal conception of marriage for g purposes of divorce. It seems to me, with respect, that the learned Judge having taken back at p. 37 to the Abbasid Caliphs has overlooked the system introduced and maintained by the Turkish paramounts of India and their successors, the British. That policy, it so happens, has been described by Lord Hobhouse in (1894) A. C. 165[6] at page 169, where the question was in a sense the opposite question; how far under Turkish rule the laws of the old Christian Church had been preserved by the Turkish Emperors for their Christian subjects. The view of the Court from which the appeal lay to the Judicial Committee was as follows:

"We feel that it is extremely improbable that the Ottoman Government should have consented to confer on its Christian subjects any larger privileges with regard to the legitimising of children than belong to its Moslem subjects." h

Lord Hobhouse after quoting the introduction to the Hedaya, said this:

"If any inference may be drawn from the policy of one set of Mahomedan conquerers to that of another, the policy of the conquerers of India is at variance with what the learned Judges think to be probable. During the period of their rule, as at the present time, there has been such wide liberty for each religious community to follow its own laws in private affairs, that it may almost be said that territorial law has not existed there except for matters of Supreme Government."

4. (1924) 1924 A. C. 1007 : 94 L. J. P. C. 15 : 132 L. T. 163, Sassoon v. Sassoon.

5. (1925) 1925 A. C. 377 : 94 L. J. P. C. 100 : 133 L. T. 23.

6. (1894) 1894 A. C. 165 : 63 L. J. P. C. 63 : 6 R. 420 : 70 L. T. 254, Parapano v. Hapaz.

Then at page 171:

a "There is nothing improbable in supposing that when Mahomedans conquered territories inhabited by people of another creed supported by strong religious organizations, they smoothed their way by leaving important local and personal usages to a great extent undisturbed."

The policy of the succeeding paramounts for India, the British, has been exactly the same. They "smoothed their way." Hence Charters, Proclamations of the Queen, Government of India Act and so forth leaving the personal law of each community intact. Hence, as Lord Hobhouse points out, there is hardly a territorial law, or law of domicile in India. It seems to me, therefore, that having no one personal law or law of the domicile or territorial law, there can be no one public policy or one good conscience. What is the good conscience of one is the bad conscience of another. It follows that we b have our own problems within India: conflicts, so to speak, of private international law between group and group, community and community for which we have adopted the misbegotten word "communal." Those problems, juridically, no less than politically can only be solved by applying principles of mutual consideration. Hence statutory rules such as my learned brother, Syed Nasim Ali J. preferred to, somewhat difficult to find, and sometimes difficult to apply. Rules failing, there remains, as the better part of judicial valour "discretion," : S. 42, Specific Relief Act.

NASIM ALI J. — I agree with my Lord the Chief Justice that this appeal should be dismissed. The plaintiff-appellant is a Christian of Russian parentage. She was born in Poland. Defendant-respondent is a Russian Christian. Plaintiff was mar- c ried to defendant in Berlin. Defendant never came to this country. He is residing at present in Edinburgh in Great Britain. Plaintiff is residing within the local limits of the ordinary original civil jurisdiction of this Court since September 1938. On 27th June 1940, she became a convert to Islam. The next day she sent a message by telegram to the defendant informing him of her conversion to Islam and calling upon him to embrace Islam. On 2nd July 1940, the defendant informed the plaintiff by a telegraphic message that he was not willing to embrace Islam. On 4th August 1940, plaintiff raised the present suit on the original side of this Court for a declaration that her marriage with the defendant has been dissolved under the Muslim law. She also prayed in the alternative for a decree dissolving her marriage with the defendant. The summons of the suit was thereafter served on the defendant in Edinburgh. On 19th September 1940, b he wrote a letter to the plaintiff acknowledging the receipt of the writ and stating that he would put forward no defence. On 3rd January 1941, Edgley J. heard the suit ex parte and dismissed the suit on the following grounds :

(1) That the plaintiff and the defendant have a Russian domicile. (2) That the plaintiff can obtain dissolution of her marriage with the defendant only in the Courts of Russia. (3) That the plaintiff not being domiciled in India cannot be allowed to dissolve a Christian marriage by observing the procedure prescribed for this purpose by the Muslim law. (4) That even if it be assumed that the plaintiff is entitled to dissolve her marriage on the refusal of her husband to embrace Islam after it was presented to him she has not adopted the correct procedure under the Muslim law inasmuch as Islam was not presented to the defendant by the Court acting as Kazi as required by Islamic law. (5) That Islamic law relating to converts to Islam is opposed to d public policy and is to be regarded as obsolete in this country.

On 17th February 1941, plaintiff filed the present appeal. Mr. Banerjee appearing on behalf of the plaintiff-appellant did not press the plaintiff's prayer in the plaint for a decree dissolving her marriage with the defendant. He confined his arguments to the plaintiff's prayer for a declaration that her marriage with the defendant was dissolved on account of her conversion to Islam and the refusal of her husband to embrace Islam. The only point for determination in this appeal, therefore, is whether the Court should declare under S. 42, Specific Relief Act, that the marriage of the plaintiff with the defendant has been dissolved. Under S. 42, Specific Relief Act, the Court has power to declare that the plaintiff is entitled to a certain "legal character." The words "legal character" have not been defined f in the Specific Relief Act. These words, in my opinion, are wide enough to include the status of a person. In order to entitle the plaintiff to bring a suit under S. 42, Specific Relief Act, it is not necessary that the defendant should actually deny the plaintiff's legal character. If the defendant is interested to deny the plaintiff's legal character plaintiff may come to Court for a declaration that he or she is entitled to the legal character. If the claim which may be set up by the defendant is a hindrance to the plaintiff in the exercise of his or her rights or will expose him or her to liability if he or she disregards it he or she may come to Court for a declaration that the claim which may be so set up by the defendant is not well founded. Plaintiff has brought the present suit against the defendant because the latter is interested to deny the validity of the dissolution of her marriage with him under g the Muslim law. The power of the Court, however, to make the declaration is discretionary and will be used with caution. If the declaration sought for is useful and is sufficient to put a stop to the dispute between the parties the Court should make the declaration (Daniel's Chancery Practice, Edn. 8, Vol. 1, p. 689.)

When the jurisdiction of the Court is exercised according to the rules of international law, its decree should be respected by the tribunals of every civilised country: 1895 A. C. 517[1] at p. 527. In such a case the decree is useful and will put a stop to the dispute between the parties. Where the Court of a country in which the spouses are domiciled is bound by the municipal law of that country as in 1924 A.C. 1007[4] to acknowledge the validity of divorce good according to the religious law of the person concerned it is bound to make a declaration h that the marriage has been dissolved. No statute law was placed before us by the learned counsel for the appellant by which the Courts in this country are bound to acknowledge the validity of divorce according to the religious law of the plaintiff in a suit who is not domiciled in this country. A defendant in a suit may be a citizen, native or naturalised or a foreigner. "In regard to the former, while within the territory of their birth or of their adopted allegiance, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled; and it ought to be respected everywhere. But as to citizens of a country domiciled abroad, the extent of jurisdiction which may be lawfully exercised over them in personam is not so clear upon acknowledged principles. It is true that nations generally assert a claim to regulate the rights and duties and obligations and acts of their

own citizens, wherever they may be domiciled. And so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement or for protection or for remedy, there may be no just ground to exclude this claim. . . . But when such rights, duties, obligations, and acts come under the consideration of other countries, and specially of the foreign country where such citizens are domiciled, the duty of recognizing and enforcing such a claim of sovereignty is neither clear, nor generally admitted. The most that can be said is, that it may be admitted *ex comitate gentium*. But it may also be denied *ex justitia gentium*, whenever it is deemed injurious to the interests of such foreign nations, or subversive of their own policy or institutions." (Story's Conflict of Laws, Edn. 7, pp. 682-683.)

Much reliance was placed by the learned counsel for the appellant upon the letter written by the defendant to the plaintiff after he was served with summons of this suit in which he said that he would not put forward any defence in this suit. This, however, does not appear to me to amount to submission of the defendant to the jurisdiction of this Court. Plaintiff is not domiciled in this country. The defendant is a non-resident foreigner. He has not in any way submitted himself to the jurisdiction of this Court, I am therefore of opinion that the declaration sought for by the plaintiff in the present suit will not put a stop to the dispute in this case. I do not therefore consider this to be a fit case in which the Court in its discretion should pass a decree under S. 42, Specific Relief Act, declaring that the marriage of the plaintiff with the defendant has been dissolved. In this view of the matter, the questions whether the effect of the conversion of the plaintiff to Islam and the refusal of the defendant to embrace Islam is the dissolution of the marriage of the plaintiff with the defendant, whether the plaintiff has adopted the correct procedure under the Muslim law while she presented Islam to the defendant, whether the Muslim law relating to converts to Islam is opposed to public policy and is to be regarded as obsolete in this country, do not arise for determination in this case and I express no opinion on these questions. If the learned Judge intended to lay down that his decisions on these questions would also apply to converts to Islam domiciled in this country he went beyond the scope of the present suit inasmuch as the decision on the law relating to the rights of converts to Islam domiciled in this country was not necessary for the disposal of the present suit.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 330

MOHAMAD AKRAM AND PAL JJ.

Raj Kumari Baishnabi d/o Chandra Nath Paramanick — Defendant — — Appellant

v.

Mirja Samsuddin and others — Plaintiffs — Respondents.

Appeal No. 18 of 1939, Decided on 18th December 1941, from appellate decree of Deputy Commissioner as Sub-Judge, Darjeeling, in O. C. A. No. 1 of 1937.

(a) Transfer of Property Act (1882), S. 117— Original purpose of tenancy determines applicability of Act.

It is not the actual use of the land but the original purpose of the tenancy which determines the question of applicability or otherwise of the Transfer of Property Act. [P 331 C 1]

(b) Bengal Rent Act (10 of 1859), S. 6—Word "raiyat" in Act means actual cultivator — Tenancy originally created for agricultural purposes—Substantial portion of tenancy land still used for agricultural purposes—Fact that portion of tenancy land is used for building purposes cannot take tenancy out of operation of Act.

Where the tenancy was originally created for agricultural purposes and a substantial portion of the land of the tenancy is still being used for agricultural purposes, the tenancy being one entity must be governed by the Act. It is incorrect to split up the tenancy and say that because a portion of the tenancy land is being used for another purpose (building purposes) the tenancy ceases to be governed by the Act. [P 331 C 2]

Birendra Kumar De — for Appellant.

Gopendra Nath Das and Sambhu Nath Banerji — for Respondents.

PAL J. — This appeal is by the defendant in a suit for ejectment after service of notice to quit. The case of the plaintiff is as follows. The defendant Raj Kumari Baisnabi holds 4 bighas of land under the plaintiffs as a tenant-at-will at an annual rental of Rs. 4. The land appertains to a touzi belonging to the plaintiffs and is in the Shilliguri town. The plaintiffs served a written notice on the defendant on 11th Aswin, 1341 B. S., asking her to quit the same after removing the structures constructed by her thereon by the end of Kartick 1341 B. S. The plaintiffs' case is that in spite of this notice, she did not quit the land and consequently the present suit was instituted on 9th May 1935. The defence case is that the tenancy is a permanent one and that in any case the defendant has acquired an occupancy right in the tenancy under Act 10 of 1859, which Act is applicable to this particular tenancy. Her further case is that the notice served on her was inadequate for the purpose of determining the tenancy.

The Court of first instance upheld the contentions of the defendant and dismissed the suit. On appeal by the plaintiffs, the Court of appeal below found that the defendant did not acquire occupancy right in the land in suit, inasmuch as she, having purchased this land in 1914, possessed the same by cultivation upto 1918 but thereafter the major portion of the land was possessed by her not by cultivation but for residential purposes. On these findings, the learned lower appellate Court thought that Act 10 of 1859 did not apply and that the tenancy was governed by the Transfer of Property Act. In this view he accepted the notice served as adequate and decreed the plaintiffs' suit. Hence this appeal by the defendant. In support of this appeal, it has been contended that in view of its own finding, that even now a portion of the tenancy land is still under cultivation, the Court of appeal below was wrong in holding that Act 10 of 1859 did not apply to it. It has been further contended that, in view of the finding by the Court of first instance, nowhere reversed by the Court of appeal below, that the original tenancy was for agricultural purposes, the latter Court was wrong in applying the provisions of the Transfer of Property Act to this case. It was further contended that in any case the notice served was inadequate in the facts and circumstances of this case.

It appears that the tenancy in question dates at least from 1892. It was found by the Court of first instance that this tenancy was for agricultural purposes. There is evidence on record and that evidence has been accepted by both the Courts below that this land was used for agricultural purposes at least upto the year 1918. The tenant who held the land in 1892 was one Abdul Rahaman. He transferred it to one Durga Charan in 1908 and this transfer was recognised by the landlord. Durga Charan on his part transferred it to the present defendant in 1914 and this transfer was also recognised by the landlord. So there is no doubt that the tenancy is continuing at least from 1892 and according to the finding arrived at by the Court of first instance, the purpose of the tenancy was agricultural. So long as this finding stands, it is difficult to see how the provisions of the Transfer of Property Act can be applied to this tenancy. Section 117, T. P. Act, lays down that none of the provisions of the Chapter relating to lease shall apply to leases for agricultural purposes. It is not the actual use of the land but the original purpose of the tenancy which determines the question of applicability or otherwise of the Transfer of Property Act. In our opinion, the Court of appeal below has gone wrong in applying the provisions of the Transfer of Property Act without setting aside the finding arrived at by the Court of first instance, that the tenancy was for agricultural purposes. While coming to the question whether or not the defendant did acquire occupancy right in the land under S. 6 of Act 10 of 1859, the Court of appeal below held that the occupancy right acquired by the original tenant Abdul Rahaman, did not pass to the subsequent transferees, the occupancy right itself being non-transferable. He then next proceeded to examine whether the present defendant herself acquired occupancy right in the land. Coming to this question he found that she held this land by cultivation from 1914 to 1918. Thereafter from 1918 to the date of the suit, (that is 1935), 3/4ths of the land have been converted into homestead lands, but ¼th is still under cultivation. On these facts, he concluded that S. 6 of Act 10 of 1859 would not apply to this tenancy. It is difficult to see why the defendant would be deprived of the benefit of the section. Section 6 of the Act runs as follows :

"Every raiyat who shall have cultivated or held land for a period of 12 years, shall have a right of occupancy in the land so cultivated or held by him ...."

The land in suit formed one tenancy. The present defendant was a raiyat within the meaning of Act 10 of 1859, it having been found that she took to cultivation in those days. She did cultivate this land at least for the period from 1914 to 1918. She still holds by cultivation at least a portion of the land comprised in the tenancy. In this way, taking the lands of the tenancy as one entity, she is still holding that land by cultivation as a raiyat and in our opinion she has acquired occupancy right therein on the completion of the period of 12 years from 1914. Mr. Dass, appearing for the respondents, contended that as soon as the land ceased to be used for agricultural purposes, it went out of the operation of Act 10 of 1859 : the word 'land' in the Act means 'land used for agricultural purposes.' In support of his contention, he relied on the decision in 18 W.R. 234,[1] affirming the decision of Glover J., reported in 17 W. R. 151[2] and in 68 C. L. J. 381.[3]

In our opinion, these decisions shall not help the plaintiffs in the present case, inasmuch as it has been found here that at least a substantial portion of the land of the tenancy is still being used for agricultural purposes. The tenancy being one and a portion of the land falling within this tenancy still being land within the meaning of Act 10 of 1859, we do not see how the plaintiffs can split up this tenancy and say that because a portion of the tenancy land is being used for another purpose therefore the tenancy ceases to be governed by Act 10 of 1859. Section 6 of Act 10 of 1859 requires that the person claiming to acquire occupancy right must be a raiyat. The word 'raiyat' as used in Act 10 of 1859, refers to the actual cultivators. In this particular case according to the finding arrived at by the Courts below, the present defendant did satisfy this requirement and as we noticed above, taking the tenancy as one entity, the land also satisfies the condition of being still used for agricultural purpose. We are therefore of opinion that the provisions of Act 10 of 1859 shall apply to this case and the defendant succeeded in acquiring occupancy right in the tenancy in question. In this view it is not necessary for us to see whether the notice was otherwise adequate. It is not the case of the plaintiffs that even after the defendant acquired occupancy right, she was still liable to eviction on service of notice. In the result this appeal is allowed ; the judgment and decree of the Court of appeal below are set aside and those of the Court of first instance are restored. The defendant-appellant will get her costs in this Court as also in the Court of appeal below. The cross-objection is not pressed and is dismissed without costs.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Appeal allowed.*

1. ('72) 18 W.R. 234 : 9 Beng.L.R. 101, Ranee Doorga Soonduree Dossee v. Bibee Oomdutoonissa.
2. ('71) 17 W.R. 151, Ranee Doorga Soonduree Dossee v. Bibee Oomdutoonissa.
3. ('38) 25 A.I.R. 1938 Cal. 866 : 176 I.C. 479 : 68 C.L.J. 381 : I.L.R. (1939) 1 Cal. 101, Prasanna Deb Raikat v. Tabiur Rahaman.

T. P. Act —

(a) ('36) Mulla, S. 117, Page 663 Note "Agricultural purposes" see also Pt. (g).
('37) Mitra, S. 117 Page 641 Note 617.

A. I. R. (29) 1942 Calcutta 331

NASIM ALI AND PAL JJ.

Gokulpati Dutta — Plaintiff — Appellant

v.

Pashupati Nath Dutta and others — Respondents.

Appeal No. 215 of 1938, Decided on 7th July 1941, from original decree of Sub-Judge, Burdwan, D/- 28th June 1938.

(a) Hindu law — Dayabhaga — Succession — Brother or uncle living jointly after separation without being reunited is not entitled to preference — Affection by itself cannot form basis of preference.

Under the Dayabhaga a brother or uncle, who, after separation, lives jointly without being 'reunited' in the sense of the Hindu law is not entitled to any preferential claim at succession. Nor is such a preferential claim deducible from the principles of succession propounded in the Mitakshara.

Where there is no reunion, affection by itself cannot be invoked as an independent principle forming the basis of preference. Consequently, all the uncles under Dayabhaga law inherit equally when the deceased nephew was not 're-united' with any of them : ('40) 27 A. I. R. 1940 Cal. 157, *Rel. on* ; 35 Cal. 721, *Not approved.* [P 334 C 2; P 335 C 2; P 336 C 2]

(b) Hindu law — Partition — Re-union—Re-union is not result of quasi contract but of real contract—Quasi contract explained — Even re-union cannot restore pre-partition legal position—Hence necessity of special rules to define position consequent on re-union—Applicability of principle of survivorship to cases of re-union —Re-united brother, nephew or uncle takes not by survivorship but by special rule of succession.

'Re-union' as understood in Hindu law is not the result of any quasi contract but is the product of real contract, in fact, is the product of an agreement express, or implied, from conduct : ('23) 10 A. I. R. 1923 P. C. 136; 30 Cal. 725 (P.C.) and ('34) 21 A. I. R. 1934 P. C. 138, *Rel. on.* [P 335 C 2]

A quasi contractual relation is one which is not in truth contractual, but which the law treates as if it were so. It is contractual in law, but not in fact and being the subject of contract covers relations which do not in reality fall within it. A quasi contract may be said to be a contract implied in law as distinguished from a contract implied in fact. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. The effect of reunion on the present ownership of the parties, on a possible second partition and on the rule of succession in case one dies while still reunited, is determined by special texts. These special rules are only the exceptions to the general principles of succession adopted by both the Dayabhaga and Mitakshara schools and are intended specifically for the cases of reunion, as understood in the Hindu law which form the basis of preference. The principle of survivorship is the result of the principle of ownership by birth adopted by the Mitakshara. As between the separated coparceners the very basis of the principle will be wanting as the result of the partition. Thereafter, even re-union cannot restore the pre-partition legal position and hence the necessity to define the position consequent on reunion. Even in the case of reunion, a reunited brother, nephew or uncle takes not by survivorship but by the special rule of succession expressly laid down for the case. [P 334 C 2; P 335 C 2; P 336 C 1]

Bankim Chandra Mukherji and Sanat Kumar Chatterjee — for Appellant.

Gopendra Nath Das and Kamalakha Basu — for Respondents.

JUDGMENT. — The facts which are not in dispute in this appeal are these : One Bepin Behary Dutt was the owner of certain immovable properties. He had five sons, Pasupati (defendant 1), Ganapati (Defendant 2), Kamalapati, Gokulpati (plaintiff) and Baidya Nath (Defendant 3). Kamalapati died on 15th Falgun 1323 B.S. leaving a minor son, Pran Gobinda and a widow Arunbala Dasi. On 4th Sraban 1324 B.S. Bepin Behari executed a Nirupanpatra (a deed of settlement) by which he divided his properties into five shares and gave one share to each of his four sons and one share to his grand-son Prangovinda. Arunbala died in Magh 1326 B.S. After her death Bepin Behary took charge of the person and properties of Pran Govinda. Bepin Behary died in Kartick 1328 B. S. A few days after his death Pasupati, Defendant 1, took charge of the person and properties of Prangovinda with the consent of his three brothers. Prangovinda attained majority in 1338 B.S. and died in 1339 B. S. unmarried. On 29th June 1937 (Asar 1344 B.S.) Gokulpati instituted the present suit for possession of 4 annas share of the properties left by Prangovinda after partition. Only Defendant 1 contested the suit. His defence is that he was joint with Prangovinda or at least "reunited" with him and consequently he has inherited the entire property left by Prangovinda. The Subordinate Judge has come to the conclusion that Defendant 1 was not "reunited" with Prangovinda but as he was joint with Prangovinda at the time of the latter's death he was entitled to get the whole of Prangovinda's property. He has accordingly dismissed the suit. Hence this appeal by the plaintiff.

The finding of the trial Judge that Defendant 1 was not "reunited" with Prangovinda as contemplated by Hindu law was not challenged by the learned advocate appearing on behalf of Defendant 1. His contention, however, is that though not "reunited" within the meaning of the Hindu law, Defendant 1 is still entitled to inherit the whole of Prangovinda's property by reason of his having been joint with him at the time of his death. He relies on the decision of this Court in 35 Cal. 721.[1] Before coming to the decided cases we would prefer to look to the texts of the Hindu law itself. There is a sharp difference between the Mitakshara and the Dayabhaga on the fundamental principles of the law of Succession and Inheritance. Both the authorities use the word दाय daya to denote the property devolving upon a person by succession. The Mitakshara explains the term as signifying the wealth which becomes the property of another solely by reason of his kinship to the owner :

दायशब्देन यद्धनं स्वामिसंबन्धादेव निमित्तादन्यस्य स्वं भवति तदुच्यते ।

Dayabhaga, on the other hand, defines the term as signifying the wealth in which property, dependent on kinship to the former owner, arises, only upon the cessation of his ownership thereof :

पूर्वस्वामिसम्बन्धाधीनं तत् स्वाम्यो परमे यत्र द्रव्ये स्वत्वं तत्र निरुढ़ो दायशद्बः ।

There is a fundamental divergence between the Mitakshara and the Dayabhaga schools relating to the devolution of property on the death of a member of a joint family. According to the Mitakshara law, to quote the language of Mr. Mayne, "there is no such thing as succession, properly so called, in an undivided family . . . The whole body of such a family, constituting of males and females, constitutes a sort of corporation, some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance. Each person is simply entitled to reside and be maintained in the family house; when he dies his claims cease, and as others are born their claims arise. But the claims of each spring from the mere fact of their

1. ('08) 35 Cal. 721: 12 C.W.N. 511, Akshay Chandra v. Haridas Goswami.

entrance into the family, not from their taking the a place of any particular individual. Deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund just as births may diminish their interests by increasing the number of claimants. The joint family property continues to devolve upon the members of the family for the time being by survivorship and not by succession. For, according to the principles of Hindu law, there is coparcenership between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members and upon the death of any one of them, the others take by survivorship that in which they had during the deceased's life-time a common interest and a common possession."

According to the Dayabhaga however the ownership of a person is the same whether he is or is not b a member of a joint family. During jointness he only holds the property in common tenancy with the other co-owners and on his death his heirs will come in by succession and inheritance. The word for partition in both the schools is विभाग Vibhaga. The Dayabhaga explains the term by saying :

"Partition consists in manifesting (or in particularising) by the casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed. Or partition is special ascertainment of property, or making of it known" —

एकदेशोपात्तस्यैव भूहिरण्यादावुत्पन्नस्य स्वत्वस्य c विनिगमनाप्रमाणाभावेन वैशेषिकव्यवहारानर्हतया अव्यवस्थितस्य गुटिकापातादिना व्यञ्जनं विभागः। विशेषेण भजनं स्वत्वज्ञापनं वा विभागः।

The Mitakshara on the other hand says :

विभागो नाम द्रव्यसमुदायविषयाणामनेक स्वाम्यानां तदेकदेशेषु व्यवस्थापनम्।

"Partition is the adjustment of diverse rights regarding the whole, by distributing them or particular portions of the aggregate." In either school what a person gets as his allotment on partition becomes his property and, subject to the rights of the sons and grandsons in the Mitakshara school, shall devolve on his heirs by the law of succession.

The two schools again differ on the principles of d succession. According to the Dayabhaga school a person succeeds to the estate of another on the strength of his conferring some benefit on that other. The right of succession to property is founded on competence for offering oblations at obsequies; and the order of succession is regulated by the degree in which benefits are conferred. According to Dayabhaga —

धनार्जनस्य हि प्रयोजनद्वयं भोगार्थत्वं दानाद्यदृष्टार्थत्वञ्च, तत्रार्जकस्य तु मृतत्वात् धने भोग्यत्वाभावेनादृष्टार्थत्वमेव शिष्टम्।

Two motives are indeed declared for the acquisition of wealth : One, temporal enjoyment; the other, the spiritual benefit अदृष्टार्थत्वम् of gifts and so forth. Now, since the acquirer is dead, and cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit. e (Chap. 11, S. 6, verse 13).

In determining the preferential heir again the principle applied is one of benefits of the last owner :

यथा यथा मृतधनस्य तदुपयुक्तत्वं भवति तथा तथा अधिकारक्रमोऽनुसरणीयः।

"Such order of succession must be followed as will render the wealth of the deceased most serviceable to him" (Chap. 11, S. 6, verse 28). According to Dayabhaga

तदर्जितधनस्य च तदुपकारतारतम्येन तादर्थ्यसम्पादनस्य न्याय्यत्वात् उपकारकत्वेनैव धनसम्बन्धो न्याय प्राप्तो।

"And it is reasonable that the wealth, which a man has acquired, should be made beneficial to him by appropriating it according to the degree in which f services are rendered to him." (Chap. 11, S. 6 verse 31.)

Jimutavahana relies on the text of Manu —

अनंतरः सापिण्डाद् यस्तस्य तस्य धनम् भवेत्।

—"to the nearest sapinda the inheritance next belongs." (Chap. 9, verse 187) — and says "nor should it be pretended that the text of Manu is intended to indicate nearness of kin according to the order of birth, and not according to the presentation of offerings; for the order of brith is not suggested by the text."—

न च जननक्रमेणानन्तर्य्यग्रहणार्थं वचनं न तु प्रदातृत्वेनानन्तर्य्यार्थमिति वाच्यं जननक्रमस्य वचनादनवगतेः। g

(Chapter 11, S. 6, verse 18). According to the Mitakshara on the other hand, propinquity (nearness of blood) is the regulating principle in determining the order of succession among heirs. This rule of propinquity is founded by Vijneshwara on the same text of Manu, viz. :

अनंतरः सपिण्डाद् यस्तस्य तस्य धनम् भवेत्।

(Chapter 9, S. 187). He only takes the word 'pinda' to mean 'corporal particles.' The Mitakshara texts, however, fail to help the ascertainment of the degree of nearness in blood in many cases. In such cases the Viramitrodaya solves the difficulty by referring to the doctrine of spiritual benefit. This view of the Viramitrodaya has been accepted by the Judicial Committee, 13 M.I.A. 373[2] at p. 392; 42 I.A. 208[3] at p. 227. Their Lordships say :

"When a question of preference arises as prefer- h ence is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindus), viz., who best can confer on the deceased, and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees."

In the last-named case the Judicial Committee observed :

2. ('69-70) 13 M.I.A. 373 : 14 W.R. 1 : 5 Beng.L.R. 293 : 2 Suth. 330:2 Sar. 566 (P.C.), Bhayah Ram Singh v. Bhayah Ugur Singh.
3. ('15) 2 A.I.R. 1915 P. C. 70 : 30 I. C. 529 : 37 All. 604 : 42 I. A. 208 (P. C.), Budha Singh v. Laltu Singh.

It is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the Gotrajas, the test to be applied to discover the preferential heir is the capacity to offer oblations." a

The Hindu law contemplates cases of "reunion" after partition and there are express Smriti texts to define what is 'reunion' and to determine what will be the rule of succession in such a case. The relevant Smriti texts are these :

सोदर्या विभजेयुस्तं समेत्य सहिताः समम् ।
भ्रातरो येच संसृष्टा भगिन्यश्च सनाभयः ॥

(Manu 9, verse 212).

"His uterine brothers, having assembled together, shall equally divide it, and those brothers who were reunited (with him) and the uterine sisters:" (Manu Chap. 9, verse 212 as translated by Max Muller). b

संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदरः ।
दद्यादपहरेच्चांशं जातस्य च मृतस्य च ॥

"A reunited (brother) shall keep the share of his reunited (co-heir) who is deceased or shall deliver it to (a son subsequently) born. (Yajnavalkya Chap. 2, verse 139 as translated by Colebrooke).

अन्योदर्यस्तु संसृष्टी नान्योदर्यो धनं हरेत् ।
असंसृष्ट्यपि वाऽऽदद्यात्संसृष्टो नान्यमातृजः ॥

(Yajnavalkya Chap. 2, verse 140) :

"A half-brother, being again associated, may take the succession, not a half-brother though not reunited : but one, united (by blood though not by coparcenary) may obtain the property; and not exclusively) the son of a different mother:" (Yajnavalkya Chap. 2, verse 140). c

विभक्तो यः पुनः पित्रा भ्रात्रा वैकत्र संस्थितः ।
पितृव्येणाथवा प्रीत्या स तत्संसृष्ट उच्यते ॥

"He who, being once separated, dwells again through affection with his father, brother, or paternal uncle is termed reunited" (Vrihaspati Chap. 25, verse 72). The Vrihaspati text defines "reunited" संसृष्ट Dayakrama Samgraha in its Chap. 5 explains what this reunion (संसर्ग) is. After citing this text of Vrihaspati, it says :

तेन पित्रादिभिः सहविभक्तः सन् पुनरपि अन्योऽन्येच्छया पूर्वकृत विभागम् उपेक्ष्य यत् तवधनम् तन्मम धनम् यन्मम धनम् तत् तवधनमिति व्यवस्थया एकगृहिरूपतया संस्थानम् संसर्ग इति प्रतिपन्नम् । d

Therefore where a person has been once disunited from his father and the rest—afterwards the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being concluded to the following effect, "the wealth which is thine, is mine" — "that which is mine is thine," they resolve on the dwelling in the same abode—This is considered reunion." (As translated by Wynch, Chap. 5, verse 3.)

The Vyavahara Mayukha also understands reunion as the result of agreement in fact :

"When two settle thus : the present or future wealth of us two, is common property, until we make a partition a second time; when there exists such a sign, either by an understanding or expressed wish, it is a union" : (S. 9, verse 1).

Sarasvati Vilasa says :

"The rule of reunion means the undergoing of the risk of the burden of contingent loss when, at a time subsequent to partition, coparceners throw again together their separate wealth, and start in life together as reunited persons with the special compact that they should share in the profits and losses which may happen to accrue. The order of succession in respect of the reunited is based on reason because, from the reasoning employed, the reunited are to be preferred to the wife and the daughter and also the non-reunited father and the rest included in the order." : (Verses 712 & 173). e

Smritichandrika says :

"A reunion is completed not by the union of the coparceners alone, but by the union of their wealth. It must therefore be understood that the term 'reunion' does not apply, until the effects which had been divided, are again mixed together as before, so as to destroy altogether every mark indicating division. A mere joint residence of coparceners does not amount to a reunion." f

'Re-union' is thus understood in the Hindu law as the result of an agreement between the persons reunited. *See* in this connexion 30 I.A. 130;[4] 50 I.A. 192[5] and 61 I. A. 257.[6] Its effect on the present ownership of the parties, on a possible second partition and on the rule of succession in case one dies while still reunited, is determined by special texts. These special rules are only the exceptions to the general principles adopted by both the schools and are intended specifically for the cases of reunion, as understood in the Hindu law. The Dayabhaga itself says :

"The text, 'a reunited (brother) shall keep the share of his reunited co-heir' is intended to provide a special rule governed by the circumstance of reunion after separation, and applicable to the case where a number of claimants in an equal degree of affixity occurs." (Chap. 11, S. 5, verse 38). g

संसृष्टिनस्तु संसृष्टीत्येतच्च तुल्यरूपसम्बाधिसमवाये संसर्गकृत विशेषप्रतिपत्त्यर्थम् ।

Beyond these special texts governing the cases of 're-union' there is no text in the Dayabhaga laying down any special rule which will entitle a brother or uncle, who, after separation, lives jointly without being 're-united' in the above sense of the Hindu law, to any preferential claim at succession. It is contended that such a preferential claim is deducible from the principles of succession propounded in the Mitakshara. In 12 M. I. A. 397,[7] the Judicial Committee said :

"The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of h

4. ('03) 30 Cal. 725 : 30 I. A. 130 ; 8 Sar. 470 : 7 C. W. N. 642 (P.C.), Balabux v. Rakhmabai.
5. ('23) 10 A.I.R. 1923 P. C. 136 : 74 I. C. 462 : 4 Lah. 350 : 50 I. A. 192 (P. C.), Mt. Jatti v. Banwarilal.
6. ('34) 21 A.I.R. 1934 P. C. 138 : 150 I. C. 1 : 57 Mad. 931 : 61 I. A. 257 (P. C.), Babu v. Official Assignee of Madras.
7. ('67-69) 12 M. I. A. 397 : 10 W.R. 17 : 1 Beng. L. R. 1 : 2 Suther 135 : 2 Sar. 361 (P. C.), Collector of Madura v. Mootoo Ramalinga Sathupathy.

India, schools with conflicting doctrines arose. Thus, the Mitakshara which is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as the high authority, yielding only to the Dayabhaga in those points where they differ was a commentary on the Institutes of Yajnavalka; and the Dayabhaga, which wherever it differs from the the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools equally admits and relies on the authority of Yajnavalka."

The verses of the Mitakshara on which reliance is placed by the appellant are the following :

तत्र दायशब्देन यद्धनं स्वामिसंबन्धादेव निमित्तान्यस्य स्वं भवति तदुच्यते । स च द्विविधः अप्रतिबन्धः सप्रतिबन्धश्च । तत्र पुत्राणां पौत्राणां च पुत्रत्वेन पौत्रत्वेन च पितृधनं पितामहधनं च स्वं भवतीत्यप्रतिबन्धो दायः । पितृव्यभ्रात्रादीनां तु पुत्राभावे स्वाम्यभावे च स्वं भवतीति पुत्रसद्भावः स्वामिसद्भावश्च प्रतिबन्धः तदभावे पितृव्यत्वेन भ्रातृत्वेन च स्वं भवतीति सप्रतिबन्धो दायः । एवं तत्पुत्रादिष्वप्यूहनीयः ।

"Here the term heritage (daya) signifies that wealth which becomes the property of another, solely by reason of (his) relation to the owner."

"It is of two sorts : unobstructed (Apratibandha) or liable to obstruction (Sapratibandha). Now the wealth of the father and of the paternal grandfather, becomes the property of his sons and of his grandsons, in right of their being his sons and grandsons respectively and that is an inheritance not liable to obstruction. But property devolves on paternal uncles, brothers and the rest, upon the death of the owner, and in default of male issue and thus the existence of a son and the existence of the owner are impediments to the succession; and on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is inheritance subject to obstruction. The same should be inferred in respect of their sons and the rest." (Mit. Chap. I, S. 1 verses 2 & 3).

It is difficult to see how this text helps the proposition enunciated by the appellant. The property after partition becomes the property of the nephew and if any uncle claims it on the demise of the nephew it will be a case of सप्रतिबंधदाय 'obstructed heritage'—to him. The very basis for the application of the doctrine of survivorship is removed by the partition ; and, in the absence of any special incident introduced by any reunion, the uncle must claim only as an heir to his nephew. The position, therefore, is that the Smritis, the Dayabhaga or the Mitakshara do not anywhere lay down that a brother or uncle who after separation becomes joint but not re-united is entitled to any preference. In 35 Cal 721,[1] Mitra J. sitting singly observed :

"The reason for inheritance by a reunited coparcener is not spiritual benefit, but a quasi contractual relation and affection for each other. Spiritual benefit has no place. Affection is an important element (Vrihaspati XXV 72-77). The agreement, the wealth, which is thine, is mine, that which is mine, is thine, is also another element (Dayakarma Sangraha Chap. V, S. 1, paras. 2 and 3). The criterion is not expressly spiritual benefit."

"We must next see what in such a case as the present, the older authorities have laid down and whether they have been expressly dissented from by Jimutavahana. An express dissent by the authorities of the Bengal school of law will preclude our adopting the rules laid down by the older and the more orthodox authorities. The sages, whose texts have been interpreted in the Mitakshara, were undoubtedly of opinion that a coparcener, who is joint, is entitled to preference under the law of survivorship. If, as has been found in this case, Lal Mohan was joint with Nanda Gopal, he would succeed according to the Mitakshara, which in my opinion, should be the guiding principle in the absence of any express texts or commentaries of the Dayabhaga school of law. I would, in all cases of absence of texts or precedents under the Dayabhaga law, have recourse to the theory of propinquity and natural love and affection, as adopted by Vijnaneswara and the commentators of the more ancient and orthodox schools of Hindu law. They are highly respected by lawyers of the Bengal school and I would make the law of Bengal correspond with the law as administered in the rest of India."

We have already referred to the text of Dayakarma Sangraha relied on in this decision by Mitter J. In our judgment that text does not support the rule of law sought to be enunciated in the above case. Verse 72 of Chap. XXV of Vrihaspati again only defines the 're-united' (संसृष्टी). The other verses of Vrihaspati referred to in the judgment of Mitter J. are the following :

"When brothers formerly divided are again living together through affection and arrange a second division, the right of primogeniture does not accrue in that case." (Chap. XXV 73).

"When any one (brother) should die or anyhow renounce worldly interests, his share is not lost : it is allotted to his uterine brother." (Chap. XXV 74).

"If there be a sister, she is entitled to a share of his property. This is the law regarding (the wealth of) one destitute of issue, and who has no wife or father." (Chap. XXV 75).

"When two (coparceners) have again established together they shall mutually inherit their property." (Chap. XXV 76).

"If among reunited coparceners any one should acquire property through learning, valour, or other (independent effort of his own), a double share must be given to him ; the rest shall take equal shares." (Chap. XXV 77).

These are all exceptions to meet the special cases of reunion. 'Reunion' is not the result of any quasi contract but, as has been pointed out above, is the product of real contract in fact,—is the product of an agreement, express, or implied, from conduct. A quasi contractual relation is one which is not in truth contractual, but which the law treats as if it were so. It is contractual in law, but not in fact and being the subject of contract covers relations which do not in reality fall within it. A quasi contract may be said to be a contract implied in law as distinguished from a contract implied in fact. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. (See Salmond : Jurisprudence, Edn. 9, p. 642.)

The general rule is that all brothers or paternal uncles would equally divide the heritage. "Reunion" is an exception to this general rule and is the basis of preference. Affection may lead to 're-union.' Where there is no re-union, affection by itself cannot be invoked as an independent principle forming the basis of preference. No doubt 'affection' plays an important part in the utilitarian doctrine

of succession. But as we have seen above, the basis a of succession, as adopted by the Hindu law-givers, did not turn upon this factor at all. No doubt the theory of nearness of blood might imply the theory of 'affection.' But that cannot be said to be the principle of succession adopted by the Mitakshara. We enquired of the learned advocate for defendant 1 as to whether there is any authority in support of the observation of Mitter J. that "the sages whose texts have been interpreted in the Mitakshara were undoubtedly of opinion that a coparcener who is joint is entitled to preference under the Law of Survivorship." The learned advocate cited verses 2 and 3 of S. 1, Chap. 1 of the Mitakshara in support of the above observation of Mitter J. As we have observed above, these verses simply lay down that on the failure of male issue, brothers or uncles inherit by reason of their relationship with the deceased. The principle of survivorship is the result b of the principle of ownership by birth adopted by the Mitakshara. As between the separated coparceners the very basis of the principle will be wanting as the result of the partition. Thereafter even reunion will not restore the pre-partition legal position and that is why special texts became necessary to define the position consequent on re-union. It may further be noticed here that even in the case of reunion a re-united brother, nephew or uncle takes not by survivorship but by the special rule of succession expressly laid down for the case. Vijnaneshwara in Chap. 2 S. 9 verse 13 of the Mitakshara says :

येषा भ्रातृणां संसृष्टिनां मध्ये ज्येष्टः कनिष्ठो वा मध्यमो वांशप्रदानतोंऽशप्रदाने । सार्वविभाक्तिकस्तासिः । विभागकाल इति यावत् । हीयेत स्वांशात् भ्रश्येत c आश्रमान्तरपरिग्रहेण ब्रह्महत्यादिना वा म्रियेत वा तस्य भागो न लुप्यते ।

"Among re-united brothers, if the eldest, the youngest or the middlemost, at the delivery of shares, that is, at the time of making a partition, lose or forfeit his share by his entrance into another order or by the guilt of sacrilege or by any other disqualification, or if he be dead, his allotment does not lapse." (Mit. Chap. 2, S. 9 verse 13)

Vijnaneshwara draws this inference from the texts of Manu in Chap. 9, verses 211 and 212 :

'येषां ज्येष्टः कनिष्ठो वा हीयेतांशप्रदानतः म्रियेतान्यतरो वापि तस्य भागो न लुप्यते ॥ सोदर्या विभजेयुस्तं समेत्य स हिताः समम् । भ्रातरो ये च d ससृष्टा भगिन्यश्च सनाभयाः ॥'

"Should the eldest or youngest of several brothers be deprived of his allotment after distribution or should any one of them die, his share shall not lapse; but his uterine brothers and sisters, and such brothers, as were re-united after separation, shall assemble together and divide the share equally."

Similarly Smritichandrika says :

"If, before partition in a family prior to re-union one should die or enter into a religious order without having male issue, his share becomes extinct because no partition has taken place in the family and there has been consequently no ascertainment of the extent of share of each parcener. Therefore all the other undivided parceners take the whole heritage of the deceased. But, in the instance of a parcener dying after re-union, no such ascertainment of the extent of his share is wanting, the extent having already been ascertained in the original partition. A re-union cannot have the effect of destroying the extent of share so ascertained. It simply destroys the exclusive right which he had possessed prior to the re-union to the property that had fallen to his share. Therefore the whole estate is not, on his death, taken by all the other re-united parceners. . ." (Chapter 12, para. 9.) Its succession is governed by the special texts. We, therefore, see no reason why all the uncles under Dayabhaga law should not inherit equally when the deceased nephew was not 're-united' with any of them. A Division Bench of this Court has also taken this view, 43 C.W.N. 937.[8]

The trial Judge has found that defendant 1 was joint with Prangobinda, but not re-united. After the death of Bepin Behari, defendant 1 took charge of Prangovinda and of the properties which were given to him by Bepin Behari. The tenants who used to cultivate the lands of Prangovinda and de fendant 1 used to deliver the bhag paddy to defendant 1. The record of rights prepared under Chap. 10, Ben. Ten. Act, records the separate possession of Prangovinda in his properties. The explanation of defendant 1 that the record was wrongly prepared as he could not be present on account of his illness before the settlement authorities cannot be accepted. Prangovinda died shortly after he attained majority. Consequently, it cannot even be said that defendant 1 was joint in property with Prangovinda during his lifetime. The result, therefore, is that this appeal is allowed. The judgment and the decree of the Subordinate Judge dismissing the appellant's suit for partition are set aside. Plaintiff's title to 4 annas share of the disputed properties is declared. The case is sent back to the trial Judge for determining the issue as to whether the plaintiff is entitled to get any decree for accounts. The learned Judge is further directed to draw up a preliminary decree for partition in accordance with our finding that the plaintiff has got 1/4th share in the properties in suit. In the facts and circumstances of this case we direct the parties to bear their own costs in the trial Court. So far as the costs of this Court are concerned, the appellant will get the costs incurred by him for the preparation of the paper book only from defendant 1.

G.N./R.K. *Appeal allowed.*

8. ('40) 27 A.I.R. 1940 Cal. 157 : 187 I.C. 330 : 70 C.L.J. 294 : 43 C. W. N. 937, Jyotish Chandra v. Praphulla Chandra.

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(a) ('40) Mulla, Page 96 S. 94 and Page 414 Ss. 343 and 344.
('38) Gour, Page 678 para. 1677 and Page 1018 para. 2406.

(b) ('40) Mulla, Pages 413 and 414 Ss. 342 to 344.
('38) Gour, Page 674 paras. 1668 and 1670; Page 675 para. 1671; Page 676 para. 1675; Page 678 para. 1677 and Page 1018 Pt. (4).

A. I. R. (29) 1942 Calcutta 337

ROXBURGH J.

Fazal Ahmed Choudhury s/o Nazir Ahmed Choudhury — Defendant — Petitioner

v.

Etim Ali Choudhury s/o Jan Ali Choudhury — Plaintiff — Opposite Party.

Civil Rule No. 1546 of 1941, Decided on 7th January 1942, in matter of application for setting aside and decree of Munsif, Second Court, Patiya (Chittagong), D/- 19th August 1941.

(a) Bengal Agricultural Debtors Act (7 of 1936), Ss. 18 (1) and 25 (3) — Board's decision that debt under handnote had been satisfied bars suit on handnote in civil Court.

Where a debt due under a handnote is brought before the Board and the creditor fails to appear before the Board a decision by the Board that the debt had been satisfied and that nothing further was due on the handnote bars a suit on the handnote in the civil Court. [P 337 C 2]

(b) Bengal Agricultural Debtors Act (7 of 1936), S. 2 (6A) — Munsif's Court exercising jurisdiction of Small Cause Court is civil Court within S. 2 (6A).

The Court of a Munsif exercising the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act by virtue of the provisions of S. 25, Bengal, Agra and Assam Civil Courts Act, is the Court of a Munsif defined in S. 3 (4) of that Act as one of the classes of the civil Courts thereunder and is a civil Court within the meaning of S. 2 (6A), Bengal Agricultural Debtors Act. [P 337 C 2]

(c) Bengal Agricultural Debtors Act (7 of 1936), Ss. 47 and 25—Award under Act— S. 49, Registration Act, does not apply — Award is admissible in civil Court without registration.

Section 49, Registration Act, does not apply to an award under the Bengal Agricultural Debtors Act and therefore the award is admissible in a civil Court without registration. [P 338 C 1]

Imam Hossein Chowdhury — for Petitioner.

Tafazzal Ali — for Opposite Party.

ORDER. — This rule arises out of a decree passed by the second Court of the Munsif of Patiya in the exercise of his jurisdiction as a Court of Small Causes dated 19th August 1941 allowing a claim on a handnote for Rs. 70. The rule has been obtained on the ground that the Court had no jurisdiction to hear the suit. The case of the defendant in the suit was that he had filed a case No. 119 of 1940 in the Kashiash Debt Settlement Board showing all his debts including that of the present handnote. In the award finally made by the Board this debt is shown and it is clear therein that no amount is due on the pronote. This decision is binding on the parties by virtue of the provisions of Ss. 25 (3) and 18 (1), Bengal Agricultural Debtors Act, 1936, and therefore no decree should be passed in respect of the claim. It was the defendant's case that the debt had been paid off by enjoyment of the usufruct of the land by the plaintiff creditor for a period of years and it was further contended that the Debt Settlement Board had passed an order under S. 13 (2), Bengal Agricultural Debtors Act, to the effect that nothing was due to the plaintiff on the pronote in question. The learned Munsif found that there was no order under S. 13 (2) and no copy of such an order has been proved in the case. He further considered that the proceedings of the Board were, in some respects, defective and held that the award must follow the order under S. 13 (2). As there was no such order the award could not be valid in this respect. In my opinion the learned Munsiff has taken a wholly incorrect view of the matter. It is clear that this debt was brought before the Board, that the creditor failed to appear before the Board which held that the debt had been satisfied and that nothing further was due on the handnote. In that view of the matter the learned Munsif should have dismissed the suit.

It has, however, been brought to my notice that the opposite party has obtained a certified copy of the award from the Registration Office and this differs in material particulars from that filed in the suit. It is not possible for this Court conveniently to enquire into the matter and in these circumstances the proper order would appear to be to set aside the order decreeing the suit and send the case back to the lower Court for that Court to consider the copies of this award and to ascertain which is the correct copy. It would then be in a position to decide in the light of the above remarks whether in the correct copy of the award there is anything which is a bar to a decree being given in the suit.

An objection has been taken that the second Court of the Munsif of Patiya exercising jurisdiction of a Court of Small Causes is not a civil Court within the meaning of the definition given in S. 2 (6A), Bengal Agricultural Debtors Act. Strictly speaking, no question of jurisdiction arises in this matter. The only point is that the Court is bound by the decision of the Board. However, as the point has been discussed at some length, I will briefly state my reasons for holding that the Court of the Munsif in this matter is a civil Court within the meaning of the definition given in S. 2 (6A). The munsif is exercising the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Cause Courts Act of 1887 by virtue of the provisions of S. 25, Bengal, Agra and Assam Civil Courts Act of 1887. In other words, it is the Court of a munsif defined in S. 3 (4) of that Act as one of the classes of the civil Courts thereunder that is exercising the jurisdiction of the Court of Small Causes so conferred, and it is therefore clear that the Court is exercising that jurisdiction as a civil Court within the meaning of the definition in the Bengal Agricultural Debtors Act. The Provincial Small Cause Court's Act of 1887 in S. 5 makes provision for the establishment of Courts of Small Causes and in S. 6 for the appointment of Judges of such Courts. Succeeding sections of the Act make provision as regards jurisdiction, practice and procedure of such Courts. In Chap. 5 supplementary provisions are made and in S. 32 (1) specific provision is made that certain parts of Chaps. 3 and 4 specified therein apply "to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts."

Section 33 makes special provision that for the purposes of the Provincial Small Cause Courts Act and the Civil Procedure Code. "A Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its

jurisdiction in suits of a civil nature which are not a cognizable by a Court of Small Causes shall be deemed to be different Courts."

Section 34 (a) provides thus : "when in exercise of the jurisdiction of a Court of Small Causes, a Court invested with that jurisdiction sends a decree for execution to itself as a Court having jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes ;" certain documents are not required to be sent. All this abundantly supports the view that it is the civil Court of the munsif which is functioning even when it is exercising the jurisdiction of the Court of Small Causes conferred upon it by a notification made under S. 25, Bengal, Agra and Assam Civil Courts Act. It is clear therefore that the Court is a civil Court within the definition given in S. 2 (6A), Bengal Agricultural Debtors Act of 1936. A further objection is taken that, as at the time of the suit b the award in question had not been registered as required under S. 47, Bengal Agricultural Debtors Act, the award could not be put in as evidence. In my opinion, there is no substance in this objection as S. 49, Registration Act of 1908, has no application to an award under the Bengal Agricultural Debtors Act. The rule is accordingly made absolute, the order of the munsif decreeing the suit in favour of the opposite party is set aside and the case will go back for consideration by the Court below in the light of this order, of the terms of what it finds to be the actual award made by the Debt Settlement Board in Case No. 119 of 1940. There will be no order as to costs in this rule.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 338

c

MOHAMAD AKRAM AND PAL JJ.

Hiranmoy Bhaduri — Plaintiff — Appellant

v.

Probal Kumar Pramanik — Defendant — Respondent.

Appeal No. 1797 of 1938, Decided on 18th December 1941, from appellate decree of Dist. Judge, Nadia, D/- 4th June 1938.

(a) Civil P. C. (1908), O. 21, R. 63 — Decree against contractual firm of *A* and *B* — Decree-holder seeking attachment against members of joint family of *A* and *B* and attaching house belonging to joint family — *C*'s objection that d **house was purchased by him at auction allowed — Suit by decree-holder under O. 21, R. 63 for declaration that house belonged to joint family and *C* was mere benamidar—Defect that decree was not available against execution debtors named in execution application held did not at all affect maintainability of suit as framed.**

The decree-holder obtained a decree against a contractual firm consisting of *A* and *B*, and sought execution thereof against the members of the joint family of *A* and *B*. A house belonging to the joint family was attached but *C*'s objection that he had purchased the house at an auction sale was upheld and the decree-holder's contention that *C* was a mere benamidar of the joint family was rejected. In the suit by the decree-holder under O. 21, R. 63 for declaration that the house belonged to the joint family and therefore was liable to be attached in execution of his decree and that *C* was a mere benamidar of the joint family it was contended that the suit as framed was not maintainable :

Held that the alleged defect that the decree was not available against the execution debtors named in the application for execution, was certainly not a defect in the frame of the suit, and strictly speaking, the defect, if any, did not touch the maintainability of the suit at all. The alleged defect might defeat the title claimed by the plaintiff in the suit; but that was very different from any preliminary defect in the frame of the suit rendering the suit as framed not maintainable in law. [P 339 C 2]

(b) Civil P. C. (1908), O. 14, R. 1—Object of framing issue, stated — Court should make issues sufficiently expressive of matters to be considered under them — Frame of issue defective — Parties going to trial knowing full well what question for decision was—Plaintiff given opportunity to meet point not covered by issue e **—Plaintiff not availing of opportunity — Plaintiff is precluded from contending that defect in issue prejudiced him.**

The object of framing an issue is to direct the attention of the parties to the main questions of fact or law to be decided and the duty of framing and recording the proper issues has been placed on the Court by the Civil Procedure Code. It is expected that in framing such issues the Courts of law should exert themselves so as to make them sufficiently expressive of the matters which they desire to consider under such issues. [P 340 C 1]

Where in spite of the defect in the frame of the issue, the parties have gone to trial knowing full well what the question for decision was and the plaintiff was given an opportunity of meeting the point raised at the trial though not covered by the issue, he cannot subsequently be heard to say that f the defect in the frame of the issue prejudiced him when he did not avail himself of that opportunity. [P 340 C 1]

(c) Civil P. C. (1908), O. 21, Rr. 63 and 58 — Words "right which he claims to property in dispute" in R. 63 refer to right claimed in execution proceedings — Property attached in execution—Objector's claim allowed — Suit under O. 21, R. 63 by decree-holder to establish his execution-debtor's title—Objector cannot question validity of execution proceeding — Merely because he is alleged by decree-holder to be benamidar of execution debtors it does not entitle objector to question maintainability of execution proceeding on behalf of real owners particularly when latter are not moving in the matter.

g

The words "the right which he claims to the property in dispute" as used in R. 63 refer to the right which the party claims in the execution proceedings. In a suit by an "execution creditor" under O. 21, R. 63 to establish the title of his "execution-debtor" to certain property which had been released from attachment on a claim preferred by the defendant objector the latter has no right to set up any irregularities in the execution in answer to the execution creditor's claim of title. He cannot be allowed to set up the defence that the decree cannot be executed against the execution-debtors named in the execution case : 4 W. R. 394 and 10 Bom. 659, *Rel. on*; 17 Mad. 389, *Expl.* [P 340 C 1,2]

And so long as the order of the executing Court directing the execution to proceed against the execution-debtors who were made parties to the execution proceedings stands the execution debtors

themselves may be debarred from raising that question. A benamidar does not always represent the real owner in a suit or proceeding. Merely because an objector who is no party to the execution proceedings and who comes to fight his own fight, is alleged by the decree-holder to be the benamidar of the execution debtors, it does not entitle the objector to take up the cause of the real owners and to challenge the maintainability of the execution proceeding on behalf of the real owners particularly when the latter even though made parties to the execution proceedings are not moving in the matter. [P 340 C 2]

Sharat Ch. Mukherjee and Kamjit Mukherjee — for Appellant.

Satish Chandra Sinha and Binayak Nath Banerjee — for Respondent.

PAL J.—This appeal by the plaintiff is in a suit under O. 21, R. 63, Civil P. C. The plaintiff instituted Suit No. 561 of 1931 in the Original Side of this Court. The defendant in that suit was described: "Pramatha Nath Pramanik and Anukul Chandra Pramanik, a firm carrying on business at Ghurni and Goari in the District of Nadia, traders and landholders." The suit was decreed on 24th July 1931, against the defendant firm as described above.

The plaintiff's case in the present suit is that Protap Chandra Pramanik, Nilmani Pramanik and Hari Charan Pramanik were three brothers living jointly at Ghurni, that the brothers had a joint business which descended to their heirs; that Pramatha Nath Pramanik was the second son of Nilmani and Anukul is the son of Pratap; that after several successive deaths in the family, the above family business was carried on by Pramatha and Anukul as kartas on behalf of the family and that while thus carrying on the above family business they purchased goods from the plaintiff; that the amount claimed in the Suit No. 561 of 1931 above referred to was due by the plaintiff from the Pramanik family on this account. After having obtained a decree in Suit No. 561 of 1931, the plaintiff got the decree transferred to Nadia Court and took out execution of the same as per Execution Case No. 76 of 1933 and Execution Case No. 261 of 1934. The last named Execution Case was dismissed on 5th February 1935. Thereafter he started the Execution Case No. 156 of 1935 and this time execution of the decree was sought against the members of the joint family of the Pramaniks and attachment was prayed for of the property belonging to this joint family. In this execution case the dwelling house of the Pramaniks was attached and the present defendant Probal Kumar Pramanik objected to this attachment, claiming that he had purchased this property in 1934 at an auction sale held in execution Case No. 1117 of 1933, and that the property no longer belonged to the family of the Pramaniks. This Probal Kumar Pramanik is not a member of the Pramanik family. The plaintiff decree-holder in that objection case asserted that the claimant was merely a benamidar of the family. The claim however was allowed by the executing Court on 8th February 1936. Thereupon the plaintiff instituted the present suit on 19th November 1936. In this suit he prayed for a declaration that the defendant was a mere benamidar of the Pramaniks and that the property in dispute belonged to the joint family of the Pramaniks and consequently was liable to attachment and sale in his Execution Case No. 156 of 1935. The defendant appeared and filed a written statement contesting the claim of the plaintiff on various grounds and ultimately the learned Munsif framed 17 issues on the pleadings of the parties. Of these issues, only issues 2 and 3 were first picked up for hearing and these were accordingly heard by the learned Munsif with the concurrence of both the parties. The issues run as follows : (2) Is the suit maintainable according to law and in its present form? (3) Is the suit bad for vagueness?

The learned Munsif then proceeded to consider these two issues together for the sake of convenience and decided them both against the plaintiff. He held (1) that the plaint was really vague, inasmuch as it did not make it clear how a decree standing against a firm which was in all appearance a contractual one, could be made available against the members of the family and (2) that the present suit was not maintainable, inasmuch as the decree obtained by the plaintiff being against the firm Pramatha Nath Pramanik and Anukul Chandra Pramanik and not against the joint family of the Pramaniks the execution case against the family was untenable, and consequently, the execution against the joint family property could not proceed. He, therefore, dismissed the suit. On appeal by the plaintiff, the learned District Judge of Nadia affirmed this decision holding that the decree in question was against a contractual firm and not against the joint family of the Pramaniks and consequently the prayer for its execution by attaching the joint family property was not maintainable. Mr. Mukherjee appearing for the appellant, urged the following points in support of this appeal : (1) that the present suit being one under O. 21, R. 63, Civil P. C., the plaintiff is entitled to succeed only on establishing the right which he claimed to the property in dispute in his execution case and that therefore the only relevant point for decision in this suit was whether the property belonged to the Pramanik family or whether it belonged to the defendant; (2) that the present execution case having been taken out against the joint family of the Pramaniks and they not having raised any objection to the execution, it was not open to the present defendant who was a stranger to that family to raise the question in the present suit whether the decree should be executed against the joint family; (3) that the issue raised and tried did not at all cover the points decided by the Courts below and that this has greatly prejudiced the appellant inasmuch as he had no opportunity of meeting the points raised and decided against him by the judgments; (4) that, at any rate, the construction put upon the decree that it was only against a contractual firm and not against the joint family of the Pramaniks was wrong and was based on insufficient materials.

As regards point 3 raised by Mr. Mukherjee in support of this appeal it must be said that issue 2 as framed by the learned Munsif fails adequately to raise the question actually considered by him in his judgment. The issue is "Is the suit maintainable according to law and in its present form?" No defect in form, however, seems to have been alleged in this case. At least no such defect has been adverted to by the Courts below and none could be pointed out to us here. The defect complained of, viz., that the decree in question is not available against the execution-debtors named in the application for execution, is certainly not a defect in the frame of the present suit, and, strictly speaking, the defect, if any, does not touch the maintainability of the suit at all. This may defeat the title claimed by the plaintiff in the suit ; but that is a matter very different from any preliminary defect in the frame of the suit rendering the suit as framed not main-

a tainable in law. The object of framing an issue is to direct the attention of the parties to the main questions of fact or law to be decided and the duty of framing and recording the proper issues has been placed on the Court by the Code of Civil Procedure. It is expected that in framing such issues our Courts of law should exert themselves so as to make them sufficiently expressive of the matters which they desire to consider under such issues. In spite of the defect in the frame of the issue, however, the parties in the present case seem to have gone to trial knowing full well what the question for decision was. At least the plaintiff was given an opportunity of meeting the point raised at the trial though not covered by the issue, and he cannot be heard to say that the defect in the frame of the issue prejudiced him when he did not avail himself of that opportunity.

In our opinion, the first two points raised by Mr.
b Mukherjee are of much greater substance. Order 21, R. 63, Civil P. C., lays down : "Where a claim or objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute. . . . ." In this particular case the present plaintiff as decree-holder claimed in his execution case the right to proceed against the property in question as belonging to the joint family of the Pramaniks. The application for execution is Ex. B-1 in this case and it is amply clear from this execution petition that, rightly or wrongly, the plaintiff decree-holder applied for execution of his decree against the members of the joint family of the Pramaniks and prayed for attachment and sale of the property belonging to the family. Pursuant to this prayer, the properties were attached which were alleged as belonging to that family. The present property is
c only one of the items thus attached. The present defendant who was not a member of the family preferred a claim to this property under O. 21, R. 58 asserting a title in himself on the basis of a purchase of 1934, as has been stated above. On this claim being preferred, an order was made against the present plaintiff by which it was held that the property belonged to the claimant. So the plaintiff is the party against whom the order was made within the meaning of O. 21, R. 63, Civil P. C., and he instituted the present suit to establish the right which he claimed there. In our opinion, the words 'the right which he claims to the property in dispute' as used in R. 63 of O. 21 refer to the right which the party claims in the execution proceedings. In this particular case the plaintiff in the execution proceedings claimed that the property belonged to the joint family of the Pramaniks, and that is the
d right for the establishment of which the present suit has been instituted. It is difficult to see why an objector should be allowed to question the legality or validity of the proceeding against the execution-debtors named in the execution case. There is no doubt that if the execution proceedings proceeded upto the stage of sale and the present decree-holders purchased this property at the sale held in execution of this decree, the present claimant could not have defeated their title to the property by alleging that the joint family was not liable for the decree. In order to succeed in an action after such sale, the present defendant must have taken his stand only on his own title, or on want of title of the joint family. It appears that this view was taken by a Division Bench of this Court as far back as the year 1875 in 24 W. R. 394;[1] (Sir Richard Garth C. J. and Birch J.) ; it was held that in a suit by an 'execution-creditor' to establish the title of his 'execution-debtor' to certain property which had been released from attachment on a claim preferred by the defendant the latter had no right to set up any irregularities in the execution in answer to the execution-creditors' claim of title. Garth C. J. observed as follows :

"We consider that the only question which could properly have been tried in this case is whether the property seized did really belong to the "execution-debtor" as against the defendant in this suit. As between the 'execution creditor' and the 'execution debtor', it would of course have been open to the latter to contend that his immovable property could not be seized till the remedies against his person and movable property were exhausted. But the defendant who merely comes in to contest the title to the property has no right to set up any irregularities in the execution as an answer to the execution-
f creditors' claim to title." In the present case the joint family is the 'execution-debtor', though they may not be the judgment-debtor named in the decree. No member of the family is coming forward to object to the execution. We do not see why the present defendant who is merely a stranger claimant should be allowed to set up the defence that the decree cannot be executed against the execution-debtors named in the execution case. Similar view was taken in 10 Bom. 659,[2] (Sargent C. J. and Birdwood J.). The decision in 17 Mad. 389[3] is not against this view. There the defendant claimant was connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband or being his coparcener and consequently it was held that it was open to him to question the decree itself, in a suit under S. 283, Civil P. C. of 1882 (now O. 21, R. 63 of the present Code).
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Mr. Sinha appearing for the respondent contended that the defendant in the present suit having been alleged to be the benamidar of the execution-debtors named in the execution case was competent to question the maintainability of the execution proceeding itself on behalf of the real owners. We are unable to accede to this contention. In the execution proceeding itself, the members of the family have been made parties and the executing Court has directed the execution to proceed against them. So long as that order stands, these members themselves may be debarred from raising this question. At any rate a benamdar does not always represent the real owner in a suit or proceeding. The alleged real owners here have been made parties to the execution proceeding and they are not contesting there the claim of the plaintiff-decree-holder. It is difficult to see on what principle their benamidar who
h is no party to the execution proceeding and who comes to fight his own fight, can be allowed to take up the cause of the real owners particularly when the latter are not at all moving in the matter. The difficulties of a decree-holder are already numerous and their trouble will indeed be endless if any one can thus come and question the validity of the execution. In our opinion, therefore, the grounds on which the present suit has been dismissed by the Court of appeal below were not open to the present defendant and the order of dismissal cannot be allowed to stand. The result is that this appeal is allowed; the judgments and decrees of the Courts below are set aside and the suit is sent back to the Court of first instance for disposal according to law

1. ('75) 24 W.R.394, Tofail Ahmud v. Bani Madhub.

2. ('86) 10 Bom. 659, Gulibai v. Jagannath.
3. ('94) 17 Mad. 389, Narayyan v. Nageswarayyan.

keeping in view the observations made above. We
a would like to make it clear that our observations made above should not be taken as deciding who is the real owner of the property. That is a question which is to be decided by the Court hearing the suit. Costs will abide the result.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Appeal allowed.*

C. P. C. —
(b) ('40) Chitaley, O. 14 R. 1 N. 1; N. 4 pts. 6 and 8 and N. 5 pts. 2 and 3.
('41) Mulla, O. 14 R. 1 Page 689 Note 'of the framing of issues.' Page 690 pt. (p); Page 691 Note 'wrong issue.'
(c) ('40) Chitaley, O. 21 R. 63 N. 7 pts. 3 and 4 and Note 14.

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b MOHAMAD AKRAM AND PAL JJ.

Mozam Shaikh—Defendant—Appellant

v.

Annada Prasad Bhadra and another—Plaintiffs—Respondents.

Appeal No. 110 of 1939, Decided on 16th December 1941, from appellate decree of Dist. Judge, Jessore, D/- 29th October 1938.

(a) Landlord and tenant — Ejectment suit—Plaintiff alleging that notice served was sufficient to determine tenancy—Onus is on plaintiff to establish that notice expired with month or year of tenancy.

Where in a suit by the landlord to eject his
c tenant the landlord pleads that the notice served by him was sufficient to determine the tenancy, the onus is on the landlord to establish that the notice legally determined the tenancy by showing that it expired either with the end of the year or the end of the month of the tenancy. In the absence of evidence by the plaintiff to show when the year or month of the tenancy commenced his suit must fail. [P 341 C 2]

(b) Landlord and tenant—Tenancy-at-sufferance or at-will — What is and how created — Tenancy created by contract cannot be characterised as at will or at sufferance.

The tenancy-at-sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It, therefore, cannot be created by contract and arises only by implication of law when a person
d who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled. The tenancy-at-will again arises by implication of law in cases of permissive occupation. Where the tenancy was created by contract there is no scope for characterising it as one at-will or at sufferance. [P 341 C 2; P 342 C 1]

Rajendra Bhusan Bakshi and Ram Mohan Bhattacherji—for Appellant.

Hemendra Chandra Sen and Sures Chandra Sen—for Respondents.

PAL J. — This appeal is by the defendant in a suit for ejectment after notice. The disputed property is a small plot of land in the bazar at Narail. The plaintiffs' case is that the defendant was a tenant-at-will in respect of the land from before the date when he executed the kabuliat, Ex. 1 on 26th Falgoon 1305, corresponding to 9th March 1899; that, though not necessary, a notice to quit was
a served on him on 30th Aswin 1343 B.S. corresponding to 16th October 1936, asking him to quit by 30th Chaitra 1343 B. S. The defence, inter alia, was that the tenancy was a permanent one and that, at any rate, the notice served was insufficient and defective, inasmuch as it did not expire with the end of either the year of the tenancy or the month of the tenancy. Both the Courts decreed the plaintiffs' suit; hence this second appeal by the defendant.

As has been stated above, the notice asked the defendant to quit by 30th Chaitra, 1343 B.S. The exact vernacular words used in the notice were "Trishe Chaitra Madhye." It was contended on behalf of the appellant that these words mean that he was asked to quit before the expiry of 30th Chaitra 1343 B.S. and hence defective. We are unable to accept this contention of the appellant. The words "Trishe Chaitra Madhye" would mean "by 30th Chaitra"
f and the tenant would have the whole of that day to give up the tenancy. This is also made clear from the next clause in the notice which says that in case of default the landlord would take legal proceedings to re-enter on 1st Baisakh. The next contention of the appellant is that 30th Chaitra was neither the end of the month of the tenancy nor of the year of the tenancy. His contention is that as the kabuliyat Ex. 1, reserved yearly rent, the tenancy must be treated to be a yearly one terminable by six months notice expiring with the end of the year of the tenancy. He contends that if the kabuliyat Ex. 1, be taken to be the document by which the tenancy was created then in that case, as there is nothing in the document itself expressly specifying from which date the tenancy is to commence, it must be taken that it commenced from 26th Falgoon 1305 B.S. the date on which the kabuliyat was executed.
g In that case the year or month of the tenancy will not end on the last date of that month but on the 27th. His further contention is that the kabuliyat itself shows that the tenancy was in existence from before the date of this kabuliat, and no evidence has been adduced by the plaintiffs in this case to show when it did really commence.

The tenancy of the defendant is admitted, and it is the plaintiffs who plead that it determined on the expiration of a notice to determine his lease. It is for them to prove that the notice in question legally determined the lease, in order to show that it must be shown that the notice served upon him expired either with the end of the year of tenancy or with the end of the month of the tenancy. In the absence of any evidence to show when the year or month of the tenancy commenced, the plaintiffs' suit must fail. In our opinion, this contention of
h the defendant must be given effect to. The plaintiffs want to say that the notice served by them was sufficient to determine the tenancy. It is for them to show that it was really so sufficient. It was open to them to prove the commencement of the tenancy by producing their collection papers but they did not adduce any evidence to do that. The plaintiffs respondents next contended that the tenancy was really a tenancy-at-will or at sufferance and, consequently, no notice was at all necessary for the purpose of determining it. We are unable to accept this contention of the plaintiffs-respondents. The tenancy-at-sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It, therefore, cannot be created by contract and arises only by implication of law when a person who has been in possession under a lawful title continues in possession after that title has determined without the consent of the person entitled. The tenancy-

at-will again arises by implication of law in cases of permissive occupation. In the present case nothing of the kind happened. Admittedly, the tenancy was created by contract and in our opinion there is no scope for characterising the present tenancy as one at will or at sufferance.

The next point urged by the appellant in support of his appeal is whether or not in case of eviction he would be entitled to have any compensation for his structures. As, in our opinion, the appeal must succeed on the ground that the notice served failed to determine the tenancy, inasmuch as it has not been established in this case that it expired with the month or year of the tenancy, it is not necessary for us to enter into this second question. In the result this appeal is allowed; the judgments and decrees of the Courts below are set aside and the suit is dismissed on the ground of insufficiency of notice. In the circumstances of this case, we direct that the parties do bear their respective costs throughout.

MOHAMAD AKRAM J.—I agree.

G.N./R.K. *Appeal allowed.*

T. P. Act —
(a) ('36) Mulla, S. 106 Page 589 Note 'Date of expiry of notice.'
('37) Mitra, S. 106 Page 576, N. 557.
(b) ('36) Mulla, S. 105 Page 568 Pt. (J); Page 569 Pt. (w).
('37) Mitra, S. 116 Page 635, N. 614.

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HENDERSON J.

Abdur Rahim alias Manghu Mia —
Judgment-debtor — Petitioner
v.
Abdur Rauf and others —
Opposite Party.

Civil Rule No. 1151 of 1941, Decided on 20th November 1941, for setting aside order of Munsif, Second Court, Bolpur (Birbhum), D/- 7th March 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 2 (2) — "Borrower" — Purchaser of part of equity of redemption.

A purchaser of a part of an equity of redemption is a successor-in-interest of a mortgagor and hence is a borrower within the meaning of S. 2 (2) : ('41) 28 A.I.R. 1941 Cal. 484, *Foll.* [P 342 C 2]

(b) Civil P. C. (1908), S. 47—Application for holding that decretal amount is paid off in view of Bengal Money-lenders Act is one under S. 47 and order rejecting it is appealable.

An application to the effect that in view of the provisions of the Bengal Money-lenders Act it should be held that the decretal amount has been paid off, and the execution case be accordingly dismissed on full satisfaction is one under S. 47 and an order rejecting it is appealable : ('41) 28 A.I.R. 1941 Cal. 530, *Disting.* [P 342 C 2]

Syed Farhat Ali — for Petitioner.

Abdul Quasem — for Opposite Party No. 2.

ORDER.—This rule is directed against an order of the Munsif rejecting an application made by the petitioner in a certain proceeding taken in execution of a mortgage decree. The petitioner is a purchaser of a part of the equity of redemption. The Munsif started by saying that the application was one to re-open the decree. He held that a purchaser of a part of an equity of redemption is not a successor-in-interest of a mortgagor. This point has been dealt with in the judgment of a Division Bench of this Court in 45 C.W.N. 530.[1] The petitioner treating the matter as one under S. 47, Civil P. C., filed an appeal. It was dismissed as incompetent and the learned Judge followed the decision of this Court in 45 C.W.N. 776.[2] The decision of the lower Court was correct on the footing that the petitioner was attempting to re-open the decree by a review application under S. 36, Bengal Money-lenders Act.

The record is now before us and it has become apparent that the petitioner never asked that the decree might be reopened. He filed an application under S. 47, Civil P. C., to the effect that in view of the provisions of the Bengal Money-lenders Act it should be held that the decretal amount has been paid off, and the execution case be accordingly dismissed on full satisfaction. Now, it is not for me to say whether that claim is well-founded. It is for the learned Judge to decide when he hears the appeal both on questions of fact and on questions of law. The order of the District Judge is accordingly set aside and he is directed to hear the appeal on merits. As this order is by consent, costs in the rule will be costs in the appeal—hearing fee, one gold mohur.

K.S./R.K. *Order accordingly.*

1. ('41) 28 A. I. R. 1941 Cal. 484 : 198 I. C. 315 : I. L. R. (1941) 1 Cal. 514 : 73 C. L. J. 435 : 45 C.W.N. 530, Sailendra Nath v. Amarendra Nath.
2. ('41) 28 A. I. R. 1941 Cal. 530 : 196 I. C. 683 : I.L.R. (1941) 2 Cal. 402 : 45 C.W.N. 776, Promode Nath Saha Roy v. Sm. Rasheshwari Dassi.

C. P. C.—
(b) ('40) Chitaley, S. 47, N. 40.
('41) Mulla, S. 47 P. 180, Note 'Adjustment of decree.'

A. I. R. (29) 1942 Calcutta 342 (2)

PANCKRIDGE J.

In re Tilak Chand Koyal.

Insolvency No. 2 of 1939, Decided on 12th August 1941.

Presidency Towns Insolvency Act (1909), S. 55 — S. 55 does not apply to property over which insolvent as karta or trustee has disposing power.

Section 55 does not apply to property over which an insolvent in his capacity as karta or trustee has disposing power, at any rate with regard to the shares of other persons interested in it : ('25) 12 A.I.R. 1925 P.C. 18, *Rel. on.* [P 342 C 2; P 343 C 1]

R. S. Bachwat — for Creditor.

O. S. Surita — for Official Assignee.

ORDER. — In my opinion, it cannot be said that there was any consideration for the transfer in the present case. Therefore, the deed of 13th July 1938, prima facie falls within the scope of S. 55, Presidency Towns Insolvency Act. At the same time, I think it follows from the decision of the Privy Council in 52 I. A. 221 that the section does not apply to property over which an insolvent

1. ('25) 12 A. I. R. 1925 P. C. 18 : 84 I. C. 883 : 52 I. A. 22 : 6 Lah. 1 (P.C.), Satyanarain v. Behari Lal.

in his capacity as karta or trustee has a disposing power, at any rate with regard to the shares of other persons interested in it. In these circumstances I think that all that the Official Assignee is entitled to is a declaration that the deed is void in so far as it purports to affect the share of the insolvent in the property transferred by the deed. I do not think that he is entitled to an immediate order for possession, and he must, if he sees fit, assert his right against the trustees and the other beneficiaries under the deed in other proceedings. The Official Assignee will get his costs out of the estate, certified for counsel. No other order as to costs.

G.N./R.K. *Order accordingly.*

A. I. R. (29) 1942 Calcutta 343

R. C. MITTER AND KHUNDKAR JJ.

Haji Mahammad Nabi Shirazi and others — Plaintiffs — Appellants

v.

Province of Bengal and others — Respondents.

Appeal No. 163 of 1939, Decided on 6th August 1941, from original decree of Sub-Judge, 1st Court, Hooghly, D/- 24th April 1939.

(a) Civil P. C. (1908), O. 1, R. 8 and S. 80 — Suit for declaration that wakf was for benefit of Shia community — Cause title of plaint containing names of plaintiffs — Copy of plaint attached to notice under S. 80 — Subsequently plaintiffs' application for issue of notices under O. 1, R. 8 stating suit to be on behalf of Shia community allowed — Plaint held contained sufficient indication of suit being representative —Failure to specify suit to be representative in plaint annexed to notice under S. 80 held not fatal defect—Statement in plaint that plaintiffs were entitled to "hissas" and "rewards" held did not alter character of suit.

The cause title of the plaint which asked for a declaration that the waqf was for the benefit of the Shia community contained the names of the plaintiffs. To the notice required under S. 80 a copy of the plaint was annexed. Subsequently, on the plaintiffs' application for the issue of notices under O. 1, R. 8 stating that they had instituted the suit on behalf of the Shia community, an order was recorded permitting the plaintiffs to sue under O. 1, R. 8 and directing the requisite summons to issue :

Held that the plaint contained a sufficient indication of the fact that the plaintiffs were bringing the suit in a representative capacity on behalf of the Shia community, and therefore the notice under S. 80 could not be said to be fatally defective on the ground that the copy of the plaint attached thereto failed to specify the suit as one filed in a representative capacity. [P 345 C 2]

Held further that the statement in the plaint that the plaintiffs were entitled to "hissas" and "rewards" which were not specified was a mere verbiage and did not alter the representative character of the suit. [P 348 C 2]

(b) Civil P. C. (1908), S. 92 — Public endowment for religious uses defined — Distinction between private and public trust—Endowment held public trust.

A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion : 15 Beng.L.R. 167, *Rel. on.* [P 346 C 2]

The essential difference between a private and a public trust is that in the former the beneficiaries are defined and ascertained individuals or who within a definite time can be definitely ascertained but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons either the public at large or some considerable portion of it answering a particular description. The fact that that uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion, e. g., Shias or even a sub-sect of Shias, would not make any difference in the matter and would not make the wakf a trust of a private character : 34 All. 468; ('32) 19 A.I.R. 1932 Pat. 33 and ('38) 25 A.I.R. 1938 Bom. 471, *Rel. on.* [P 349 C 1]

The founder after stating in the wakf deed that he had neither children nor grandchildren created a wakf of extensive properties including a zemindary estate and the Imambara building. The income of the wakf properties was to be applied to the Fatiha ceremonies of the head of the creation, the last of the Prophets and of the sinless Imams and in the expenses appertaining to the ten days of the Sacred Mohurram and all other blessed days, in the repairs of the Imambara and the cemetery :

Held that the endowment was a public trust and did not confine the founder's bounty to the sub-sect of Shias to which he happened to belong : 15 Beng.L.R. 167, *Disting.* [P 346 C 1, 2]

(c) Civil P. C. (1908), S. 92—Suit found to be in respect of public trust — Finding supported by evidence must be upheld in appeal.

The trial Court's finding that the suit is in respect of a public trust when supported by the materials on the record must be upheld in appeal. [P 346 C 2]

(d) Civil P. C. (1908), S. 92 — Whether suit falls under S. 92 depends on form of suit as revealed by plaint — Suit held came within purview of S. 92.

Whether a suit comes within rules of procedure in S. 92 which prescribe the conditions for the valid institution of suits of a particular kind depends on the form of the suit as revealed by the plaint. [P 346 C 2]

In the cause title of the plaint the Secretary of State for India was described as the trustee of the endowment and it was alleged that the Government of Bengal purporting to act as trustee under the provisions of the Act of 1863 had been unlawfully and illegally spending the income of the wakf on purposes foreign to the trust, and had adopted the position of mutwalli and had become an express trustee. A mandatory injunction was asked for directing the Province of Bengal to act in accordance with the express terms of the trust and to cease spending the income on secular objects :

Held that the suit came within the purview of S. 92 as the relief of which the plaintiffs were in pursuit pointed unerringly to the Province of Bengal as a defendant by reason of its position as trustee of the wakf according to the plaintiff's case a trustee de son tort. [P 346 C 2]

(e) Civil P. C. (1908), S. 92—Trust for public purposes — Suit founded upon breach of, need not be brought in accordance with S. 92 unless relief sought falls under S. 92 (1) (a) to (h).

Suits founded upon any breach of trust for public purposes of a charitable or religious nature do not require to be brought in accordance with the provisions of S. 92 unless the reliefs sought fall within clauses (a) to (h) of S. 92 (1): ('28) 15 A. I. R. 1928 P. C. 16, *Rel. on.* [P 347 C 1]

(f) Civil P. C. (1908), S. 92 (1) (a) to (h) — Words "further or other relief" in S. 92 (1)(h) —Meaning — Relief to compel trustee to cease spending waqf income on secular objects and to apply entire income to religious purposes falls under S. 92 (1) (h) as it is of same nature as contemplated in S. 92 (1) (e).

The words "further or other relief" in S. 92(1)(h) must, on general principles of construction, be taken to mean relief of the same nature as cls. (a) to (g) : ('28) 15 A. I. R. 1928 P.C. 16, *Rel. on.* [P 347 C 1]

The reliefs embraced in S. 92 (1) (h) are also limited by the qualifying phrase "as the nature of the case may require" in S. 92 (2) read with the opening words of S. 92 (1). But it cannot be said that a relief to come under S. 92 (1) (h) must be an additional relief to some other relief prayed for, which also must fall within S. 92 (1) (a) to (g). A relief to compel the trustee to cease spending the wakf income on secular objects, to apply the entire income to religious purposes upon which only a portion of that income was being expended, falls within S. 92 (1) (h) because it is of the same nature as that contemplated in S. 92 (1) (e) which involves direction and control of benefits which are capable of flowing in different directions. [P 347 C 2]

(g) Interpretation of statutes — Principle of ejusdem generis — Meaning of.

The ejusdem generis doctrine means that where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words : (1897) 1 Q. B. 175, *Rel. on.* [P 347 C 1]

(h) Civil P. C. (1908), S. 92—Amendments of 1882 and 1908 of S. 92 as it originally stood were intended to be retrospective.

The amendments in 1882 and 1908 of S. 92 as it originally stood were intended to be retrospective and affected existing rights : 40 Cal. 704 and ('30) 17 A. I. R. 1930 Cal. 34, *Rel. on*; ('28) 15 A. I. R. 1928 P. C. 16, *Ref.* [P 348 C 1]

(i) Specific Relief Act (1877), S. 42—Scope— Suit for declaration that certain endowment was for upkeep of imambara, for celebration of religious ceremonies therein and for benefit of Shia community and not for any secular uses and for injunction directing defendant to act in future according to declaration sought — Suit does not fall under S. 42—Suit held under general law for mandatory injunction, declaratory prayer being introductory thereto.

Section 42 does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to property" : 39 Cal. 704, *Rel. on.* [P 348 C 2]

The plaintiffs as representing the Shia community of Moslems sued for a declaration that a certain endowment was intended for the upkeep of an imambara, for the celebration of religious ceremonies therein, and for the benefit of the Shia community and not for any secular uses and prayed for a mandatory injunction against the defendant directing him to act in future in accordance with the declaration sought :

Held that the suit was not one under S. 42 for a declaration coupled with a prayer for consequential relief by way of injunction, but that it was one under the general law for a mandatory injunction and that the prayer for a declaration was merely introductory thereto. [P 348 C 2]

(j) Bengal Waqfs Act (13 of 1934), S. 73 (2) —Applicability—Waqf need not be under direct charge of Commissioner.

There is nothing in S. 73 (2) to indicate that for its applicability the waqf must be in the direct charge of the Commissioner of Waqfs. [P 348 C 2]

(k) Trust—Public trust—Individual or limited individuals may have personal right in public trust—Whether personal right exists—Tests — Individual right can be enforced independently of S. 92, Civil P. C.

An individual or a limited group of ascertained individuals may have personal or individual rights in a public waqf or public trust. In considering whether a member of the public or a member of a particular community has an individual or personal right in a public trust which is alleged to have been infringed by the trustee one important test is, whether, apart from the infringement of the rights of the general body, there is some damage special to the plaintiff in which the other members of the general body are not concerned. Such individual right can be enforced independently of S. 92, Civil P. C. [P 349 C 2]

(l) Civil P. C. (1908), S. 92 (1) (e) and (g) — Construction.

The essence of S. 92 (1) (e) and (g) is directions from the Court concerning the management of the trust. A direction that in the administration of the trust the trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management. [P 350 C 1]

Sir S. Wazir Hasan, H. L. Chakraburtty, Khurshad Husnan, Syamadas Bhattacharjya, Syed Ibni Imam and Saiyed Husain — for Appellants.

Dr. Basak, Ramaprosad Mookerjee, Rakhal Ch. Bose and Abdul Quasem No. 2 — for Respondents.

KHUNDKAR J. — This is an appeal from an order of the learned Subordinate Judge of the First Court at Hooghly, dated 24th April 1939, by which he dismissed the appellant's suit on preliminary grounds. The suit was instituted by certain persons purporting to represent the Shia community of Moslems, for a declaration that a certain endowment at Hooghly, sometimes called the Mohsiniya wakf, was intended for the upkeep of an imambara, for the celebration of religious ceremonies therein, and for the benefit of the Shia community and not for any secular uses. A mandatory injunction was prayed for against defendant 1, the Secretary of State for India in Council, directing him to act in future in accordance with the declaration sought. The other persons impleaded as defendants were the members of the Committee of Management of the Imambara, defendants 1 to 6 (a), and the Commissioner of Wakfs, Bengal, defendant 7. The case made in the plaint was to the following effect : In the year 1806, Haji Mohammad Mohsin, a Shia Mussalman created by deed a wakf of extensive properties embracing a zemindary estate in Jessore known as the Syedpur estate, the Imambara building, and bazar land in Hooghly. The wakfnama allocated the income between certain objects in the following properties :

Three-ninths for the expenses of religious ceremonies in the imambara, and for repairs to the imambara and to a cemetery ;

Two-ninth as the remuneration of two mutwallis ;

Four-ninth for the upkeep of the establishment, salaries of servants, and monthly stipends to certain specified persons.

The wakif died in 1813. In 1818 the Board of Revenue, Bengal, purporting to act under Regn. 19 of 1810 took possession of the Syedpur Trust estate. In 1835 the Government of India apportioned the income in a certain manner. In 1875 the Board of Revenue purporting to act under Act 20 of 1863 (The Religious Endowments Act), assumed power of disposal over the usufruct of the wakf estate, and diverted five-ninths of the income to purposes foreign to those of the wakf. The Government of Bengal purporting to act as trustee under Act 20 of 1863, has since then been unlawfully spending the income on purposes not sanctioned by the deed of wakf. The interests of Shia Muslims who are beneficiaries under the wakf have suffered by reason of such diversion and misapplication of the trust funds. It was further averred in the plaint that the plaintiffs were interested in the wakf, and that the Government had adopted the position of mutwalli and had become express trustees. The plaintiffs craved leave to sue in a representative capacity under O. 1, R. 8, Civil P. C. The two principal prayers in the plaint were thus expressed :

"(a) That it be declared that the wakf created and established by the late Haji Muhammad Mohsin known as Mohsinya Waqf Hooghly by a waqfnama in Persian language dated 20th April 1806, was meant for the upkeep of the Mohsiniya Imambara of Hooghly, the ceremonies and functions observed therein according to the Shia faith and for the benefit of the Shia community and that it was not intended by the wakif that any portion of the wakf be spent on secular uses. (b) That an order of mandatory injunction be passed against defendant 1 that he may act in future in accordance with the aforesaid declaration."

The plaint was filed on 6th April 1937, on which date an application for the issue of notices under O. 1, R. 8, was granted, and a direction was made for the publication in the Calcutta Gazette as well as in a local newspaper of the fact of the institution of the suit. Prior to that on 26th January 1937, the plaintiffs' pleader, by way of notice under S. 80 of the Code, addressed to the Secretary of State through the Collector of Hooghly, a letter to which was annexed a copy of the plaint. A written statement on behalf of defendant 7, the Commissioner of Wakfs, Bengal, was filed on 25th June 1937, and a written statement on behalf of defendant 1, the Province of Bengal, verified by the Collector of Hooghly, was filed on 23rd July 1937. Issues were framed on 9th August 1937. These included two of a preliminary character which arose out of pleas in bar. Issue 2 raised the question whether the suit was barred under S. 92, Civil P. C., and S. 73 (2), Bengal Waqfs Act, and issue 5 raised the question whether the suit was maintainable at the instance of the plaintiffs under O. 1, R. 8 of the Code. On 24th, 25th and 27th March 1939 respectively three applications were filed for permission to amend the plaint. Paragraph 1 of each of these applications contained the following statement :

"That it appears that in the cause title of the above suit the plaintiffs have not been described in their representative capacity although from the body of the plaint it appears that they are suing not only in their individual capacity but also on behalf of the members of the Shia Community."

The plaintiffs in these applications prayed for the insertion of the words "for self and on behalf of the members of the Shia community" after the word "plaintiff" in the cause title, and for insertion of the words "as members of the Shia community" in para. 11 after the word "plaintiffs." The question of amendment and the pleas in bar were heard together on 25th March 1939. The learned Subordinate Judge held that the suit was barred under S. 92 of the Code as the consent of the advocate general had not been obtained before the institution of the suit, and the suit had not been instituted in the proper Court. He further held that the suit had not been validly instituted in as much as a proper notice under S. 80 of the Code has not been served on the Province of Bengal. The learned Judge's view in regard to this matter was that the plaint originally filed did not indicate the person on whose behalf or for whose benefit the suit was brought, and that although it was open to the Court to allow the amendments prayed for, and so to convert the suit into a properly constituted representative suit under O. 1, R. 8, and also to direct the issue of fresh notices under that rule, such a proceeding would serve no useful purpose, for, it would not cure the defect in the notice under S. 80 of the Code which was served as required two months before the institution of the suit, but which in the present case did not amount to notice of a representative suit such as the plaintiffs were seeking to convert the action into by amendment of their plaint.

We are not impressed by the learned Judge's reasoning in regard to the failure of the plaint to fulfil the requirements of O. 1, R. 8. That provision enacts that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued on behalf of or for the benefit of all persons so interested. The cause title of the plaint contained the names of seven plaintiffs and prayer (a) asked for a declaration that the waqf was meant "for the benefit of the Shia community." On 6th April 1937, the plaintiffs submitted an application for the issue of notices under O. 1, R. 8 in which they stated that they had instituted this suit on behalf ol the Shia community. On 7th April 1937 an order was recorded permitting the plaintiffs to sue under O. 1, R. 8 and directing the requisite summonses to issue. In our judgment the plaint contained a sufficient indication of the fact that the plaintiffs were bringing the suit in a representative capacity on behalf of the Shia community, and it does not appear to us that the notice under S. 80 of the Code was fatally defective. As regards the finding under issue 2 that the suit was barred by reason of failure to comply with the provisions of S. 92 of the Code, it has been contended before us that S. 92 does not apply at all for several reasons. Firstly, this is not a suit in respect of a public wakf, for there are words in the waqfnama clearly indicating that the Imambara is a private Imambara, and that the trust is for the members of the sub-sect of Shias to which the founder belonged. We may say at once that we are satisfied that there are no such words in the deed. The second paragraph opens with the words :

"Whereas I have neither children nor grandchildren nor other relatives who would be my legal heirs and whereas it is my earnest wish to keep up and continue the ceremonies and the expenses that

are good and have been all along prevailing in this family such as Fatiha of Hazarat (on them be peace and blessings) and other ceremonies besides these I therefore do hereby dedicate purely for the sake of God all the above properties ..... as a permanent wakf for the expenses, details of which are given herein ....."

The second paragraph contains the words :

"The abovenamed mutwallis after paying the Government revenue shall divide the remaining proceeds of the said Mahals into nine shares, three shares of which they shall first of all disburse in Fatiha ceremonies of the Head of the creation, the last of the Prophets and of the sinless Imams (on all of them be the blessings and peace of God) and in the expenses appertaining to the ten days of the Sacred Mohumrram and all other blessed days, in the repairs of the Imambara and the cemetery."

Now these are the only words in waqfnama which relate to religious as distinct from secular purposes. How they can be construed to apply to purposes singular to the sub-sect of the Shia community to which the wakif belonged, we confess we cannot see. The deed recites that the founder has neither children nor grand-children, a circumstance which in itself suggests that the imambara was not to remain a private or family institution. Reference is made to ceremonies that have been prevailing in the founder's family but these are specified as Fatihas of the Holy Prophet and the sinless Imams, the ceremonies of the sacred Mohurrum and other blessed days. To say that these words clearly confine the founder's bounty to the sub-sect of Shias to which he happened to belong is in our opinion only to do violence to the language of the deed.

The case in 15 Beng. L.R. 167[1] which was cited for the purpose of supporting the contention that the Mohsiniya Wakf is a private wakf, has no application, for, in that case the dedication was by a purdanashin lady in respect of an Imambara situated within the female apartments of her dwelling house from which she had the power of excluding strangers. In the words of the judgment there was nothing in the taulitnama which contemplated an appropriation for the general benefit and the founder's object was further explained in her deposition. "It was to perpetuate certain ceremonies in commemoration of her mother's death according to the custom of the family which was of the Shia sect, and in the regular performance of which the defendant, who had married a husband of the Sunni sect, probably saw some future difficulty."

A passage cited from Ameer Ali's Mahomedan Law, Vol. 1 (Edn. 3) p. 456 in support of the contention, shows on the contrary that the learned author considered this particular Imambara — the Imambara of Haji Mohammad Mohsin at Hooghly—to be a public Imambara. The plaint far from making a case of private wakf clearly states that the suit is brought in the interest of the Shia community. Paragraph 1 expressly avers that the properties were dedicated "to the religious purposes of the Shia faith of the wakif and his community." Paragraph 9 states that "the interest of the Shia Muslims, who are the beneficiaries of the aforesaid wakf have suffered greatly. In prayer (a) of the plaint a declaration is asked for that the wakf "was meant for the upkeep of the Mohsinya Imambara at Hughly, the ceremonies and functions observed therein according to the Shia faith and for the benefit of the Shia community." It is reasonably clear that one of the main purposes of the suit was to establish the exclusive right of the Shia community to the benefit of the founder's bounty. As laid down in 15 Beng. L. R. 167[1] at p. 184, "A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion."

We have been invited to remand the case in order to enable the Court below to determine whether this is a suit in respect of a public trust, for it is said that there are no materials on the record to enable this Court to decide that question. It was never argued in the trial Court that this was not a suit in respect of a public trust, and the learned Judge has found in clear terms that it is a suit of that description for, to quote his own language, "there can hardly be any doubt that this is a case of an 'alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature. . . . ." This finding is amply supported by the materials on the record to which we have already referred, and it must be upheld.

The second reason advanced in defence of the proposition that the suit does not fall within the scope of S. 92 of the Code is that relief is claimed against the Province of Bengal which is not a trustee but a stranger to the trust, and reliance is placed upon 55 I. A. 96[2] in which it was laid down that S. 92 does not apply to suits in which relief is sought against strangers to the trust such as persons who are alienees from the heirs of a mutwalli. In our judgment that principle does not apply here. Whether a suit comes within rules of procedure which prescribe the conditions for the valid institution of suits of a particular kind depends on the form of the suit as revealed by the plaint. In the cause title the Secretary of State for India in Council is described as the trustee of the endowment. In para. 7 it is alleged that the Government of Bengal purporting to act as trustee under the provisions of the Act of 1863 has been unlawfully and illegally spending the income of the waqf estate on purposes foreign to the trust. In para. 11 it is averred that defendant 1 has adopted the position of mutwalli and has become an express trustee. In prayer (b) a mandatory injunction is asked for directing defendant 1 to act in accordance with the declaration sought for in prayer (a). There can be little doubt that in the present suit the relief of which the plaintiffs were in pursuit pointed unerringly to the Province of Bengal as a defendant by reason of its position as trustee of this waqf according to the plaintiff's case a trustee de son tort. The third of the reasons advanced for the proposition that this is not a suit within S. 92 of the Code, is that the reliefs sought do not fall under any of the cls. (a) to (h) of sub-s. (1). To appreciate this argument it is necessary to advert to the two principal prayers in the plaint which have been set out before.

Prayer (a) is for a declaration of a comprehensive character which must extend to saying "that it was not intended by the wakif that any portion of the wakf be spent on secular uses." Prayer (b) is for an injunction to compel the Province of Bengal to act in accordance with this declaration. The effect of these two prayers is to ask for a direction which will prevent Government from appropriating any portion of the income for secular purposes, and which will compel it to spend the entire usufruct

1. ('75) 15 Beng. L. R. 167 : 23 W.R. 453, Delroos Bano Begum v. Nawab Syud Asngur Ally Khan.

2. ('28) 15 A.I.R. 1928 P.C. 16 : 108 I. C. 361 : 55 Cal. 519 : 55 I.A. 96 (P. C.), Abdur Rahim v. Abu Mahomed Barkat Ali Shah.

on the upkeep of the Imambara, on the ceremonies and functions observed therein, and for the benefit of the Shia community. As secular uses are to be denied "the benefit of the Shia community," presumably means those benefits which the members of that community may derive from the upkeep of the Imambara and the ceremonies and functions observed therein according to the Shia faith. Admittedly, the relief sought does not come under cls. (a), (b), (c), (d), (f) or (g). On behalf of the appellants, it has been contended that it cannot be considered to be a relief within cl. (e) or even cl. (h). The former clause is in these terms "declaring what proportion of the trust property or the interest therein shall be allocated to any particular object of the trust." In the present case the plaintiffs are not invoking the jurisdiction of the Court as Kazi to make a division of the income in certain proportions between different objects, but they are asking the Court to declare that all expenditure shall be limited to certain defined purposes of a religious nature. Therefore, there is no prayer for allocation of any proportion of the trust property or the interest therein to any particular object of the trust.

It is not necessary for us to decide the point in view of the fact that we consider the relief claimed to be covered by cl. (h). On behalf of the appellants two objections have been urged against such a conclusion; firstly, that the relief sought should be ejusdem generis with those indicated in cls. (a) to (g), and secondly, because it must be further relief in the sense of being additional to some other relief also prayed for which latter must fall within one of the cls. (a) to (g). The second objection is unsupported by any really relevant authority and indeed it was not seriously pressed. We are of the opinion that it is without any substance whatever. The first objection must be considered in the light of what was laid down in 55 I. A. 96[2] which enunciated the principle that suits founded upon any breach of trust for public purposes of a charitable or religious nature do not require to be brought in accordance with the provisions of S.92 unless the reliefs sought fall within cls. (a) to (h) of sub-s. (1). Their Lordships of the Judicial Committee of the Privy Council held in that case that the words "further or other relief" in cl. (h) must on general principles of construction be taken to mean relief of the same nature as cls. (a) to (g), and that the opposite construction would cut down substantive rights which existed prior to the enactment of the Code of 1908 when sub-s. (2) was first introduced. "It is unlikely," said their Lordships "that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time."

Does the relief sought in the present case come within cl. (h) as being a relief of the same nature as the reliefs indicated in cls. (a) to (g) ? The ejusdem generis doctrine has been described in the words of Lopes L. J. in (1897) 1 Q. B. 175[3] as meaning, "that where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words." Here attention has to be directed to the words of cl. (e) set out above. Is the relief asked for of the same nature as the apportioning of the income of property between particular objects ? That is not what is asked for, but it is prayed that Government be compelled to cease spending the income of this wakf on secular objects, and be directed to apply the entire income to religious purposes upon which at the present time, only a portion of that income is being expended. In our judgment the one act would be in its nature, and probably also in its method of execution, essentially similar to the other act. Government has been doing something which has caused a diversion of the income to secular objects. Government is now to do something which will stem that diversion. A stream of benefits moving in one direction is to be put back so that it may proceed in another direction, and "allocation" in the context of cl. (e) surely involves direction and control of benefits which are capable of flowing in different directions. We think that looked at broadly the difference between allotting a thing in its entirety and allocating only a portion of it is in substance really only a difference of degree, and we are satisfied that the relief which is sought by this plaint is within cl. (h) because it is of the same nature as that which is contemplated in clause (e).

The next reason advanced in support of the contention that S. 92 does not apply is that the words "reliefs specified in sub-s. (1)" mean reliefs particularised or specially described in sub-s (1). It is suggested that if the relief which the plaintiffs are seeking comes within clause (h) it is an unspecified relief because cl. (h) is a residuary clause embracing reliefs not already mentioned. The short answer to this contention is that if the prohibition contained in sub-s. (2) were intended to apply only to suits brought to obtain the reliefs mentioned in cls. (a) to (g) and not to those covered by clause (h) the sub-section would have said so. It is reasonably clear that the reliefs embraced in cl. (h) are limited not only by what was laid down in 55 I. A. 96[2] but also by the qualifying phrase "as the nature of the case may require" in sub-s. (2) read with the opening words of sub-s. (1) : "In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust." These limitations have narrowed down the possible reliefs under cl. (h) to reliefs of a very definite order, and it cannot be said that it would be a misnomer to apply the word "specified" to those reliefs.

Next it has been urged that the cause of action in the present suit arises out of the Government's interferences with the trust which commenced prior to the year 1882, and that the amendments of the Code in 1882 and 1908 cannot in any way curtail that right. As S. 539 of the old Code which has been replaced by S. 92 of the present Code, was amended so as to apply to trusts for religious purposes in the year 1882, the section cannot apply to the present suit which concerns exclusively religious purposes. It is further urged that the prohibition contained in sub-s. (2) of S. 92 does not affect this suit because that sub-section was first enacted in the Code of 1908. These propositions are sought to be supported upon the principle enunciated in 55 I. A. 96[2], and referred to above, that it is unlikely that in a Code regulating procedure the legislature intended without express words to abolish substantive rights which existed at that time.

We cannot assent to the proposition that the cause of action in the present suit arose when Government first intervened in the administration of

3. (1897) 1 Q. B. 175 : 66 L. J. Q. B. 137 : 75 L. T. 534 : 45 W. R. 203 : 61 J. P. 116, Smelting Co. of Australia v. Commissioners of Inland Revenue.

the trust. That question has to be determined in the a first instance by what is stated in the plaint. In the plaint in this suit there is no indication of the time when the cause of action first arose, and no relief is prayed for in respect of the past acts of the Government. The remedies of which the plaintiffs are in pursuit are in respect of the existing state of things, and what they are really asking for are a declaration to be followed by an injunction which will regulate the future conduct of the defendants. The statement in para. 14 of the plaint that the cause of action has arisen from to day is by itself too vague to be of any import. In 40 Cal. 704[4] Jenkins C. J. stated that the Legislature evidently considered that the present Code might and would interfere with rights, and that the Code as framed would affect existing rights under the old Code. In disposing of the argument that this view would involve hardship and that rights would be im- b perilled, he referred to S. 1, cl. (2) which prescribed that, though the Code was passed in March, 1908, it should not come into operation until January and observed that "that provision afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation."

A similar view in regard to the Limitation Act of 1908 was expressed in 33 C.W.N. 519.[5] In that case B. B. Ghose J. quoted the following observations of Wright J. in (1898) 2 Q.B. 547[6] at p. 551 :

"Perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

c At p. 553; — "one exception to the general rule has some times been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended."

In 55 I.A. 96[2] the Judicial Committee were dealing with the contention that cl. (h) of s. 92 was wide enough to include a relief against strangers to the trust and one observation should be quoted :

"Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of S. 539 by the addition of any relief or remedy against third parties, i. e., strangers to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that d even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in cl. (h) under the general words "further" or other reliefs."

In our judgment, the appellants have failed to make out a case for holding that the cause of action upon which this suit was founded was a right which was in existence prior to 1882, or that if it so existed, it was not affected by the amendments of the Code which took place in that year and in the e year 1908. It was then argued that whatever other character this suit may bear, it is nevertheless a suit in which the plaintiffs seek to establish their individual right to something, and that to that extent it is not a suit governed by S. 92. The argument was somewhat involved, but if we have apprehended it aright it amounts to this. It is stated in para. 11 of the plaint that the plaintiffs are recipients of hissas and rewards and the declaration for which they are suing would affirm their rights to such hissas and so afford them relief as individuals; the prayer (b) for a mandatory injunction was added merely to satisfy the requirements of S. 42, Specific Relief Act.

The "hissas" or shares and the "rewards" to which reference is made are in no way specified. What are they shares in ? Are they shares in alms or in food or in material benefits of some other f kind ? What are the rewards for, and what is their value or extent ? How do these plaintiffs derive their right to any shares or rewards from the trust deed ? The suggestion conveyed by the words "hissas" and "rewards" is nebulous and indeterminate, and when the plaint is read as a whole, they can only be regarded as mere verbiage. There can be little doubt that this is a representative suit in which the plaintiffs are suing as members of the Shia community and on behalf of that community. Such rights as they may be entitled to under the trust deed are rights which they claim in common with other members of that community, and we fail to see how under these circumstances any of the reliefs for which they have instituted this suit can be regarded as separable and personal. Then again, to say that the prayer for a mandatory injunction was thrown in, so to speak only to satisfy the g requirements of S. 42, Specific Relief Act, is to lose sight of the terms of that section. As was made clear in 39 Cal. 704[7] that section does not sanction every form of declaration, but only a declaration, that the plaintiff is "entitled to any legal character or to any right as to property." It is, in our judgment, reasonably clear that this suit is not one under S. 42, Specific Relief Act, for a declaration of this kind coupled with a prayer for consequential relief by way of injunction, but that it is one under the general law for a mandatory injunction and that the prayer for a declaration is merely introductory thereto.

There remains to mention an argument advanced on behalf of defendant 7, the Commissioner of Wakfs against the finding that the suit is not barred by s. 73 sub-s. (2), Bengal Wakfs Act, 1934. The learned Subordinate Judge has held that the con- h sent required by this sub-section is not a necessary condition for the validity of the suit because there is no denial of the statement in para. 11 of the plaint that the Commissioner of Wakfs, Bengal, is not directly in charge of this wakf. There is nothing however in the section to indicate that the wakf must be in the direct charge of the Commissioner, and we are of the opinion that as S. 92, Civil P. C., applies this suit is also barred by section 73 (2), Bengal Waqfs Act. The appeal accordingly fails and is dismissed with costs.

R. C. MITTER J. — I agree but I wish to say a few words on the question as to whether the suit is barred by the provisions of S. 92, (2), Civil P. C., in view of the fact that the consent in writing of the

4. ('13) 40 Cal. 704 : 19 I. C. 391 : 17 C. W. N. 622, Bisseswar Sonamnut v. Jasoda Lal Chowdhry.
5. ('30) 17 A.I.R. 1930 Cal. 34 : 122 I.C. 201 : 56 Cal. 1117 : 49 C.L.J. 362 : 33 C.W.N. 519, Khondkar Mahomed Saleh v. Chandra Kumar Mukherji.
6. (1898) 2 Q.B. 547 : 67 L.J.Q.B. 935 : 79 L.T. 303 : 47 W.R. 114 : 5 Manson 322, Re Athlumney.
7. ('12) 39 Cal. 704 : 15 I.C. 427 : 16 C.W.N. 838 Deokali Koer v. Kedar Nath.

Advocate General or of the Local Government has not been obtained by the plaintiffs. This question depends upon the following considerations, namely, (1) Whether the suit is in substance one which falls within sub-s. (1) of that section and (2) whether sub-s. (2) thereof is applicable. As the suit was decided in the Court below on preliminary issues pleaded in bar we must proceed on the basis of the plaint only, assuming all averments made therein to be true.

The first point for consideration is whether the trust is a public trust. I have no doubt that the plaint proceeds on the basis that Haji Mohamad Moshin's wakf is a public one, and that the plaintiffs also accepted that position when the preliminary issues were considered by the Court below. Even without the applications for amendment of the plaint being taken into consideration, the original plaint is sufficiently clear on the point.

The reference to O. 1 R. 8, Civil P. C., in para. 12 of the plaint makes it clear that the five plaintiffs were suing on behalf of a large number of persons, not on behalf of themselves only. Paragraph 9 gives a further indication, namely that according to the plaintiffs the wakf was created for the benefit of all Muslims of the Shia faith and prayer (a) shows that the plaintiffs were seeking relief on behalf of the Muslims of that faith. In my judgment there is nothing in para. 1 or para. 11 which militates against this view. The meaning of para. 1 appears to me to be that the dedication was made for the maintenance of the religious rites and ceremonies observed by the Shia Muslims generally and not by any particular subsect of the Shia community. The phrase "Shia faith of the wakif" occurring in that paragraph merely means that the wakif was a Muslim of the Shia faith and nothing more. If the plaintiffs had intended to plead that the wakf was intended for the benefit of a particular sub-sect of the Shia community in that case that sub-sect would have been specifically mentioned in the plaint. Even if it be assumed that the beneficiaries were to be the members not of the Shia community generally but only of a sub-sect of that community there would be no difference at all ; the trust would still be a public trust. The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or who within a definite time can be definitely ascertained but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons—either the public at large or some considerable portion of it answering a particular description (Lewin on Trust page 15, 14th Edition).

In my judgment the fact that that uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion, e.g., Shias or even a subsect of Shias, would not make any difference in the matter and would not make the wakf a trust of a private character. The observations in the following cases, and many others which I need not refer to, support the view I am taking : 34 All. 468[8] at p. 473 ; 11 Pat. 288[9] at p. 344 , A.I.R. 1938 Bom. 471 = 40 Bom.L.R. 1041.[10]

The learned advocate for the plaintiffs appellants has also contended before us that for deciding the question as to whether the wakf in question is a public or a private one we must construe the wakfnama also, because it is a part of the plaint. On the wakfnama his contention is that it is a private one, for according to him the purpose was to maintain the family rites and religious ceremonies of the wakif in his private Imambara and to provide pensions to some named individuals on whose death the money ear-marked for them was to be spent on those religious ceremonies only. I cannot accept this construction of the wakfnama. In the first place the religious ceremonies mentioned in the wakfnama are not special or family ceremonies. These are observed by all Shia Muslims and some of them by Sunni Muslims also. In the second place the wakfnama indicates that the Imambara was to be a public Imambara. It may have before been the private Imambara of Haji Muhamed Moshin — a sort of family chapel—but he never intended it to continue to be so after the execution of the wakfnama. This is manifest from the recitals in the wakfnama where he stated that he had no children and no relations who would inherit his properties. It does not appear that the plaintiffs maintained in the Court below that the trust was a private one. No issue was framed at their instance as to the character of the trust and no argument was addressed to the Subordinate Judge on the point. I hold that the trust is a public one and this appeal must proceed on that footing.

It is urged by the learned advocate for the plaintiffs appellants that assuming the wakf to be a public one this suit is of a composite character,—to enforce the individual rights of the five named plaintiffs, as also to enforce the rights which these plaintiffs have as members of the Shia community. To support this contention that the suit is also a suit to enforce individual rights he refers us to para. 11 of the plaint and to the applications for amendment of the plaint. In those applications the plaintiffs state that they were suing both for self, and as representatives of the Shia community. In para. 11 they say that they take part in the religious ceremonies and congregational prayers in the Imambara and have the right to receive hissyas and rewards from the said Imambara. That paragraph is liable to the construction that the rights asserted there are not their individual rights but only those which they have in common with other members of the Shia community. An individual or a limited group of ascertained individuals may have personal or individual rights in a public wakf or public trust. For instance the right of a Muslim to say prayers in a public mosque is according to Muslim law an individual right. If a Muslim is prevented from entering the mosque he can sue to enforce his rights without taking recourse to the procedure laid down in S. 92, Civil P. C. But in considering whether a member of the public, or a member of a particular community as the case may be, has an individual personal right in a public trust which is alleged to have been infringed by the trustee one important test is, whether, apart from the infringement of the rights of the general body, there is some damage special to the plaintiff in which the other members of the general body are not concerned. In the plaint there is no allegation of such special damage. No allegation that the plaintiffs have been prevented by the defendants or any one of them from taking part in the rites and ceremonies performed in the Imambara, or from joining the congregational prayers or from participating in the hissyas and

8. ('12) 34 All. 468 : 14 I.C. 698 : 9 A.L.J. 709, Puran Atal v. Darshan Dass.
9. ('32) 19 A.I.R. 1932 Pat. 33 : 136 I.C. 417 : 11 Pat. 288: 12P.L.T. 817,Md. Kazim v. Abi Saghir.
10. ('38) 25 A.I.R. 1938 Bom. 471 : 178 I.C. 926 : 40 Bom.L.R. 1041, Dhoribhai v. Pragdasji.

rewards flowing from the institution. Even assuming that individual rights of the five plaintiffs have been asserted in para. 11, no infringement of those rights is pleaded and no relief in respect of the same has been prayed for in the plaint. If the plaintiffs had claimed relief for the infringement of their individual rights, that part of their suit would not have been affected by the bar imposed by S. 92, but the reliefs prayed for by the plaintiffs indicate conclusively that it is only a suit by the plaintiffs in their representative capacity as members of Shia community in general. Section 92 (2) would prima facie be a bar if the suit satisfies the other conditions of S. 92 (1). Section 92 applies to two classes of cases concerning a public trust :

(1) where there is an alleged breach of trust or (2) where directions of the Court are deemed necessary for the administration of the trust. The suit we have before us falls within these two classes. Its object is to prevent the alleged continued breaches of trust and also for the proper administration of the trust fund. It would not however be enough to bring the suit within S. 92 (1) simply because the reliefs asked for are reliefs appropriate to those objects but a further condition must be satisfied, namely, that the reliefs are of the nature mentioned in cls. (a) to (g) or reliefs analogous to those reliefs : 55 I.A. 96.[2]

The reliefs claimed in this suit are not those mentioned in any of the cls. (a), (b), (c), (d), (f) or (g). In my judgment they do not also come within cl. (c). That clause contemplates one of two cases namely (1) where the creator of the trust had allotted a sum of money to several objects and the Court is asked to apportion the said sum to each or some of those objects: and (2) where on account of changed circumstances the Court is asked to make new allotments to the several objects of the trust. But, in my judgment, the relief asked for in this suit is analogous to the relief mentioned in this clause, as also that mentioned in cl. (g). The wakfnama, which is made a part of the plaint, allots 2/9th of the income for payment of the salary of the two mutwallis. Three-ninths is allotted for the performance of the Fateha ceremonies of the Prophet and the Imams, for the performance of the Mohurram and repairs of the Imambara and cemetery. The remaining four-ninths are to be applied for payment of wages of the servants and for payment of allowances to some named individuals. As those named persons are all dead a portion of the said four-ninths of the income has according to the plaintiffs become available for distribution to other objects.

The case of the plaintiffs substantially is that as the governing intention of the wakif was to devote the income of the wakf properties to religious purposes for the benefit of Shias this lapsed sum of money can only be applied to religious purposes only. They want a declaration from the Court to that effect and further pray for an order from the Court directing the trustees to spend the income on religious purposes only. In substance they want the trust to be managed in a certain way and they want in substance the application of the cypres doctrine to the surplus income. I consider the essence of the cl. (c) as also of cl. (g) to be directions from the Court concerning the management of the trust. A direction that in the administration of the trust the trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management. The reliefs claimed in this suit therefore come within cl. (h) of S. 92 (1). I do not consider it to be a sound argument at all that cl. (h) contemplates a general prayer in addition to one or some of the prayers mentioned in cls. (a) to (g) that must be made in the plaint. This contention is against the construction put upon cl. (h) by the Judicial Committee of the Privy Council in 55 I. A. 96.[2] As I understand the judgment in that case, even if no such relief as is mentioned in any of the cls. (a) to (g) is claimed in the suit but another relief analogous to any of the reliefs mentioned in those clauses is claimed the suit would be one under S. 92 (1). I hold that the suit as laid in this plaint is a suit which falls within S. 92 (1) of the Code. If that is so I fail to see how it is maintainable in the absence of the consent in writing of the Advocate General or of the Collector of the District. Whatever conflict of opinion was there before 1909 sub-s. (2) which is a new addition in the Code of 1908, has made the position clear. To get rid of this difficulty the learned advocate for the appellants has addressed his argument in two lines. I will notice them presently, but I may at once say that I have not been able to comprehend how the first of those arguments has any bearing at all.

The first line of argument is that in the Civil Procedure Code of 1882, S. 539 was what is enacted in S. 92 (1) of the Code of 1908, but there was no such provision which corresponds with sub-s. (2) of S. 92. It was the view of this Court, though the Bombay High Court had held otherwise, that a suit of the description mentioned in S. 539 could be maintained either under the procedure mentioned in that section or under the procedure mentioned in S. 30 of that Code and that in the last mentioned case without the consent of the Advocate General. Sub-section (2) of S. 92 has now taken away that option and the procedure provided for in sub-s. (1) is now the only procedure left. That subsection accordingly has affected right of action. It cannot therefore take away or curtail the right of action which had accrued to the plaintiffs before the Civil Procedure Code of 1908 came into force. Thus far I can follow the argument but not the next step in the argument which is that the plaintiffs of this suit are suing on a cause of action which had accrued to them before 1st January 1909. It is said that in fact the cause of action had arisen either in 1835 when the Government of India apportioned the income in a certain way or in 1875 when the Board of Revenue purporting to act under S. 21, Religious Endowments Act, diverted five-ninths' income to purposes foreign to the wakf. I have stated the details of the argument only to show how absurd it is.

The next line of argument is that sub-s. (2) of S. 92 bars only those suits falling within sub-s. (1) in which any of the reliefs mentioned in cls. (a) to (g) are claimed. It is said that if the relief claimed therein comes only within the general cl. (h), sub-s. (2) would not be a bar. For this argument stress is laid on the word "specified" used in sub-s. (2). My learned brother has dealt in detail with this part of the argument of the appellants' advocate. I do not wish to repeat his reasons with which I concur. I wish only to point out that if the construction sought to be put upon that sub-section by the appellants' advocate had been correct, it would not have been at all necessary for the Right Hon'ble Lord Sinha to examine whether the relief claimed in 55 I. A. 96,[2] could come within cl. (h) of Sec. 92 (1). The last two paragraphs at the bottom of p. 102 of 55 I. A. 96[2] imply that the Judicial Committee of the Privy Council considered the phrase "reliefs specified in sub-s. (1)" occurring in sub-s. (2) to

cover not only the reliefs described in cls. (a) to (g) of sub-s. (1), but also any other relief which, by the application of the rule of ejusdem generis could be brought within cl. (h) of that sub-section. I also agree with my learned brother that as the suit falls within S. 92, Civil P. C., S. 73, Bengal Wakfs Act, is an additional bar to the maintainability of this suit. The result is that this appeal fails.

We have been asked by the learned advocate for the appellants not to allow any costs against his clients but to direct their costs of both Courts to come out of the estate also. For considering the question of costs the following facts brought to our notice by the learned Assistant Government Pleader are relevant. The five-ninths of the income in respect of which directions are sought by the plaintiffs are being applied by the Government for more than a century without any objection for the maintenance of a hospital and for furthering the cause of education of Muslims of all communities, and that this suit is the result of disputes and differences between the Shias and Sunnis in other spheres of their activities. To substantiate his last mentioned allegation he drew our attention to a petition filed by the plaintiffs in the lower Court where they admitted the said fact. In these circumstances we do not see our way to accede to the prayer of the appellants' advocate. The plaintiffs must pay the costs of this Court and of the Court below to the contesting defendant-respondents. So far as the hearing fee of this appeal is concerned, it is to be divided in the proportion of three-fourths and one-fourth between the Province of Bengal and the Commissioner of Wakfs.

G.N./R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 80, N. 13 Pt. 3; S. 92, N. 7.
('41) Mulla, Page 304 Pt. (b).
(b) ('40) Chitaley, S. 92, N. 5 Pts. 9, 10, 29.
('41) Mulla, Page 330, Note "Public purposes."
(d) ('40) Chitaley, S. 92, N. 2 Pts. 5, 6.
('41) Mulla, Page 337, Note "Suits outside the scope of the section."
(e) ('40) Chitaley, S. 92, N. 2 Pts. 8-12; N. 9, Pt. 1.
('41) Mulla, Page 337, Pt. (r).
(f) ('40) Chitaley, S. 92, N. 11 Pts. 1, 2, 3.
('41) Mulla, Page 336, Pts. (m), (n), (o).
(g) ('40) Chitaley, Preamble N. 7, Pt. 30.
(h) ('40) Chitaley, S. 92, N. 3.
(i) ('40) Chitaley, S. 92, N. 4 Pts. 23, 24.
('41) Mulla, Page 346 Pts. (s), (t).
(k) ('40) Chitaley, S. 92, N. 2 Pts. 5, 11; N. 7.
('41) Mulla, Page 326, Pt. (a); Page 337 Pt. (u).
(l) ('40) Chitaley, S. 92, N. 19 Pt. 1; N. 21.
('41) Mulla, S. 92, Page 334, Notes "Clause (e) : apportionment of income;" "Clause (g) : Settling a Scheme."

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BARTLEY AND LODGE JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal — Appellant

v.

H. C. Patel — Accused — Respondent.

Government Appeal No. 6 of 1941, Decided on 13th January 1942.

(a) Sea Customs Act (1878), Ss. 30 and 29 — Charge under S. 420, Penal Code, against accused for causing false declaration to be made of real value of goods—Essentials to be proved by prosecution stated.

In a charge under S. 420, Penal Code, that the accused caused a false declaration to be made of the real value of the goods imported by him it is not sufficient for the prosecution to prove that the Customs Officers in fact applied S. 30 (b) of the Act, or that the importer sought to have the real value determined under S. 30 (b). It is incumbent on the prosecution to prove that those conditions were fulfilled which entitled the Customs Officers to apply S. 30 (b) and not S. 30 (a). In other words, it is incumbent on the prosecution to prove that 'the whole-sale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation' was not ascertainable. [P 352 C 2]

Consequently when no attempt is made by the prosecution to prove what was the 'real value' of the goods under S. 30 (a) nor to prove that the price mentioned in S. 30 (a) could not be ascertained the prosecution must be deemed to have failed to prove that the accused caused a false declaration to be made of the real value of the goods imported by him. [P 352 C 2; P 353 C 1]

(b) Sea Customs Act (1878), S. 30 (b) — Construction—Real value—What is—Proof.

Section 30 (b) does not lay down that the real value of imported goods is the cost at which those particular goods are delivered, but 'the cost at which goods of the like kind and quality could be delivered' at that place. The mere fact that an importer paid a particular price for particular goods is not sufficient to prove that that price is the real value for the purposes of S. 30 (b). It must be shown that goods of the like kind and quality could not be delivered at that place at a lower price. [P 353 C 1]

S. M. Bose and Anil Chandra Roy Chaudhury — for the Crown.

N. K. Basu, D. N. Bhattacharjee and Bireswar Chatterjee — for Respondent.

LODGE J. — This is an appeal by the Superintendent and Remembrancer of Legal Affairs to the Government of Bengal, under the provisions of S. 417, Criminal P. C. One H. C. Patel was placed on his trial before a Presidency Magistrate on three charges under S. 420 read with S. 109, Penal Code, on the allegations that he abetted three offences of cheating the Customs Department of the Government of India, and was acquitted of all three charges. Against that acquittal the present appeal has been filed. The case for the prosecution is as follows : There is a firm of merchants named Curmally Janmahomed in Bombay with a branch in Calcutta and another branch in Osaka, Japan. The Calcutta Branch and the Osaka Branch are both styled Curmally & Co. The firm imports Japanese goods into India for sale in the Indian Market. The respondent H. C. Patel is the manager of the Calcutta Branch. The Osaka Branch is kept in funds by the Head Office in Bombay and by the Branch in Calcutta, and purchases goods from Japanese manufacturers for shipment to Bombay and Calcutta.

During the year 1939, the Osaka Branch entered into forward contracts with Japanese firms for the supply of a number of articles, including tin whistles, glass beads and glass mirrors, for shipment to Calcutta, and informed the Calcutta office of the purchase and the prices at which the purchases had been made. Subsequently the Japanese manufacturers intimated to the Osaka Branch that they could not supply the goods at the prices agreed upon

and that the prices would be increased. The Osaka
a Branch reported this fact to the Calcutta Branch; and Patel, in reply, agreed to pay the enhanced prices. Thereupon the increase in price was paid to the manufacturers in Japan by the Osaka Branch and debited to the account of the Calcutta Branch. A debit note was sent to the Calcutta Branch for this amount. When the goods were shipped from Japan however invoices were sent from the Osaka Branch to the Calcutta Branch in which the original prices accepted by the manufacturers were given as the cost of the goods and no mention was made of the subsequent increases in price paid by the Osaka Branch under instructions from Calcutta. When the goods arrived at Calcutta, bills of entry were submitted to the customs giving the 'real value' of the goods as the cost at which the goods were supposed to have been bought, and in support of this value, the invoices sent from Japan were pro-
b duced before the customs authorities, and representations were made to those authorities that the goods had been purchased at the price mentioned in the invoices. Information was received from the Censor, which led the customs authorities to apply for a warrant for the search of the premises of the Calcutta Branch at 55 Canning Street. In the course of that search, documents and correspondence were seized and those documents &c. have been relied on to prove the case against the respondent.

Three specific charges were framed against the respondent, the first in respect of a consignment of tin whistles which arrived in Calcutta in March 1940, the second in respect of a consignment of hollow glass beads which arrived in Calcutta in June 1940, and the third in respect of a consignment of glass mirrors which arrived in Calcutta in June 1940. Evidence was also given in respect of a
c number of other consignments in which similar false declarations as to the 'real value' of the consignments were said to have been made. In a long written statement, the respondent admitted that he was the manager of the Calcutta Firm, Curmally & Co. but asserted that the Osaka branch and the Calcutta branch operated as distinct and separate firms. He denied that he had paid anything more for the goods than the prices agreed upon in the original forward contracts and asserted that the values given in the various bills of entry were the prices actually paid by the Calcutta Firm. As stated above, the prosecution has relied almost entirely on the correspondences and documents seized on the premises of the Calcutta Firm at 55 Canning Street. If these letters and documents reveal the true state of affairs, there can be no doubt that the written statement is substantially false; that the Osaka
d Firm and the Calcutta Firm did not operate as separate and distinct entities; that the respondent on behalf of the Calcutta Firm did agree to pay the increased prices demanded by the Japanese manufacturers; that those increased prices were in fact paid; and that the invoices submitted by the Calcutta Firm in support of the bills of entry were false and misleading. Consequently, the defence contended that many of the letters and documents seized were not admissible as evidence of the truth of the statements contained in them; that the letters and documents (if admitted as evidence) did not reveal the true state of affairs; and finally that if the letters and documents did reveal the true state of affairs, no offence of cheating had been committed. In the view we take of this case, it is not necessary to decide whether the letters and documents in question are admissible in evidence as proof of the truth of the statements contained in them, nor to decide whether those letters and documents reveal the true state of affairs. We shall *e*
assume, without in any way deciding these questions, that the facts are as contended by the prosecution. The material part of the first charge against the respondents was in the following words :

"That you, H. C. Patel . . . . . aided and abetted one B. G. Samaddar, in committing an offence of cheating the Government of India, in its Customs Department, Calcutta, by causing a false declaration to be made of the real value of tin whistles . . . . dishonestly concealing the fact that an increment of 20 per cent. has been given to the makers of the said goods prior to their delivery at Calcutta, which increment formed part of the real value of the goods as defined in S. 30 (b), Sea Customs Act, and thereby deceived etc. etc."

The other two charges are in similar terms. B.G. Samaddar is said to be the clearing agent, who was himself deceived by the importer Patel. It is obvi- *f*
ous therefore that the first question for consideration is whether the respondent 'caused a false declaration to be made of the real value' of the goods. Section 29, Sea Customs Act, requires the owner to state in his bill of entry the real value to the best of his knowledge and belief. The statement of the owner need not, however, be accepted by the Customs Officials. Section 30, Sea Customs Act, defines 'real value' and reads :

"*30.* For the purposes of this Act, the real value shall be deemed to be —

(a) the wholesale cash price, less trade discount for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or *g*

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

Mr. S. M. Bose, for the appellant, has contended that S. 30 (b), Sea Customs Act, was clearly applied in the present case, and that inasmuch as the importer gave as the 'real value' of the goods, the price said to have been paid by him, and supported his statement by producing the invoices, it was equally clear that the importer sought to have the 'real value' determined under S. 30 (b) of the Act. In our opinion, it was not sufficient to prove that the Customs Officers in fact applied S. 30 (b) of the Act, or that the importer sought to have the real value determined under S. 30 (b). It was incumbent on the prosecution to prove that those conditions were fulfilled which entitled the Customs Officers to *h*
apply S. 30 (b) and not S. 30 (a). In other words, it was incumbent on the prosecution to prove that 'the whole-sale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation' was not ascertainable. No attempt was made to prove that this price was not ascertainable. Indeed the only evidence on record bearing on this point, to which our attention has been drawn, seems to suggest that such price was ascertainable. That evidence is contained in the re-examination of P. W. 4, F. P. Q. I Baker, and reads:

"Tin whistles are staple goods. I cannot say if it (i. e. a record of prices of staple goods kept by each appraiser) will appear in the record."

It therefore follows that no attempt was made by the prosecution to prove what was the 'real value' of the goods under S. 30 (a), Sea Customs Act, nor

to prove that the price mentioned in S. 30 (a) of the Act could not be ascertained. Even if it be assumed that S. 30 (b), Sea Customs Act, was applicable to the consignments in respect of which the three charges were framed, it does not follow that a false declaration of the real value must have been made. Section 30 (b) does not lay down that the real value of imported goods is the cost at which those particular goods are delivered, but 'the cost at which goods of the like kind and quality could be delivered' at that place. It does not follow that all importers can import goods at the same cost; and it is clear from the evidence on record that the minimum cost at which goods of the like kind and quality could be delivered, is taken as the real value. It may easily happen, particularly in the disturbed conditions following an outbreak of war, that different importers import similar goods at different prices, and that one importer is willing to import at prices in excess of the 'real value' in anticipation of future rises in price. It might happen that in circumstances similar to those of the present case, some importers declined to pay 'the increased prices demanded by the manufacturers and succeeded in inducing or compelling the manufacturers to supply the goods at the contract rate. The mere fact that an importer paid a particular price for particular goods is not sufficient to prove that that price is the real value for the purposes of S. 30 (b), Sea Customs Act. It must be shown that goods of the like kind and quality could not be delivered at that place at a lower price.

The prosecution made no attempt to prove that other goods of the like kind and quality were not being imported into Calcutta at that particular time, or that those other goods could not be imported at the cost given by the respondent as the real value of his goods. In other words, the prosecution made no attempt to prove what was the real value of the goods imported by the respondent, and therefore failed to prove that the respondent 'caused a false declaration to be made of the real value' of the goods. All that the prosecution sought to prove was that the respondent gave an estimate as to the real value of the goods, and furnished false evidence in support of that estimate. Even if the facts alleged by the prosecution are taken as proved, no offence of cheating was made out. In our opinion, therefore, the respondent was rightly acquitted. This appeal is accordingly dismissed and the respondent is discharged from his bail bond.

BARTLEY J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 353

HENDERSON J.

Raj Mohan Saha — Decree-holder — Appellant

v.

Jogendra Nath Sarkar and others — Judgment-debtors — Respondents.

Appeal No. 33 of 1941, Decided on 11th August 1941, from appellate order of Dist. Judge, Rangpur, D/- 23rd September 1940.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), S. 75A—Enhancement of rent agreeable to both sides — Landlord cannot be compelled to eject tenant under S. 75A.

Section 75A cannot have the strange effect of compelling a landlord to eject a tenant whom he is perfectly willing to retain on an enhanced rate of rent which is agreeable to both sides. [P 353 C 2]

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), Ss. 75A and 48D—Decrees for enhancement and ejectment are mutually exclusive—S. 75A does not apply to ejectment decree.

A decree for enhancement of rent and a decree for ejectment are mutually exclusive. A decree for ejectment passed on tenant's failure to agree to the enhancement of rent is entirely outside the scope of S. 75A. [P 354 C 1]

In the suit for enhancement of rent under S. 48D the Court fixed a fair rent and instead of asking the tenant, whether he would agree to pay, forthwith passed a conditional decree to the effect that on the tenant's failure to intimate his consent within 15 days he would be ejected. The tenant took no action :

Held that if the tenant had accepted the enhanced rent within the time allowed, the decree could have been interpreted as one for enhancement. But inasmuch as he did not do so, it could only be interpreted as a decree for ejectment, pure and simple. [P 354 C 1]

Priya Nath Bhattacharyya — for Appellant.

Birendra Kumar De — for Respondents.

JUDGMENT. — This appeal is by the decree-holder and it raises an interesting point. The appellant instituted the suit for enhancement of rent under the provisions of S. 48D, Ben. Ten. Act. The Munsif found that a fair rent would be Rs. 25 per annum. Instead of asking the defendants whether they would agree to pay, he passed forthwith a sort of conditional decree, to the effect that, if the defendants did not intimate their consent within 15 days, they would be ejected. The defendants took no action. The decree-holder applied for execution and took delivery of possession, on 23rd December 1939. The case of the defendants is that they knew nothing of this conditional order. Indeed they appeared and filed a petition to the effect that they were willing to pay the enhanced rent and they endeavoured to have the decree put right.

Both parties were willing that the case should be settled on these terms. The appellant however felt nervous as to the effect of the new S. 75A, Ben. Ten. Act, on any compromise. It would be a strange effect of this amendment, which presumably was passed in the interest of tenants, that a landlord should be compelled, because of his nervousness, to eject a man whom he is perfectly willing to retain on terms agreeable to both sides. Since, however, this appeal was argued, the learned advocates have been able to agree on terms which can be incorporated by me in the decree of this Court. The present appeal arises out of an application under S. 47, Civil P. C., by the judgment-debtors to the effect that they are entitled to be restored to possession in view of the provisions of S. 75A, Ben. Ten. Act. Briefly, that section provides that decrees enhancing rent after 27th August 1937, shall be inoperative for a period of ten years. The Munsif rejected the petition but it has been allowed in appeal by the District Judge.

The only ground pressed in support of the appeal is that S. 75A, Ben. Ten. Act, has no application to decrees for ejectment. In support of the decision of the learned District Judge Mr. De argued that a decree for ejectment is really dependent upon a decree for enhancement and it cannot be enforced so long as the former is inoperative. In my judgment the pro-

visions of S. 48D are reasonably plain and lead to the conclusion that a decree for enhancement of rent and a decree for ejectment are mutually exclusive. Under S. 48D (ii), the Court has to fix a fair rent. Having done so, the Court must inquire whether the defendant is willing to pay. If he agrees, there is an end of the matter, and a decree giving effect to the Court's order ought to be drawn up. No question of ejectment can then arise. I have no doubt that such a decree would be one enhancing the rent and within the terms of S. 75A, Ben. Ten. Act. If the defendant does not agree, the only decree which can be passed is one for ejectment. In my opinion, it is impossible to call such a decree one enhancing the rent. It is entirely outside the scope of S. 75A, Ben. Ten. Act.

Then, in the second place, Mr. De contended that, whatever may be the law with regard to decrees which are properly drawn up, the peculiar decree which has been drawn up in the present case is within the terms of the section. It is impossible to extract any such meaning out of this decree, peculiar though it is. If the defendants had accepted the enhanced rent within the time allowed, it could have been interpreted as a decree for enhancement. But inasmuch as they did not do so, it can only now be interpreted as a decree for ejectment, pure and simple. The appeal is accordingly allowed. The order of the District Judge is set aside and that of the Munsif dismissing the objection restored. But in view of the compromise between the parties, it will be necessary to make the following order. If the defendants pay into Court Rs. 226-14-0 before 31st December 1941, they will be restored to possession and the decree-holder's execution case will be dismissed on full satisfaction. It is further directed that with effect from 1st January 1942, the defendants will hold the land on an annual rent of Rs. 25 for a period of eight years. I make no order as to costs.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 354

MOHAMAD AKRAM AND PAL JJ.

Surendra Nath Das Gupta — Plaintiff — Appellant

v.

Abdul Jalil Laskar and others — Defendants — Respondents.

Appeal No. 53 of 1939, Decided on 2nd December 1941, from appellate decree of Addl. Dist. Judge, Sylhet, D/- 29th August 1938.

(a) Bengal Land Revenue Sales Act (11 of 1859), Ss. 11 and 12—Circumstances mentioned in S. 11 in fact not existing — Opening of separate account by Collector is without jurisdiction.

The jurisdiction of the Collector to open a separate account is absolutely dependent on the existence of the circumstances mentioned in S. 11. The Collector himself is not given any jurisdiction to decide the existence or otherwise of those circumstances. That power is given to another tribunal by S. 12. Consequently, if it is found that the circumstances authorizing the Collector to open the separate account did not as a matter of fact exist his jurisdiction to open the account will thereby be affected and the account opened will be without jurisdiction : (1888) 21 Q. B. D. 313 and (1915) 3 K. B. 768, *Rel. on.* [P 355 C 2]

(b) Assam Land and Revenue Regulation (1 of 1886), S. 71—Auction purchaser at revenue sale does not take property free from other titles and interests existing in property.

Under S. 71 the auction-purchaser at a revenue sale takes the property sold free from all incumbrances. The purchaser does not take the property free from all other titles and interests existing in the property. [P 355 C 2]

(c) Assam Land and Revenue Regulation (1 of 1886), Ss. 3 (b) and 70 — "Estate" in S. 3 (b) Assam Regulation and S. 13, Bengal Act 11 of 1859, does not include separate accounts *(Obiter)*.

The word "estate" in S. 3 (b) of the Assam Regulation and S. 13, Bengal Act 11 of 1859, does not include separate accounts : ('14) 1 A. I. R. 1914 Cal. 58, *Approved.* [P 355 C 2; P 356 C 1]

Hemendra Kumar Das, Paresh Lal Shome and Probodh Lal Shome — for Appellant.

Dr. Nares Chandra Sen Gupta and Ramendra Mohan Chatterjee; Priya Nath Dutt; Satyendra Kisor Ghose and Syed J. H. Sekandar — for Respondents 17, 18; 11, 13 and 14; and 1 to 7, respectively.

PAL J.—This appeal is by the plaintiff in a suit for recovery of possession of the lands described in the schedule to the plaint on declaration of the plaintiff's title thereto. The lands are situate in Mouza Sarishpur and are claimed as appertaining to separate account No. 30, Sarat Chandra Dutta and others, which was opened out of Taluk No. 31186/2 Kurpan Raza Dassan. This separate account is alleged to have been opened in 1873 under the provisions of S. 11 of Act 11 of 1859 for specific lands in the mouza. This separate account was sold for arrears of revenue on 23th September 1934 and the plaintiff purchased the same at that sale. The sale was confirmed on 24th November 1934, and symbolic possession was delivered to the plaintiff on 18th December 1934. Thereafter the plaintiff failed to get actual possession on account of the opposition by the defendants and hence the present suit was instituted on 21st December 1935.

Six sets of written statements were filed by the different defendants. The defence case is that the disputed lands appertain to the residuary chawk of Thak No. 1317 of Mouza Sarishpur which again appertains to six different taluks, namely, Taluk No. 1 Adam Raza Hal-abadi, Taluk No.2 Kurpan Raza Dassan, Taluk No. 2 Kurpan Reza Hal-abadi, Taluk No. 3 Alam Raza Dassan, Taluk No. 4 Arsadur Raza Dassan. Their further case is that Taluk No. 1 Dasan and Taluk No. 2 Halabadi were sold for arrears of revenue due thereon in 1907 and 1911 respectively and were purchased at those sales by the predecessor in interest of defendants 18 to 25. Thereafter these defendants 18 to 25 instituted a title suit (T. S. No. 426/14) in the Subordinate Judge's Court at Sylhet against all the owners of all the six taluks including the owners of the separate account No. 30 and obtained a decree in respect of their share. The present plaintiff being a cosharer in some of the taluks at that time was also made a party defendant in that suit in that capacity. Thereafter those defendants instituted a suit for partition, being Suit No. 112 of 1921, and obtained a decree in that suit also. In this partition suit also all the owners of all the six taluks including the owners of the separate account No. 30 and including the present plaintiff as a cosharer in some of the taluks were parties. In that partition suit the lands now in dispute fell into

the Saham of one Jagatbehari Purkayastha, and defendants 18 to 25 ultimately purchased the interest of Jagatbehari. According to the defence case the share of the applicant for separate account No. 30 did not consist of any specific land and the lands did not appertain only to the taluk of which he was a cosharer. Consequently the facts giving the Collector jurisdiction to open the separate account did not exist and the separate account is void and was obtained fraudulently and collusively, and the plaintiff by the revenue sale of the alleged separate account purchased nothing.

Both the Courts below have upheld the defence contention and have dismissed the suit. Hence the present appeal by the plaintiff. It has been found by both the Courts below that as a matter of fact the lands appertain to all the six taluks as alleged by the defendants. This finding is based on sufficient evidence on record and no error could be pointed out as vitiating it. It has also been found by the Court of appeal below that at the time when the application for opening of the separate account No.30 was made the applicant was not in possession of these specific lands in his share in the taluk. Mr. Das, appearing for the appellant, contended that on reading the judgment of the Court of appeal below as a whole no such clear finding on the point could be found in it. We are however of opinion that that is the finding of the Court of appeal below when it says that "there is no definite indication that these lands were held specifically by the owners of the separate account." Mr. Das next contends that even assuming that the applicant did not possess the necessary requirements for getting a separate account, when the separate account was opened as a matter of fact its validity cannot be assailed by any other cosharer so as to prejudice the interest of the purchaser of that separate account at a revenue sale. He further contends that the absence of the requisite qualifications of the applicant would not affect the jurisdiction of the Collector to open the account. Such objection could have been taken by the cosharers at the time when the application for opening the separate account was made. When no such objection was taken and the separate account was opened as a matter of fact it is binding on everybody concerned and the purchaser at the sale must be deemed to have purchased it free from all incumbrances. We are unable to accept this contention of Mr. Das. As was pointed out by Lord Esher, M. R., in (1888) 21 Q. B. D. 313[1] at p. 319 :

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. Then it is not for them conclusively to decide whether that state of facts exists, and *if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction.* But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends, and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

This view was reiterated by Lord Reading C. J., in (1915) 3 K. B. 768.[2] In this particular case the power of the Collector to open a separate account was dependent on the existence of a certain state of facts. The Collector himself was not given jurisdiction to decide those facts. If the facts were in any way disputed, the Collector was prohibited by the Statute from proceeding with the matter. Consequently his jurisdiction to open the separate account was absolutely dependent on the existence of the circumstances mentioned in S. 11 of Act 11 of 1859 and the existence or otherwise of those circumstances was made determinable by another tribunal (*vide* S. 12 of the Act). In the circumstances, if it has been found that those circumstances authorising the Collector to open the separate account did not as a matter of fact exist his jurisdiction to open the account will thereby be affected and the account opened will be without jurisdiction. In any case, S. 71 of Assam Regulation 1 of 1886 only says that the auction-purchaser at a revenue sale takes the property sold free from all incumbrances. It does not say that the purchaser takes the property free from all other titles and interests existing in the property and in our opinion, the sale could not have affected the title at least of the holders of the five Taluks other than the Taluks of which the applicant for the separate account was a cosharer. In this view, therefore, the plaintiff auction-purchaser did not acquire any title to the lands in suit as against the title of the contesting defendants. Mr. Das contended that the separate account in question constituted an estate as defined by the Assam Regulation 1 of 1886, S. 3, cl. (b) of which defines the "estate" as follows : "Estate includes . . . . (2) any land subject to the payment of a separate amount as land revenue, although no engagement has been entered into with the Government for that account . . . ."

Dr. Sen Gupta, on the other hand, contends that the definition is not wide enough to include a separate account at least for the purpose of S. 70 of the regulation and that the inclusion of separate account within this definition of "estate" would be repugnant to the context when the separate accounts are dealt with in the statute. He points out other absurdities to which the provisions of the statute will lead if separate accounts are taken as covered by the definition of 'estate'. Dr. Sen Gupta pointed out that with that extended meaning of the word "estate", as used in S. 70 of the regulation, the entire parent estate may be liable for sale for the default only of the separate account, though taking into consideration the aggregate account of the entire estate, there may be not only no default but

1. (1888) 21 Q. B. D. 313, Reg. v. Commissioners of Taxes.

2. (1915) 3 K. B. 768 : 85 L. J. K. B. 129 : 113 L. T. 1015 : 31 T. L. R. 565 : 7 Tax. Cas. 107, Rex v. Bloomsbury Income-tax Commissioner.

excess payment of revenue. Dr. Sen Gupta next points out that though for the purposes of Act 11 of 1859 the word, as defined in S. 1 of Act 7 of 1868, expressly includes separate accounts, yet it has been held that in the corresponding S. 13 of Act 11 of 1859 the word cannot have that extended meaning : 18 C. W. N. 490.[3] We feel inclined to the view urged by Dr. Sen Gupta. But as nothing turns upon whether the separate account by itself forms an estate or not it is not necessary for us to decide the point. Section 71 of the regulation which defines the interest taken by the purchaser does not turn upon whether the property sold is an estate or not. In the result this appeal fails and is dismissed with costs.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Appeal dismissed.*

3. ('14) 1 A. I. R. 1914 Cal. 58 : 21 I. C. 953 : 18 C. W. N. 490 : 18 C. L. J. 505, Indra Moni v. Priya Nath.

A. I. R. (29) 1942 Calcutta 356

MOHAMAD AKRAM J.

Nimbar alias Limbar Khan and others — Plaintiffs — Appellants

v.

Turab Ulla — Defendant — Respondent.

Appeal No. 888 of 1939, Decided on 20th November 1941, from appellate decree of Sub-Judge, 2nd Court, Sylhet, D/- 28th January 1939.

(a) Landlord and tenant — Mere denial of landlord's title by tenant does not put an end to tenancy — Landlord has option — No intention on landlord's part to end tenancy — Tenancy subsists.

Under the Bengal Act (8 of 1869) the mere denial of the title of the landlord by the tenant was sufficient to entitle him to put an end to the tenancy, but unless he showed an intention to do so and to avail himself of his rights the tenancy subsisted. The landlord has an option in the matter and the mere denial of his title does not by itself put an end to the tenancy under the Bengal Act 8 of 1869. Consequently, where the landlord has not expressed any intention to determine the tenancy while Act 8 of 1869, was in force, the right to re-enter cannot be said to have accrued to him under the Act : 24 Mad. 246, *Rel. on* ; 28 Cal. 135, *Ref.* [P 356 C 2]

(b) Sylhet Tenancy Act (11 of 1936), S. 204— Ejectment suit by landlord on basis of determination of tenancy — Plaintiff cannot ask for damages in such suit.

A suit by the landlord to eject his tenant on the basis of the determination of the tenancy, not being one as between the landlord and tenant as such, the plaintiff is not entitled to ask for damages under S. 204. [P 356 C 2]

Nikunja Behari Roy — for Appellants.

Hemendra Kumar Das and Satyendra K. Ghose — for Respondent.

JUDGMENT. — This appeal by the plaintiffs arises out of a suit for recovery of khas possession of certain lands on declaration of their maliki right thereto. The plaintiffs obtained a decree in full in the trial Court, but on appeal by the defendant the decree was modified by disallowing the claim for khas possession. Against this decree the plaintiffs have preferred the present second appeal. The plaintiff's case briefly stated was that the lands in suit were let out to the defendant in 1331 B. S., corresponding to 1924, for one year only at paddy rent; that a suit for rent (Suit No. 1088 of 1926) was instituted by the plaintiffs in which the defendant filed a written statement on 27th February 1927, repudiating the title of the plaintiffs; that the suit was consequently withdrawn on 15th September 1927, with liberty to institute a fresh suit; that Act 8 of 1869 which was then in force came to be repealed by the Sylhet Tenancy Act, 1936 (Assam Act 11 of 1936), which came into operation from 1st March 1937; that the present suit for ejectment was thereafter instituted on 21st May 1937, mainly on the ground that the defendant had forfeited his tenancy right by repudiating the title of the landlords in Suit No. 1088 of 1926. It is urged on behalf of the appellants that the Court of appeal below is in error in taking the view that the case is governed by the new Sylhet Tenancy Act (Assam Act 11 of 1936) and not by the old Act 8 of 1869; that in any event there should have been a decree for damage in favour of the plaintiffs under S. 204 of the existing Act. Regarding the first point reliance has been placed on the decision in 28 Cal. 135[1] and it is suggested that as soon as there was a denial of the plaintiffs' title there was a forfeiture of the tenancy and nothing more was necessary to be done on the part of the plaintiffs to have a complete cause of action; that the new Sylhet Tenancy Act has not taken away the rights which had accrued to the plaintiffs by any express provision in the Act.

No doubt, it is true that the mere denial of the title of the landlord was sufficient under the old Act to entitle him to put an end to the tenancy, but unless he showed an intention to do so and to avail himself of his rights the tenancy subsisted. The landlord has an option in the matter and the mere denial of his title does not by itself put an end to the tenancy under the old Act. This view finds support in the decision in 24 Mad. 246[2] and seems to be in accordance with the general principles of English law, which would govern the case. I think, therefore, that the learned Judge in the Court below took a correct view of the law in holding that the plaintiffs not having expressed any intention to determine the tenancy while Act 8 of 1869, was in force, the right to re-enter did not accrue to them under the said Act. It is admitted that under the present Act having regard to the terms of S. 45 no such right of ejectment can be claimed by the plaintiffs on the ground of forfeiture for denying the plaintiff's title. Such being the position, the plaintiffs' prayer for khas possession has in my opinion been rightly disallowed by the lower appellate Court. As regards the second point no such relief was asked for in the plaint, and no issue was framed to that effect; nor does it appear to have been urged before the lower appellate Court. Besides, having regard to the terms of S. 204 of Act 11 of 1936, the plaintiffs cannot succeed in such a claim inasmuch as the present suit was a suit in ejectment on the basis of the determination of the tenancy and was not one as between landlord and tenant as such. I do not think that the plaintiffs are entitled to ask for damages in this suit. Both the contentions raised by the appellants, therefore, fail and the appeal

1. ('01) 28 Cal. 135 : 5 C. W. N. 263, Nizamuddin v. Mamtazuddin.
2. ('01) 24 Mad. 246, Srinivas Ayyar v. Muthusami Pillai.

must accordingly be dismissed. I make no order as to costs.

G.N./R.K. *Appeal dismissed.*

T. P. Act —
(a) ('36) Mulla, S. 111 Page 647 Pt. (x); Page 649 Pt. (w).
('37) Mitra, S. 111 Page 614, N. 592; Page 625, N. 600.

A. I. R. (29) 1942 Calcutta 357

B. K. MUKHERJEA AND SEN JJ.

Monohar Kaibarta and others — *Plaintiffs — Appellants*

v.

Jagadish Chandra Banerjee and others — *Defendants— Respondents.*

Appeal No. 483 of 1938, Decided on 12th December 1941, from appellate decree of Addl. Dist. Judge, 1st Court, Dacca, D/- 30th September 1937.

(a) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (3) — Title to island chars thrown up in navigable river is incident of ownership of bed of river—S. 4 (3) follows principle of English law subject to doctrine of fordable channel.

Under the English law an island rising up in a tidal and navigable river prima facie belongs to the Crown. A subject may acquire title to the island arising in tidal waters where the bed and the soil of the tidal river were in the subject before the island arose. Thus under the Law of England the title to such an island is regarded as an incident of the ownership of the bed. The Indian law (S. 4 (3)) follows the same principle subject to the doctrine of fordable channel which is peculiar to it. [P 358 C 2; P 359 C 1]

(b) Interpretation of Statutes—Same word in same section should not be interpreted in two different ways.

It is an established rule of construction that the same word should not be interpreted in two different ways in the same section. [P 359 C 1]

(c) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (1) and (3) para. 2 — Word "estate" in S. 4 (1) and S. 4 (3) para. 2 has same meaning — Right to island chars under S. 4 (3) para. 2 can be claimed not only by zemindar but also by any subordinate tenant holding land under such zemindar—Ss. 1 and 2 Bengal Act 31 of 1858 do not take away tenant's right to claim title to island chars under S. 4 (3) para. 2 of Bengal Regulation 11 of 1825.

The words "tenure" and "estate" in S. 4 (1) have been used not merely as connoting different modes of holding property but as referring to the land or the property itself which is held by a proprietor or the different classes of tenants. In fact, the words "estate" "tenure" and "land" have been used as synonymous expressions. The word "estate" in S. 4 (1) and S 4 (3) para. 2 is intended to bear the same meaning. Consequently the words "whose estate or estates may be most contiguous" in S. 4 (3) para. 2 indicate that the right to island chars with fordable channels can be claimed not only by the zemindar or the actual proprietor of an estate but also by any species of subordinate tenant who holds lands under such zemindar. The right of the subordinate tenant under S. 4 (3) para. 2 to claim title to the island chars is not taken away merely because S. 2, Bengal Alluvion Land Settlement Act 31 of 1858, does not mention that his right is protected inasmuch as a mere omission in later Act cannot take away a right created by an earlier statute. Moreover S. 1 of Act 31 of 1858 contemplates only alluvial accessions which are dealt with under cl. (1) of S. 4 of Regulation 11 of 1825 and it does not speak of any island char formed on the bed of a river. [P 359 C 1, 2]

(d) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (3) — Words "special provisions" in S. 4 (3) refer not to substantive part of S. 4 (1) but to provisos attached thereto.

The words "subject to the special provisions specified in the first clause of this section" in S. 4 (3) do not by themselves attract the operation of the substantive part of cl. (1) but refer to the provisos to S. 4 (1) : ('35) 22 A.I.R. 1935 Cal. 711 and ('34) 21 A.I.R. 1934 Cal. 411, *Approved.* [P 359 C 2]

(e) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (1) and (3) para. 2—Plaintiff putting his case to be governed by S. 4 (1) — Defendant attempting to show that case was governed by S. 4 (3) para. 1—Both sides adducing evidence not only on point whether land was island char but also whether intervening channel was fordable—Variation between proof and pleading held not material—Appellate Court held could not refuse to go into question whether plaintiff was entitled to relief under S. 4 (3) para. 2 merely because it was not specifically raised in plaint—Practice—Powers of appellate Court.

The plaintiff's case expressly was that the disputed lands were gradual accretions to his holding and he acquired a right to them under S. 4 (1). He did not make a case under S. 4 (3). But the defendants attempted to show that the case was governed by S. 4 (3) para. 1 and evidence was adduced by both sides at the time of the trial not only on the point as to whether the land was an island char but also whether the channel intervening between the char and the main land was fordable or not. The evidence adduced by the parties had been referred to in the judgments of both the Courts below and the trial Court discussed at some length the question of law as to whether taking the channel to be fordable the plaintiff could claim a right to the char under S. 4 (3) para. 2 :

Held that the variation between proof and pleading was not material and it could not be said that the defendants were in any way taken by surprise. The appellate Court therefore could not refuse to go into the question whether the plaintiff was entitled to relief under S. 4 (3) para. 2 merely because it was not specifically raised in the plaint. [P 360 C 1]

(f) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (3) — Under S. 4 (3) channel should be fordable at any season of year — "Year" refers to year in which island was formed — Channel held fordable.

Under S. 4 (3) it is enough if the channel is fordable at any season of the year and the word "year" refers to the year in which the formation of the island took place. [P 360 C 1]

Where the channel could be crossed on foot during the dry season of the very year in which the char was formed and there is nothing to suggest that the men who crossed the channel were not men of average height or that the channel was crossed only

in a zigzag manner the channel must be regarded as fordable. [P 360 C 1]

(g) Bengal Alluvion and Diluvion Regulation (11 of 1825), S. 4 (3)—Path between plaintiff's holding and fordable channel not regular or public but tow path forming part of plaintiff's raiyati land used by boatmen during rainy season—Holding held contiguous to island char within S. 4 (3).

The path between the fordable channel and the plaintiff's land was not a regular or a public pathway but a tow path forming part of the plaintiff's raiyati land used by boatmen during rainy season for the purpose of towing boats :

Held that the plaintiff's holding must be regarded as contiguous to the island char within S. 4 (3) in spite of the tow path. [P 360 C 1]

Gopal Chandra Das and Sudhir Chandra Chowdhury—for Appellants.

Phanibhusan Chakravarti and Bankim Chandra Banerji — for Respondents.

B. K. MUKHERJEA J. — This appeal is on behalf of the plaintiff and it arises out of a suit commenced by him to recover khas possession of the lands in suit on establishment of his title to the same. The case of the plaintiff in substance was that three plots of land situated in village Kanchan, which were recorded as C. S. Plots Nos. 2897, 2898 and 5045 belonged to the plaintiff in raiyati right. Plot Nos. 2898 and 5045 appertain to touzi No. 379 of the Dacca Collectorate of which Babu Kishori Mohan Poddar was the sole proprietor. Kishori Mohan having been declared an insolvent his estate was in the hands of Receivers who were defendants 19 and 20 in the suit. As regards plot No. 2897 Kishori Babu was the proprietor to the extent of three annas and odd gandas share and the balance appertained to another touzi which belonged to defendants 1 and 2. At the time of the settlement, operations the river Lakhya flowed by the west of the suit lands. The river gradually receded and the disputed chars were formed in the river as accretions to the plaintiff's raiyati jote. The plaintiff possessed these chars for five or six years and grew crops in them but was dispossessed by defendants 1 and 2 which led to the institution of the present suit. Defendants 1 and 2, it was alleged, had wrongfully cut a khal or ditch on the raiyati lands of the plaintiff with a view to show that the disputed chars were separate from the asli lands and could not be regarded as accretions thereto. The suit was contested by defendants 1 and 2. Their defence was, that the lands in suit were not accretions to the plaintiff's holding, but constituted an island char formed on the bed of the river Lakhya and as there was a non-fordable channel to the east of the lands, the char was at the disposal of the Government. It was further alleged that there was a pathway to the further east of the channel separating the disputed chars from the plaintiff's raiyati lands. The suit according to these defendants was brought at the instance of the Receivers to the estate of Kishori Mohan Poddar between whom and these defendants there were long and bitter quarrels.

The trial Court dismissed the suit and this decision was affirmed in appeal by the Additional District Judge of Dacca. Both the Courts below have held that the lands in suit were not gained by gradual accession from the recess of the river but were an island char thrown upon its bed. Both the Courts were of the opinion that the channel between this new formation and the shore was fordable. The trial Court held that in spite of the channel being fordable the plaintiff could not lay claim to the chars under S. 4, cl. (3), Para. 2 of Regulation 11 of 1825, as, under that clause, rights could be acquired only by the proprietor of an estate and not by any subordinate tenure holder. The lower appellate Court did not discuss this question of law, being of opinion that as the plaintiff did not make any case under S. 4, cl. (3) of the Regulation the matter did not arise for consideration at all. It is against this decision that the present second appeal has been preferred. Mr. Das who appears in support of the appeal has contended before us that on the findings of fact arrived at by both the Courts below they should have held that the plaintiff acquired a title to the disputed lands under S. 4, cl. (3) para. 2 of Regn. 11 of 1825 and that the lower appellate Court was wrong in refusing to go into the question on the ground that it was not expressly raised in the pleadings. Mr. Chakravarti who appears for the respondents has argued on the other hand that no rights could be acquired by a subordinate tenure holder under Sec. 4, cl. (3) para. 2 of the Alluvion and Diluvion Regulation. He has further argued that there was no foundation for a case like this either in the plaint presented by the plaintiff or in the evidence adduced by him and that at any rate there were no proper findings come to by either of the Courts below upon which relief under cl. (3) of S. 4 of the Regulation could be given.

The first and the main point for our consideration is whether under S. 4, cl. (3), para. 2 of Regn. 11 of 1825 a char thrown up on the bed of a large and navigable river the channel between which and the main land, is fordable at any season of the year can be claimed as an accretion to his tenure by a subordinate tenant who holds the adjoining estate or tenure not directly under the Crown but under some zemindar or other superior landholder. Now, under S. 4, cl. (1) of the Regulation what is gained by gradual accession becomes the property of him to whose lands the recess of the river or the sea has annexed it. It is immaterial whether the adjoining owner is a zemindar or a superior landholder or a subordinate tenant. Every person from the zamindar or other actual proprietor of the soil down to every description of tenant is entitled to the increment by gradual accession. This has been made clear by the express words of the clause which says that "It shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate he held immediately from Government by a zamindar or other superior landholder or as a subordinate tenure of any description of under tenant whatever." The proviso added to this clause further lays down that the terms and conditions of the original tenure would apply to the increment. If the original tenure was a proprietary estate the holder of it will possess the accreted lands as proprietor liable to be assessed with fresh revenue for the same. On the other hand, if the new formation adheres to the tenure or holding of a subordinate tenant he will not be exempted from payment of additional rent for the additional area. Clause (3) of S. 4 deals with island chars thrown up in a big navigable river the bed of which is not the property of an individual. Under the English law an island rising up in a tidal and navigable river prima facie belongs to the Crown. A subject may acquire title to the island arising in tidal waters where the bed and the soil of the tidal river were in the subject before the island arose. Thus under the law of

England the title to such an island is regarded as an incident of the ownership of the bid. The Indian Law, it seems, follows the same principle subject to the doctrine of fordable channel which is peculiar to it. Where an island is formed on the bed of a navigable river which is a part of the public territory, cl. (3) of S. 4 of the Regulation lays down that it would be at the disposal of the Government provided the channel between the island and the shore is not fordable. If, on the other hand, the intervening channel is fordable at any season of the year, it shall be considered an accession to the land tenure or tenures of the person or persons whose estate or estates may be most contiguous to it subject to the special provisions specified in the cl. 1 of the section. The question before us is whether the words "whose estate or estates may be most contiguous" indicate that the right to such island can be claimed only by the zamindar or the actual proprietor of an estate and not by any species of subordinate tenant who holds lands under such zamindar. It will be seen that the wording of the operative portion of cl. (3), para. 2 follows closely that of cl. (1) except that the explanatory provision beginning with the words "where such land or estate be held immediately from Government etc.," which occurs in cl. (1) does not find a place in this part of cl. (3).

Mr. Chakravarti argues that this is a deliberate omission and shows conclusively that the Legislature did not intend that the word "estate" as used in cl. (3) should have the same wide interpretation as it bears in cl. (1). I do not think that this contention is right. It is an established rule of construction that the same word should not be interpreted in two different ways in the same section. The words occurring in cl. (1) referred to above are in the nature of an explanatory gloss which is inserted to remove any doubt that may arise as regards the proper meaning to be attached to the word estate or tenure. It appears from the language of cl. (1) of S. 4 itself that the words "tenure" and "estate" have been used not merely as connoting different modes of holding property but as referring to the land or the property itself which is held by a proprietor or the different classes of tenants. In fact, the words "estate" "tenure" and "land" have been used as synonymous expressions. In my opinion, having once explained in cl. (1) of the section as to how the word estate should be interpreted it was not necessary for the Legislature to put in the same explanation in another part of the same section and the obvious inference is that the word was intended to bear the same meaning in both the two clauses. This view is fortified by the fact that in cl. (3), para. 2 of S. 4 an island with a fordable channel has to be regarded as an "accession" to the land or tenure of the person whose estate is most contiguous to it.

The word "accession" suggests the idea of adherence to some particular land which may be termed the nucleus of accretion. If the nucleus itself is held in the right of a tenant, it stands to reason that the land added to it must also be held in the same right. Moreover, an island that is formed on the bed of a large and navigable river as contemplated by cl. (3) is a gain from public domain and there is absolutely no reason why the proprietor of an adjoining estate who has no rights of ownership in the river bed should be given the sole right to such newly formed lands. Different considerations undoubtedly arise when the ownership of the river bed is in the adjacent proprietor and such cases are dealt with not by cl. (3) but by cl. (4) of S. 4.

Mr. Chakravarti may be right in his contention that the words "subject to the special provisions specified in cl. (1) of this section," upon which Mr. Das lays so much stress do not by themselves attract the operation of the substantive part of cl. (1). A similar expression occurs in cl. (4) and it has been held in such cases that the word "provisions" refers not to the substantive part but to the provisos attached to cl. (1) : *vide* 40 C. W. N. 345[1] and 38 C.W.N. 130.[2] But as I have already pointed out there is nothing in cl. (3), para. 2 which would go to show that the right to such an island char vests on the proprietor alone. Mr. Chakravarti has in this connection drawn our attention to the provisions of S. 2 of Bengal Act 31 of 1858 (the Bengal Alluvion Land Settlement Act). Section 1 of the Act provides that in case of land added by alluvial accession to an estate paying revenue to Government, the revenue assessed upon the alluvial lands may be added to the jama of the original estate by an agreement between the proprietor and the Revenue authorities; and if there is no such agreement or if the Revenue authorities decide otherwise it may be settled as a separate estate with a separate jama. Section 2 then lays down that nothing in the preceding section shall affect the rights of an under-tenant in any alluvial land under the provisions of cl. (1), S. 4, Regulation 11 of 1825. Mr. Chakravarti argues that this section protects the rights of under-tenants under cl. (1) of S. 4 of Regulation 11 of 1825 and if under-tenants had any rights under cl. (3) they would certainly have been mentioned in the section. This argument does not impress me much. A mere omission in a later Act cannot take away a right created by an earlier statute. I think further that it was not necessary to refer to cl. (3), S. 4 of Regulation 11 of 1825 in S. 2, Bengal Alluvion Land Settlement Act. Section 1 of this Act contemplates only alluvial accessions which are dealt with under cl. (1) of S. 4 of Regulation 11 of 1825 and it does not speak of any island char formed on the bed of a river. It is true that island chars with fordable channels are assessed to revenue in the same way as alluvial accretions but that is because they are regarded as accessions by reason of the express words used in cl. (3), Para. 2 of S. 4. My conclusion, therefore, is that the plaintiff who is an occupancy raiyat is entitled to the disputed lands if they are found to be island chars most contiguous to his holding and if the intervening channel between the new formation and the main land is fordable.

The next question for our consideration is whether having regard to the case made by the plaintiff and the findings arrived at by the Courts below he should be given a decree for possession of the disputed chars under the provisions of S. 4, cl. (3) para. 2 of Regulation, 11 of 1825. The plaintiff undoubtedly did not make a case under cl. (3), S. 4 of the Regulation. His case expressly was that the disputed lands were gradual accretions to his holding and he acquired a right to them under cl. (1) of S. 4. Defendants 1 and 2, however, expressly pleaded in their written statement that the land in suit was an island char thrown up on the bed of the river Lakhya and that it was the property of the Government. These defendants, it was said, had taken possession of the lands in anticipation of taking settlement from the Government. On these pleadings issue 5 was framed which was worded as follows : "Is the newly formed char

1. ('35) 22 A. I. R. 1935 Cal. 711 : 40 C.W.N. 345, Prokash Chandra Sil v. Abdul Jabbar.
2. ('34) 21 A. I. R. 1934 Cal. 411 : 150 I. C. 374 : 38 C.W.N. 130, Naku Sheik v. Harish Chandra.

accretion to C. S. Dags Nos. 2897, 2898, 5045 as alleged in the plaint or an 'Island char' as alleged by the defendants.?" Thus, it would appear that though the plaintiff did not make a case under S. 4, cl. (3) of the Regulation, the defendants attempted to show that the case was governed by para. 1 of cl. (3) of S. 4 and evidence was adduced by both sides at the time of the trial not only on the point as to whether the land was an island char but also whether the intervening channel was fordable or not. The evidence adduced by the parties has been referred to in the judgments of both the Courts below and the trial Court discussed at some lengths the question of law as to whether taking the channel to be fordable the plaintiff could claim a right to the char under S. 4, cl. (3) para. 2. In these circumstances it seems to us that the variation between proof and pleading is not material in this case and it cannot be said that the defendants were in any way taken by surprise. The appellate Court, in my opinion, was not right in refusing to go into the question simply because this was not the specific case raised by the plaintiff in his plaint. Mr. Chakravarty has further attacked the finding arrived at by the Courts below that the intervening channel between the disputed char and the main land was fordable and his contention is that in coming to this finding the Courts below did not advert to or consider the essential elements necessary to constitute fordability. Under cl. (3) of S. 4 it is enough if the channel is fordable at any season of the year and the word "year" presumably refers to the year in which the formation of the island took place; *vide* the observations of Jackson J. in 14 W. R. 25.[3] The trial Court found that the channel was fordable at the dry season of the year in which it was formed. The Court relied upon the evidence of D. W. 3 Hafijuddi Dafadar who said that he saw men going from plaintiff's asli lands to the char on foot since the time of its formation. Kailash Chakravarty, another witness of the defendants also said that in Magh or Falgoon every year the water in the Kolegang dried up. The channel, therefore, could be crossed on foot during the dry season of the very year in which the char was formed and there is nothing in the evidence to suggest that the men who crossed the channel were not men of average height or that the channel was crossed only in a zigzag manner. The Additional District Judge sums up his conclusion on this question in the following manner:

"On considering the long and voluminous evidence on behalf of the defendants the impression presses itself upon my mind that the char was separated from the main land by a channel which was fordable."

We do not think that the Courts below misdirected themselves on any point of law in coming to the finding that the channel was fordable. A further point was taken by Mr. Chakravarty that there was a tow path between the channel and the plaintiff's land and consequently the holding could not be said to be most contiguous to the disputed char. But the finding is that it was neither a regular nor a public pathway. It may be that it was a part of the plaintiff's raiyati land and was used by boatmen during rainy season for the purpose of towing boats. In our opinion, on the facts found by the Courts below the plaintiff is entitled to a decree for possession of the disputed lands. The result is that the appeal is allowed. The judgments and decrees of the Courts below are set aside and the plaintiff's prayer for recovery of possession of the lands in suit is allowed. As the Government is not made a party to the present proceeding its right would not in any way be affected by this decision and we also do not decide any thing as to the relative rights of the rival zemindars who have superior interest over plaintiff's raiyati lands. As the plaintiff did not make a clear case in his plaint we do not allow him any costs. Each party will bear his own costs in all the three Courts.

SEN J.—I agree.

G.N./R.K. *Appeal allowed.*

3, ('70) 14 W. R. 25 : 6 Beng. L. R. 255 (F. B.), Budurunnissa v. Prosanna Coomar.

C. P. C.—

(b) ('40) Chitaley, Preamble, Note 7 Pt. 35.

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* A. I. R. (29) 1942 Calcutta 360

B. K. MUKHERJEA AND SEN JJ.

Surendra Kumar Basu — Plaintiff — Appellant

v.

District Board, Nadia and another — Defendants — Respondents.

Appeal No. 1560 of 1938, Decided on 1st December 1941, from appellate decree of Sub-Judge, Nadia, D/- 30th July 1938.

(a) Civil P. C. (1908), S. 91 (1) — Essence of public nuisance stated — Suit by *A* party seeking to use highway in particular way against rival party obstructing them in use of same is not one relating to public nuisance — *A* party can bring declaratory suit to establish their right without allegation or proof of special damage.

A suit by one party who wants to use the highway in a particular way against a rival party who would obstruct them in the use of the same is not a suit relating to public nuisance. The essence of a public nuisance is that it causes damage, injury or annoyance to the public or the people in general. An obstruction which aims at preventing only a particular class of persons from using the highway in a particular manner does not and cannot amount to public nuisance. Consequently, a person or body of persons who claim a right to use a public highway in a particular way can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage : ('25) 12 A.I.R. 1925 P. C. 36, *Expl. and Rel. on*; ('19) 6 A.I.R. 1919 Mad. 674 (F.B.) and 34 Bom. 571, *Rel. on.* [P 361 C 2]

(b) Civil P. C. (1908), S. 91 (1) — Public nuisance—Encroachment on public road withdrawing part of highway from use of public — Private individual cannot maintain action without proving special damage.

A private individual has no right of action in respect of a public nuisance, such as an encroachment upon the public road which has the effect of withdrawing a part of the highway from the use of the public unless he can show that he has sustained some special damage over and above that inflicted upon the public at large; the object being to avoid multiplicity of litigation. [P 361 C 2]

Consequently where a plaintiff seeks relief in respect of a public nuisance, and the suit is not brought in conformity with the provisions of S. 91 (1) it is bound to fail unless special damage is shown : ('37) 24 A.I.R. 1937 Pat. 481, *Approved*; ('33) 20 A.I.R. 1933 Cal. 884, View of Jack J. *Not approved*; ('39) 26 A.I.R.

1939 Mad. 691 and ('35) 22 A.I.R. 1935 Lah. 196, *Not foll.*; ('25) 12 A.I.R. 1925 P.C. 36, *Expl.*; *English and Indian case law reviewed.* [P 364 C 1]

*** (c) Civil P. C. (1908), O. 1, R. 8 and S. 91— Scope of O. 1, R. 8 — It does not vest right of suit in any person — Public nuisance—Suit by private individual—Necessity to prove special damage is not obviated by bringing suit under O. 1, R. 8 : 62 Cal. 692 = 39 C.W.N. 590, *OVERRULED.***

Order 1, R. 8 is only an enabling rule formulated for the purposes of convenience; it does not vest a right of suit in any person or group of persons but merely enables a person who has a right of suit in common with several others to sue on behalf of all. It presupposes that each one of the numerous persons by himself has a right of suit and for the purposes of convenience permits one or more of such persons to sue on behalf of the others after complying with certain formalities. It does not force one to represent many if his action is maintainable without the joinder of those persons : 24 Cal. 385 and ('37) 24 A. I. R. 1937 Pat. 481, *Rel. on.* [P 364 C 1]

If a person has not in himself the right to sue he cannot be permitted to sue not only on behalf of himself but also on behalf of a number of others who suffer from the same disability as himself. Consequently, since an individual has no right of action in respect of a public nuisance without proof of special damage the adoption of the procedure laid down in O. 1, R. 8 cannot vest him with such right and the necessity of proving special damage cannot be obviated by bringing the suit under O 1, R. 8 : 62 Cal 692=39 C.W.N. 590, *OVERRULED.* [P 364 C 1, 2]

(d) Tort—Law applicable—English Common Law applies.

In the case of torts, there being no Indian Statutory Law, the English Common Law applies as being consonant to justice, equity and good conscience : ('21) 8 A.I.R. 1921 Cal. 1 (S.B.), *Rel. on.* [P 365 C 1]

The English law can be departed from only when a particular rule is unsuitable to local conditions. [P 365 C 1]

(e) Civil P. C. (1908), S. 91 (1)—Road in front of plaintiff's house narrowed by encroachment—Special damage to plaintiff cannot be presumed.

The fact that the roadway in front of the plaintiff's house has been narrowed by encroachment, would not justify a presumption of special damage in favour of the plaintiff. [P 367 C 1]

Narendra Kr. Basu, Sisir Kr. Basu and Sukumar De — for Appellant.

Panchanan Ghose, Syamacharan Mitter for Durgadas Roy and Sukumar Ghose — for Respondents.

B. K. MUKHERJEA J.—This appeal is on behalf of the plaintiff, and it arises out of a suit commenced by him for removal of an alleged encroachment, made by defendant 1, the District Board of Nadia, upon a public thoroughfare in front of plaintiff's premises. The public road is shown as plot No. 203 in the C. S. Map of Krishnagar. The defendant District Board have their office in plot No. 206. They put up a wire fencing on the southern side of the office premises and thereby encroached upon a portion of the public road on the immediate south of which stands the residential house of the plaintiff. The Krishnagar Municipality which was made a party defendant, did not take any steps against the District Board, and the plaintiff brought this suit on the allegation that his rights as a rate-payer and as a member of the public were infringed by the encroachment of the District Board, which deprived him of the use of the full width of the public road.

Both the Courts below have dismissed the plaintiff's suit. It has been held by the Sub-Judge who heard the appeal, that there has been an encroachment made by defendant 1 upon the public road to the extent of 2 cottas 5 ch. as found by the pleader commissioner, but the suit was dismissed on the ground that it was not maintainable at the instance of the plaintiff without proof of special damage. The Sub Judge further expressed his opinion that the proper course for the plaintiff to follow was to bring a representative suit in conformity with the provisions of O. 1, R. 8, Civil P. C., and if a suit of that character was brought the necessity of proving special damage might have been obviated. The propriety of this decision has been challenged before us in this second appeal and Mr. Basu who appears for the plaintiff-appellant has contended before us that the decision of the Judicial Committee in 52 I. A. 61,[1] has now placed it beyond doubt, that it is not necessary for an individual member of the public to allege and prove special damage to sustain a suit commenced by him in respect of a public nuisance. It has further been argued that the lower appellate Court was wrong in holding that the remedy of the plaintiff lay in suit brought under O. 1, R. 8, Civil P. C., and his last contention is that in any event, on the facts admitted and proved the Courts below ought to have held that the plaintiff made out a case of special damage.

I will examine these contentions one after another. It is not disputed that in the present case the plaintiff seeks declaration and injunction in respect of a public nuisance. According to the findings of the Courts below, there was an encroachment by the defendant District Board, upon the public road, which had the effect of withdrawing a part of the highway from the use of the public. Under the English Common Law, a public nuisance is an indictable misdemeanour; criminal proceedings are also sanctioned by particular statutes in particular cases. It is, however, a settled principle of English law, which has come down from very ancient time that a private individual has no right of action in respect of a public nuisance, unless he can show that he has sustained some special damage over and above that inflicted upon the public at large; the object being to avoid multiplicity of litigation: (1699) 1 Ld. Raym 486;[2] (1867) 2 Ex. 316[3] and (1930) 1 Ch. 138.[4] This rule regarding special damage was followed by the different High Courts in India long before S. 91 came into the Civil Procedure Code As early as in 1869, Sir Barnes Peacock C. J., thus laid down the law in 12 W.R. 160[5]:

"We think it is clear that this suit will not lie. The plaintiff sues defendants for obstructing a public road without showing that he has sustained any

1. ('25) 12 A.I.R. 1925 P. C. 36 : 86 I. C. 236 : 47 All. 151 : 52 I. A. 61 (P. C.), Manzar Hasan v. Muhammad Zaman.
2. (1699) 1 Ld. Raym 486, Iveson v. Moore.
3. (1867) 2 Ex. 316 : 36 L. J. Ex. 194 : 16 L. T. 771 : 16 W. R. 15, Winterbottom v. Lord Derby.
4. (1930) 1 Ch 138 : 99 L. J. Ch 84 : 142 L. T. 198 : 94 J. P. 23 : 27 L. G. R. 752, Vandar Pant v. Mayfair Hotel Co.
5. ('69) 12 W. R. 160 : 3 Beng. L. R. A. C. 295, Baroda Prosad v. Gorachand.

particular inconvenience in consequence of the obstruction. If he can maintain this suit, any member of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damage."

A Full Bench of this Court affirmed this view in 3 Cal. 20[6] and this has been followed since then in a large number of cases. We may refer by way of illustrations to the cases in 27 Cal. 793,[7] and 25 C. W. N. 95.[8] The same view was accepted by all the other High Courts in India, *vide* 31 All. 444;[9] 33 All. 287;[10] 23 M. L. J. 539;[11] 2 Bom. 469[12] and 10 Pat. 568.[13] Section 91, Civil P. C., introduced a change in the procedure; and under this section the Advocate-General or two or more persons with his consent may institute a suit in respect of a public nuisance without any proof of special damage. It is obvious that in this procedure no multiplicity of litigation can be apprehended. So far as suits by private individuals are concerned, sub-sec. (2) expressly leaves the old law intact.

It will be necessary now to refer to another class of cases which has been a frequent subject of litigation in India, and which relate to obstruction of the right to use highways for processions by members of rival sects or communities. In such cases what usually happens is, that a group of persons belonging to a particular sect or religion who claim a right to go in procession along a public highway are obstructed by a rival party professing the same or a different faith. In the majority of these cases, there is an order by a Magistrate made under the Criminal Procedure Code, restraining a person or group of persons from using a public road in a particular way, with a view to prevent breach of public peace. If the person or persons thus obstructed institute a suit for establishment of their right to use the highway, the question arises whether such a suit is maintainable without proof of special damage. The Bombay High Court in 2 Bom. 457,[14] held that even in such a case, to sustain a suit by a body of persons who were obstructed in the use of a highway, it was necessary to prove special damage. Sir Michael Westropp C. J. in an elaborate judgment reviewed the English authorities on this point, and came to the conclusion that a private person cannot bring a suit for interference with a right which he enjoys merely as a member of the public unless he has individually suffered damage. It may be noted that in this case there was an order by the Magistrate prohibiting the plaintiffs from using the road for the purpose of carrying tabuts in procession but that was considered insufficient to furnish a cause of action to the interdicted party. This decision was followed in 18 Bom. 693.[15] In 34 Bom. 571,[16] there was a suit brought by the plaintiffs on behalf of themselves as well as other members of a religious sect to have a declaration of their right of marching in procession with a car along a particular public road to a certain temple and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants denied the plaintiff's right. The Courts below dismissed the suit on the ground that the road being a public road, the plaintiffs could not maintain the suit unless special damage was shown and proved. The decision was reversed in second appeal by Scott C. J. and Batchelor J. It was held that the suit was not for removal of a public nuisance but for declaration of the right of an individual community to use the public street. The authorities relied upon in 2 Bom. 457,[14] were not therefore applicable to such cases. In support of the view they took, the learned Judges relied upon a decision of the Madras High Court in 26 Mad. 376.[17]

In the Madras High Court the procession cases were from the beginning treated on a different footing, though even here the decisions cannot be said to be by any means uniform. The case in 5 Mad. 304,[18] is one of the earliest cases in point, where it was held that the right to conduct religious processions in the public road was a right inherent in every person provided he did not invade the right of others or cause a public nuisance and the obstruction of the right would enable the aggrieved person or persons to seek his remedy in a Court of law. The same view was taken in 26 Mad. 376,[17] and no question was raised in any of these cases regarding the necessity to prove special damage. The question was raised in 32 Mad. 478.[19] It was held there that though an action for obstructing a procession may be maintained without proof of special damage, yet when an illegal order of the Magistrate has been procured by the defendants restricting such procession a suit to declare the right to carry such procession is sustainable without such proof, the cause of action being the improper order so obtained by the defendants. The identical matter came up for consideration again before a Full Bench of the Madras High Court in 42 Mad. 271[20] and one of the questions referred to the Full Bench was: "Can a person or body of persons who claim a right to go in procession along a public highway bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage?"

This question was answered in the affirmative. Wallis C. J. in course of his judgment after referring to the case in 2 Bom. 457[14] observed as follows:

"The obstruction in the English cases cited consisted of interference with the surface of the highway which interfered with the right of the public to pass and repass freely. The same principle would

6. ('77) 3 Cal. 20 (F. B.), Raj Koomar Singh v. Sahebzada.
7. (1900) 27 Cal. 793, Raj Narain v. Ekadasi.
8. ('21) 8 A. I. R. 1921 Cal. 271 : 61 I. C. 405 : 25 C. W. N. 95, Batiram v. Siva Ram.
9. ('09) 31 All. 444 : 2 I. C. 365 : 6 A. L. J. 499, Bhawan Singh v. Narttam Singh.
10. ('11) 33 All. 287 : 8 I. C. 808 : 8 A. L. J. 19, Ram Chandra v. Joti Prosad.
11. ('12) 16 I. C. 962 : 23 M. L. J. 539, Hussain Saheb v. Narasinhappa.
12. ('77) 2 Bom. 469n, Gehanaji Kes Patil v. Ganpati Lakshuman.
13. ('31) 18 A. I. R. 1931 Pat. 418: 133 I. C. 463 : 10 Pat. 568 : 12 P. L. T. 885, Md. Din v. Mt. Atirajo Kuer.
14. ('78) 2 Bom. 457, Satku v. Ibrahim Aga.
15. ('94) 18 Bom. 693, Kazi Sujaudin v. Madhav Das.
16. ('10) 34 Bom. 571 : 7 I. C. 663 : 12 Bom. L. R. 586, Baslingappa v. Dharmappa.
17. ('03) 26 Mad. 376, Sadagopachariar v. Rama Rao.
18. ('82) 5 Mad. 304, Partha Saradi v. Chinnakrishnan.
19. ('09) 32 Mad. 478 : 1 I. C. 716 : 19 M. L. J. 617, Kandaswami v. Subaroya.
20. ('19) 6 A. I. R. 1919 Mad. 674 : 49 I. C. 533 : 42 Mad. 271 : 36 M. L. J. 79 (F. B.), Velan Pakkiri v. Subbayan.

no doubt apply if the defendants obstructed the public by assembling on the highway for their own purposes, as for the purpose of holding a market. That also would be a public nuisance and the rule as to special damage would apply. If however the defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would appear not to be a case of public nuisance."

This was the state of law when the case in 52 I. A. 61[1] came up before the Judicial Committee. This was a procession case of exactly the same type as mentioned above. The plaintiffs-appellants represented the Shiah community of Aurangabad, and the defendants were the representatives of the Sunni community in that town and the former instituted a suit against the latter for a declaration that they were entitled to stay and perform the "matam" in a circle at the public thoroughfare at the back of the newly built Juma Musjid and that the defendants had no right to offer obstruction. They further prayed for an injunction restraining the defendants from obstructing them while they were acting in the manner stated above. The trial Court gave the plaintiffs a partial decree; on appeal the suit was dismissed by the Allahabad High Court. The plaintiffs then appealed to the Judicial Committee. Their Lordships allowed the appeal and restored the order of the District Judge with some modifications. One of the questions raised before the Judicial Committee was whether a civil suit would lie against them who would prevent a procession with its observances. Lord Dunedin who delivered judgment observed at the outset that there was a conflict of decisions on the point between the Bombay and Madras High Court, and that the Calcutta view supported Madras. He then referred to the facts and decision in 2 Bom. 457[14] and pointed out that the judgment in that case proceeded entirely on English authorities which lay down the difference between proceedings by indictment and by civil action. Then there occurs the following passage in the judgment:

"In their Lordships' decision such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied to India".

Their Lordships then expressed their approval of the decision of the Bombay High Court in 34 Bom. 571[16] and quoted its headnote which was to this effect: "On second appeal by the plaintiffs held, reversing the decree and allowing the claim that the suit was not for the removal of a public nuisance but for a declaration of the right of an individual community to use a public road".

Reference was then made to the Madras cases where in granting injunction or declaration in matters like this no idea of special damage was entertained other than the obstruction of the procession itself. In conclusion their Lordships said that the view of the Madras High Court was right and that the Bombay judgment, meaning the judgment in 2 Bom. 457[14] was wrong. In my opinion, the decision in 52 I. A. 61[1] cannot be interpreted to mean that the rule of law requiring proof of special damage in cases where a member of the public prays for removal of a public nuisance, does not apply in India. Their Lordships, as has been stated above, expressly approved of the decision in 34 Bom. 571[16] and that conclusively shows that in their Lordships' opinion a suit by one party who wants to use the highway in a particular way against a rival party who would obstruct them in the use of the same is not a suit relating to public nuisance. The essence of a public nuisance is that it causes damage, injury or annoyance to the public or the people in general. An obstruction which aims at preventing only a particular class of persons from using the highway in a particular manner does not and cannot amount to public nuisance. This was exactly the view taken in 34 Bom. 571[16] and by Wallis J. in 42 Mad. 271.[20]

The Bombay High Court was wrong in applying the rule of special damage in a case like this and that is why their Lordships disapproved of the decision in 2 Bom. 457.[14] The Madras High Court, as has been said already, did apply the rule of special damage where the obstruction on the highway amounted to public nuisance, and their Lordships could not have overlooked the series of cases when they pronounced the Madras view to be right. It is true that their Lordships made a general observation that the distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied to India, but this observation must be taken with reference to the class of cases their Lordships were dealing with. It is significant that their Lordships did not make use of the expression public nuisance in this passage and the observation obviously implies that to this particular kind of disturbance on the highway which was presumably unknown in England, the English law was not applicable. That the question of special damage is not irrelevant to a suit by a private individual relating to obstruction on a public highway will be clear from the observations of the Judicial Committee, in the later decision in 64 I. A. 354[21] at page 361 of the report, there occurs the following passage:

"They express no opinion upon the question whether a permanent structure with pillars resting upon the highway, is or is not an obstruction, or is an inappreciable obstruction to the highway, or is such as could be complained of by the Advocate-General or others with his consent on behalf of the public, or by a member of the public showing special damage to himself".

The last clause is significant. The rule of special damage in suits relating to public nuisance has its origin in the desire to avoid multiplicity of litigation and so far as that ground is concerned there is no difference between the conditions in England and those in India. I am not unmindful of the fact that in some recent decisions, the view has been taken that the pronouncement of the Judicial Committee in 52 I. A. 61[1] has established that the rule requiring proof of special damage in cases in which a member of the public prays for removal of an obstruction to a public way does not apply to India. There are three decided cases which seem to have taken this view. One is a decision of our Court and is to be found in 60 Cal. 1003.[22] The other two are of the Lahore and Madras High Courts respectively: *vide* 16 Lah. 517[23] and I. L. R. (1939) Mad. 870.[24]

So far as the Calcutta case is concerned, it appears from the reports that the obstruction complained of

21. ('37) 24 A.I.R. 1937 P. C. 299 : 170 I. C. 324 : I.L.R. (1937) All. 901 : 64 I. A. 354 : 31 S. L. R. 696 (P. C.), Maharaja Mansingh v. Arjunlal.

22. ('33) 20 A. I. R. 1933 Cal. 884 : 147 I. C. 811 : 60 Cal. 1003, Mandakini Debee v. Basanta Kumari.

23. ('35) 22 A. I. R. 1935 Lah. 196 : 152 I. C. 850 : 16 Lah. 517 : 37 P.L.R. 753, Municipal Committee, Delhi v. Mohammad Ibrahim.

24. ('39) 26 A.I.R. 1939 Mad. 691 : 186 I.C. 208 I. L. R. (1939) Mad. 870 : (1939) 1 M. L. J. 392, Munusami Chetti v. Kuppusami Chetti.

was in respect of access to the private property of the plaintiff. Mallik J. was definitely of opinion that special damage was proved by the plaintiff, and he did not advert to the Privy Council case at all. Jack J. indeed interpreted the Privy Council decision to mean that no special damage was necessary to be proved in such cases, except what resulted from the obstruction itself, but he too found expressly that the plaintiff did suffer special damage as she was unable owing to the obstruction to carry large articles into her house. In my opinion, the observation of Jack J. cannot rank more than an obiter, and it is not necessary for us to refer this matter to a Full Bench. This case in 60 Cal. 1003[22] was followed by the Lahore High Court in the case referred to above. The learned Judges did not discuss the law at all. They referred to a decision of the Chief Court of Punjab where special damage was held to be necessary and as that case was based upon 2 Bom. 457,[14] which was disapproved by the Privy Council, the very foundation of the doctrine according to the learned Judges was taken away. In the Madras case the decision is that of Wadsworth J. sitting singly. With all respect to the learned Judge I must say that the view taken by him is not borne out by the judgment of the Privy Council in 52 I.A. 61.[1] My conclusion therefore is that the present case is not governed by the decision of the Judicial Committee in 52 I. A. 61.[1] As the plaintiff seeks relief in respect of a public nuisance, and the suit is not brought in conformity with the provisions of S. 91 (1), Civil P. C., it is bound to fail unless special damage is shown. The view we have taken is supported by the decision of the Patna High Court in 16 Pat. 190.[25]

I will now advert to the two other points raised by Mr. Basu in the appeal. I agree with him that the Court below was not right in holding that the plaintiff could avoid the necessity of proving special damage, if he had brought the suit in a representative capacity. Order 1, R. 8, Civil P. C., as is well established, is a purely enabling section. It entitles under certain circumstances only some of the interested persons to bring a suit on behalf of all, but it does not force one to represent many if his action is maintainable without the joinder of these persons: *vide* 24 Cal. 385;[26] 16 Pat. 190.[25] If it is necessary to prove special damage in suits by private individuals the necessity is not obviated by bringing the suit under O. 1, R. 8, Civil P. C. If the decision in 39 C. W. N. 590[27] supports the view taken by the Sub-Judge I must respectfully dissent from it. The question is not really material for our present purposes. The last point raised by Mr. Bose is to the effect that on the facts admitted and found in this case the plaintiff can be taken to have proved special damage. We do not think that we can accept this contention as sound. There was no allegation of special damage in the whole body of the plaint, and there was no evidence adduced on the point. In para. 8 of the plaint, the appellant made it quite clear that he was suing as a member of the public and had no special grievance of his own. The result therefore is that the appeal fails and is dismissed. We make no order as to costs.

SEN J.—I agree. The question which arises for decision in this appeal is whether a private individual can maintain an action in respect of a public nuisance without proving special damage. It would seem from the earlier decisions that the law was well settled that such an action did not lie but certain recent decisions both of this Court and of other High Courts seem to lay down that the well-known principle of the English law of Torts that no action lies in respect of a public nuisance unless the plaintiff has suffered some particular and peculiar damage different from that suffered by the general public by reason of the nuisance is not applicable in India. The facts of the case which have led to this appeal are as follows: The plaintiff Surendra Kumar Basu has his house on a public road belonging to the Municipality of Krishnagar in the District of Nadia. He alleges that the District Board of Nadia has encroached on this road by putting a wire fencing in front of the District Board Office which also abuts on the road and states that by reason of this encroachment his right as a rate-payer and as a member of the public to the full use of the road have been infringed. Both the Courts below have dismissed the suit. The learned Subordinate Judge on appeal has found that there has been an encroachment on the Municipal Road by the District Board but that no special damage has been pleaded or proved. He held that as this was a case of a public nuisance a suit by an individual was not maintainable without proof of special damage. He held further that if the suit had been brought by the plaintiff in a representative capacity in accordance with the provisions of O. 1, R. 8, Civil P. C., then it would have succeeded in spite of the fact that there was no special damage and that as it was not framed in accordance with these provisions the order of the Munsif dismissing the suit must be upheld.

Mr. Bose on behalf of the appellant contends that the learned Subordinate Judge has erred both in the view that proof of special damage was necessary and also in holding that the suit should have been brought in accordance with the provisions of O. 1, R. 8. I shall deal first with the second proposition laid down by the learned Judge that this suit is liable to be dismissed because it has not been framed in accordance with the provisions of O. 1, R. 8. Mr. Bose's contention is that if a person is entitled to sue under O. 1, R. 8 in a representative capacity he must be equally entitled to sue individually on his own behalf. Order 1, R. 8, he says, is merely an enabling section. This view appears to me to be sound and finds support in this decision in 24 Cal. 385.[26] If the learned Judge be correct in his view that a suit framed in accordance with the provisions of O. 1, R. 8 is maintainable in respect of a public nuisance without proof of special damage then he certainly should have decreed the present suit even though it has been instituted by the plaintiff on his own behalf only. But I am unable to accept this proposition. Once, it is held that an individual has no right of action in respect of a public nuisance without proof of special damage, I fail to see how the adoption of the procedure laid down in O. 1, R. 8, can vest him with such right. Order 1, R 8 says:

"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested."

The rule presupposes that each one of the numerous persons by himself has a right of suit and for the purposes of convenience permits one or more of such persons to sue on behalf of the others after complying with certain formalities. If a person has

25. ('37) 24 A.I.R. 1937 Pat. 481 : 167 I. C. 798 : 16 Pat. 190 : 18 P.L.T. 459, Ramghulam v. Ram Khelawan.
26. ('97) 24 Cal. 385, Baiju Lal v Bulak Lal.
27. ('35) 62 Cal. 692 : 39 C. W. N. 590 : 61 C.L.J. 182, Bir Bikram Kishore v. Comilla Municipality.

not in himself the right to sue how can he be permitted to sue not only on behalf of himself but also on behalf of a number of others who suffer from the same disability as himself? In my view the learned Judge has misconceived the scope of O. 1, R. 8. It is only an enabling rule formulated for the purposes of convenience; it does not vest a right of suit in any person or group of persons but merely enables a person who has a right of suit in common with several others to sue on behalf of all. Reliance was placed by the learned Judge on the case in 39 C. W. N. 590.[27] The suit was one for damages for the obstruction of a public road. Nasim Ali J., held that in the absence of special damage such a suit did not lie as the plaintiff was hit by S. 91, Civil P. C. He then went on to make the following observation :

"The plaintiff in the present suit being one of the members of the public, is equally affected by the obstruction with the other members of the public. He has suffered no special damage. His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and therefore having the same interest in the matter. Consequently the proper course for him was to bring a representative suit in conformity with the provisions of O. 1, R. 8, Civil Procedure Code."

The latter observation which is obiter certainly lends support to the view taken by the learned Subordinate Judge. With great respect to the learned Judge, I am unable to concur in the view set out in the above case for the reasons already given by me. I next come to the other proposition stated by the learned Judge viz., that in the case of a public nuisance no civil action lies by a member of the public unless he has suffered special damage by reason of the nuisance. The law in England is well settled on this point. It is thus stated by Lord Halsbury :

"A private individual may bring an action in his own name in respect of a public nuisance when, and only when, he can show that he has suffered some particular direct and substantial damage over and above that sustained by the public at large, or when the interference with the public right involves a violation of some private right of his own, or when a statute has given him a special protection or benefit which is being invaded." (Halsbury's Laws of England 1912 Edn. Vol. 21 page 553 para. 950).

In the case of torts, there being no Indian Statutory Law, the Indian Courts have always adopted the English Common Law as being consonant to justice, equity and good conscience: 48 Cal. 388,[28] at pp 408 and 409. They have departed from the English Law only when a particular rule was unsuitable to local conditions. The English rule regarding the right of action of private individuals in respect of a public nuisance has been adopted by this Court in a number of cases. In 12 W. R. 160[5] Sir Barnes Peacock lays down in clear terms that a private individual cannot sue in respect of a public nuisance when the nuisance causes him no inconvenience beyond that which was sustained by every other member of the public. This was a case regarding the obstruction of a public road. This decision was followed in 27 Cal. 793[7] where it was held that when the plaintiff has not succeeded in proving special damage he cannot succeed in a suit brought with respect to an obstruction on a public road. In 3 Cal. 20[6] the question arose whether a suit lay for the removal of an obstruction on a public road even when there was special damage. The question was referred to the Full Bench as there were certain decisions which held that in no circumstances would such a suit lie and that the criminal Courts alone had jurisdiction in such matter. The Full Bench said :

"We are of opinion that as the obstruction in this case has caused special injury to the plaintiff, the civil Court was perfectly justified in directing it to be removed."

The question whether a suit would lie in the absence of special damage was not expressly raised or decided but it seems that the Full Bench assumed that such a suit would not lie. In the case in 15 Cal. 460[29] the Full Bench at p. 467 says this:

"If any one obstructs a public highway he may be liable to a criminal charge of nuisance under S. 283, Penal Code, or of mischief under S. 431, if the circumstances be such as to sustain either of these charges. Any one who sustains special injury by reason of an obstruction to a highway may bring a suit, claiming damages, and any other appropriate relief."

Here also it is clear that the Full Bench was of opinion that special damage was necessary. Mr. Bose contends that these decisions are no longer good law and refers to the decision of the Judicial Committee in 52 I. A. 61[1] which he interprets as enunciating the rule that the English doctrine of the necessity of proving special damage in actions in respect of a public nuisance has no application in India. He relies further on the cases in 60 Cal. 1003,[22] I.L.R. 1939 Mad. 870[24] and 16 Lah. 517[23] wherein he says this interpretation of the judgment of the Privy Council was adopted. In my opinion, the Privy Council laid down no such rule. The suit was instituted by the Shiah Sect against the Sunni Sect for a declaration that the Shiahs had the right to go in procession reciting the "Matam" along a highway passing behind a mosque used by the Sunnis. The Matam is a ceremony performed during the Mohurrum and it consists in the processionists stopping and bewailing the death of Hasan and Hossain. The Sunnis had obstructed such a procession, hence the suit. The Subordinate Judge decreed the suit declaring the plaintiffs' right to go in procession in the manner claimed by them along the road but added that the right was exercisable subject to the order of the local authorities regulating traffic. He found that no damage had been proved. On appeal the High Court of Allahabad dismissed the suit. The learned Judges held that a community had the right to go in procession through a public street subject to the control of the Magistrates and to the use of the public thoroughfare in a reasonable way but they were of opinion that the right claimed in the suit was one to block the highway absolutely in an unreasonable manner and that therefore the suit could not succeed. On appeal the Judicial Committee reversed the decision of the High Court and restored that of the Subordinate Judge with certain modifications. In the course of their judgment their Lordships put themselves the following question. Does a civil suit lie against those who would prevent a procession with its observances"? and proceeded to answer it as follows :

"Here there is an obvious discrepancy between

28. ('21) 8 A. I. R. 1921 Cal. 1 : 59 I. C. 143 : 22 Cr. L. J. 31 : 48 Cal. 388 : 32 C. L. J. 94 : 24 C. W. N. 982 (S B.), Satish Chandra Chakravarti v. Ram Doyal De.

29. ('88) 15 Cal. 460 (F.B.), Chuni Lall v. Ram Kisen Sahu.

Bombay and Madras, and Calcutta upholds Madras. The leading Bombay authority is 2 Bom. 457[14] : Westropp C. J. and Melvill J. This was a suit by certain Mussulmans who carried tabuts in procession along a public road. They were disturbed in so doing by Mussulmans of a rival sect. The headnote sets forth the judgment accurately. "*Held*, in special appeal, that the plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying tabuts along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action." The judgment really proceeds entirely on English authorities, which lay down the difference between proceedings by indictment and by civil action."

"In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done in a highway is a distinction peculiar to English law and ought not to be applied in India."

I have reproduced the whole passage as the other decisions referred to by Mr. Bose in support of his argument are based on this passage alone. It becomes necessary therefore to ascertain exactly what the Judicial Committee said. Nowhere in their judgment did their Lordships discuss the doctrine of the necessity of proving special damage in actions relating to a public nuisance far less did they say that this doctrine had no application in India. What they said was that the English authorities which lay down the difference between proceedings by indictment and by civil action in regard to what is done on a highway has no application in India. It seems to me that the misconception of what was laid down by the Judicial Committee arises from the wrong assumption that every obstruction of a person or a group of persons on a highway constitutes a public nuisance. Every wrong done on a public highway is not necessarily a public nuisance and when such wrong is not a public nuisance the doctrine of special damage has no application. In England there are certain special rules and statutes regarding what may or may not be done on a high way and there are special remedies provided for the infringement of these special rules and statutes. All that their Lordships said was that these special rules were peculiar to England and that the Bombay High Court was wrong in relying on the English decisions which rested on these special rules. The case before the Judicial Committee and the case before the Bombay High Court were not cases of a public nuisance at all. A public nuisance obviously must be a nuisance which affects the general public; if it is committed on a highway it must affect all His Majesty's subjects in the normal use of the highway. An obstruction to an individual as such or to a particular group of individuals as such on a public highway does not constitute a public nuisance. In the case before the Judicial Committee the Shias, a particular sect, complained that they were being prevented from using a highway in a particular manner. It was a case of a trespass on the rights of the Shias and not a case regarding a public nuisance inasmuch as the general public was not being affected and inasmuch as the normal user of the road was not being interfered with. Their Lordships, not having to deal with a case of public nuisance, said nothing about the law relating to it or about the doctrine of special damage. Their observations set out above cannot in my opinion be taken to imply that in India the doctrine of special damage has no application.

In 60 Cal. 1003[22] which was a case in regard to a public nuisance, Jack J. one of the Judges after finding that there was special damage expressed the view that the Privy Council had decided in 52 I. A. 61[1] that in all cases of obstruction of a highway the doctrine of special damage had no application. The other learned Judge, Mallik J., expressed no such opinion but decreed the suit on the ground that special damage had been proved. I respectfully disagree with the view expressed by Jack J. As the decision was not based on that view we are not required to refer the matter to a Full Bench. The decision in I.L.R. 1939 Mad. 870[24] and the case in 16 Lah. 517[23] adopt the same view as was expressed by Jack J. For the reasons already given by me I am unable to follow these decisions. The view that I have taken viz. that an obstruction of the kind described in 52 I.A. 61[1] does not constitute a public nuisance finds support in 34 Bom. 571.[16] This was a suit for a declaration that the plaintiffs were entitled to go in procession with a car along a certain public road. The suit was dismissed by the trial Court on the ground that no special damage had been proved. The High Court decreed the suit holding that no special damage was necessary as the suit was not for the removal of a public nuisance but for a declaration of the rights of an individual community to use the public road. In this connexion I would also refer to the case in 42 Mad. 271.[20] Wallis C. J. at p. 279 states that where the defendants assembled on a public road to prevent the plaintiffs from using the road in a particular manner that would not be a case of public nuisance but of trespass to the defendants and that special damage in such a case was not necessary.

I am fortified in my view that the Judicial Committee in 52 I. A. 61[1] did not decide that proof of special damage in suits in respect of a public nuisance was not necessary in India by the observations of the Judicial Committee in 60 I. A. 278.[30] At p. 295 their Lordships state that a litigation in respect of a public nuisance where no special damage has been sustained is only authorized under the Code if it be instituted with the consent in writing of the Advocate-General. The remarks of the Judicial Committee in 64 I. A. 354[21] at p. 361 also indicate that the doctrine of special damage is applicable in India. I would next refer to the case in A.I.R. 1937 Pat. 481[25] where the case in 52 I.A. 61[1] was considered and interpreted in the manner suggested by me. It was also held that the Judicial Committee in the last mentioned case did not reverse the decisions of the Indian High Courts to the effect that an action with regard to a public nuisance to be maintained must establish special damage or be brought under the provisions of S. 91, Civil P. C. It was also held that the case before the Judicial Committee did not involve a public nuisance but dealt with a very limited question relating to the conduct of religious processions over a public highway. I entirely agree with this view.

In the present suit the plaintiff complains that a public highway has been encroached upon by the erection of a fencing. This constituted a public nuisance. The plaintiff neither proves nor even alleges any special damage and para. 8 of the plaint makes it quite clear that no special damage was suf-

30. ('33) 20 A.I.R. 1933 P. C. 183 : 143 I. C. 665 : 56 Mad. 657 : 60 I. A. 278 (P. C.), Kumaravelu Chettiar v. Ramaswami Ayyar.

fered. In these circumstances the suit must be dismissed. An additional ground was taken in this appeal that as the roadway in front of the plaintiff's house had been narrowed the Court should presume special damage. The map exhibited in the case shows a very slight encroachment. The mere fact that the plaintiff has his house on the road would not, in my opinion, justify a presumption of special damage. The appeal is accordingly dismissed. No order as to costs.

G.N./R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 91 N. 2 Pt. 2, N. 3 Pt. 15.
('41) Mulla, Page 324 Note "Instances of public nuisance."
(b) ('40) Chitaley, S. 91 N. 1 Pt. 1; N. 5, Pt. 1.
('41) Mulla, Page 321 Pt. (p).
(c) ('40) Chitaley, O. 1 R. 8 N. 2; N. 7 Pt. 1.
('41) Mulla, Page 325 Pt. (x); Page 505 Pt. (d).
(e) ('40) Chitaley, S. 91 N. 5 Pt. 1.

A. I. R. (29) 1942 Calcutta 367

SEN J.

Mohini Mohan Roy Chowdhury and others — Petitioners

v.

Rai Ashutosh Ghose Bahadur and another — Respondents.

Application in Suit No. 1074 of 1937, Decided on 19th August 1941.

(a) Bengal Money-lenders Act (10 of 1940), Ss. 2 (8) and 36—Mortgage—Preliminary decree —Interest payable on principal after preliminary decree up to date fixed for payment is interest within S. 2 (8).

Under a preliminary mortgage decree matters continue in a state of flux till the date appointed for the payment of the amounts found due on the several accounts mentioned therein. It is on this latter date that the rights and liabilities of the parties are given final shape and form as decretal rights and liabilities. The decree begins to operate against the judgment-debtors on the date fixed for payment. Therefore, the liability of the judgment-debtor does not pass into the domain of judgment till the expiry of the period of grace and therefore the amount found due for principal retains its character of a loan. Consequently, under a preliminary mortgage decree the interest payable on the loan after the preliminary decree up to the date fixed for payment is a sum payable in respect of the loan and therefore interest within the meaning of section 2 (8). [P 368 C 1, 2]

(b) Civil P. C. (1908), O. 34, R. 2 as amended in 1929—Effect of amendment—Mortgage suit — Contract remains effective until expiry of period of grace — Only after that date it passes into domain of judgment.

In mortgage suits, the contract remains effective until the expiry of the period of grace and it is only after that date that the matter passes from the domain of contract into the domain of judgment. The amendment of O. 34, R. 2 in 1929 did not introduce any change in the law but merely gave legislative recognition to the Judicial interpretation of the rule as it stood before amendment. Consequently the amendment of R. 2 cannot have the effect of converting the liability under the mortgage into a decretal liability on the date of the preliminary decree : ('36) 23 A. I. R. 1936 P. C. 63 and ('27) 14 A. I. R. 1927 P. C. 1, *Rel. on.* [P 368 C 2]

N. C. Chatterjee and G. K. Mitter — for Petitioners.

P. C. Ghose and S. Hazra — for Respondents.

ORDER. — The point which arises for decision in this application is whether the interest awarded to the mortgagee by the preliminary decree in this suit on the principal sum found due for the period between the date of the preliminary decree and the date fixed therein for payment is interest within the meaning of S. 2 (8), Bengal Money-lenders Act. The matter arises in this way. The petitioners borrowed money on a mortgage, the interest fixed in the bond being 7 per cent. per annum with quarterly rests reducible to 6½ per cent. per annum with quarterly rests if the dues were regularly paid. The dues were not regularly paid and the mortgagee instituted a suit. The preliminary decree was passed on 9th February 1939 and the final decree on 29th January 1940. The sale pursuant to the final decree has been made absolute and on 22nd April 1941 the sheriff was directed to make over possession to the plaintiffs. The amount of interest due on the bond calculated up to the date of the passing of the preliminary decree is not in excess of the maximum allowed by S. 30, Bengal Money-lenders Act, but the amount of interest calculated upto the date fixed for payment is admitted before me to be in excess of the maximum. The mortgagors apply under S. 36, Bengal Money-lenders Act, for relief from the payment of this excess of interest and claim that the decree should be reopened and a new instalment decree passed. Mr. Ghosh appearing for the respondents contends that interest payable after the date of the preliminary mortgage decree is not interest within the meaning of the Bengal Money-lenders Act and that the mortgagors cannot get any relief from the payment of such interest. Interest is defined in S. 2 (8), Bengal Money-lenders Act thus :

" 'Interest' includes any sum by whatsoever name called, in excess of the principal paid or payable to a lender in consideration of, or otherwise in respect of, a loan whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a lender in accordance with the provisions of this Act or any other law for the time being in force for or on account of costs, charges or expenses."

I leave out of consideration the latter part of the sub-section which excludes any sum charged for costs, etc., as it is not relevant to the matter under discussion. The section says that anything paid in excess of the principal is interest if it satisfies any one of the following two conditions, viz. : (a) It is payable in consideration of the loan. (b) It is otherwise payable in respect of the loan. It is clear from this definition that even if the sum is not payable in consideration of the loan it will still be interest if it is payable in respect of the loan. Now can it be said that the interest awarded by the preliminary decree for the period between the date of the preliminary decree and the expiry of the period of grace is a sum payable in respect of the mortgage loan. Mr. Ghosh says it cannot and his argument is this : The preliminary decree declares the sums which were payable as principal and interest on the date of the decree. When this is done the liability of the mortgagor passes from the domain of contract into

the domain of judgment and the amount declared due as principal loses the character of a loan and becomes a decretal due. The interest awarded on such an amount is not a sum payable in respect of a loan and is therefore not interest within the meaning of S. 2 (8). An examination of the preliminary decree does not support this view. The preliminary decree directs the Registrar to take an account of what is due for principal and interest on the mortgage at the date of the preliminary decree.

He is also directed to take accounts of certain other matters with which I need not deal as they relate to matters with which this application is not concerned. All these accounts are to be taken for the period up to the date of the preliminary decree. The Registrar is to make a report of these accounts to the Court and in that report he is given liberty to state what will be due on such accounts six months from the date on which the report is submitted to the Court for countersignature. In other words, he is to calculate, inter alia, the amount which will be due for interest on the principal from the date of the preliminary decree upto a date six months subsequent to the date on which the report is submitted. The Registrar is further directed to take thereafter as occasion arises such subsidiary accounts and make such enquiries as may be necessary for the purpose of finally adjusting the amount to be paid to the plaintiff or any other party under the decree. The decree goes on to say that on the report being confirmed the judgment-debtor shall pay into Court (1) the amount found due on the report within six months of the date of the countersignature and (2) thereafter on such date as may be fixed such other amounts as the Court may award under Rr. 10 and 11 of O. 34, Civil P. C. This is the preliminary decree.

If the decree be read with O. 34, Rr. 2, 4, 10 and R. 11 of the Code it becomes manifest that what the Court decreed so far as the principal and interest thereon is concerned is this : The judgment debtor is to pay to the mortgagee (a) the principal found due and interest on the principal calculated upto the date fixed for payment in the preliminary decree ; (b) thereafter he has to pay subsequent interest on an amount made up of the principal and interest payable up to the aforesaid date of payment and certain other sums representing costs expenses and items other than the principal or interest thereon.

I am not now concerned with the interest payable at the stage (b). It is quite clear from the decree that the interest referred to above which is payable up to and before stage (b) is interest calculated on the amount of the principal due and on no other amount. Mr. Ghose concedes, as he must do, that this is so but he says that the amount found due as principal ceased to be a loan on the date of the preliminary decree as on that date the decree finally determined what the contractual rights and liabilities of the parties were and converted them into decretal rights and liabilities. I am unable to accept this view. In the first place, on the date of the preliminary decree the amount due for principal and interest was not ascertained. It was ascertained later after accounts had been taken. On the date of the preliminary decree the Court directed certain enquiries to be made and did not finally decide what the liabilities of the parties were. In my opinion, under the preliminary decree matters continue in a state of flux till the date appointed for the payment of the amounts found due on the several accounts mentioned therein. It is on this latter date that the rights and liabilities of the parties are given final shape and form as decretal rights and liabilities. On the date of the preliminary decree what the Court says is this :

"I shall have accounts taken by my officer and on receiving his report shall determine the liability of the mortgagor up to the date which I shall fix for the payment of such liability and that date shall be six months from the date on which the report of my officer is signed by me as being correct."

The decree begins to operate against the judgment-debtors on the date fixed for payment : If this view be correct then the liability of the judgment-debtors does not pass into the domain of judgment till the expiry of the period of grace and therefore the amount found due for principal retains its character of a loan. That being so, the interest payable on the principal is a sum payable in respect of the loan and is therefore interest within the meaning of S. 2 (8), Bengal Money-lenders Act. Mr. Ghosh referred to the following cases in the course of his arguments : 54 I.A. 1[1] and 63 I.A. 114.[2] In both these cases it was held that in mortgage suits the contract remained effective until the expiry of the period of grace and that it is only after that date that the matter passed from the domain of contract into the domain of judgment. The view that I have taken finds support in these decisions. Mr Ghosh argued that the cases were decided before the amendment of O. 34 R. 2 in 1929 and he says that the amendment of R. 2 has made a difference. Formerly the preliminary decree directed an account to be taken of the amount that would be due for principal and interest and for costs on the expiry of the period of grace. There was no provision like a provision in the present R. 2 of O. 34 for an account to be taken of what would be due on the date of the preliminary decree. Mr. Ghose's argument is that the present form of preliminary decree indicates that the intention was to convert the liability under the mortgage into a decretal liability on the date of the preliminary decree. I am unable to see how the amendment of R. 2 of O. 34 can have this effect. On the contrary, the view taken by the Judicial Committee in 63 I.A. 114[2] is that the amendment of the Rule in 1929 did not introduce any change in the law but merely gave legislative recognition to the Judicial interpretation of the rule as it stood before the amendment.

There is no decision which supports the view propounded by Mr. Ghosh and in my opinion that view cannot be upheld on principle I hold, therefore, that the petitioners are entitled to relief under the Bengal Money-lenders Act. The decrees passed are reopened, the sale is set aside and a new decree is passed in accordance with the provisions of S. 34, Bengal Money-lenders Act. The mortgagee will get interest at the rate of 8 per cent. simple from the date of the mortgage till the date fixed for the payment of the first instalment under this decree. The decretal amount shall be paid in five equal annual instalments. The first instalment shall be paid a week after the reopening of the Court. The parties shall bear their own costs of this application The plaintiffs shall be entitled to all the costs incurred in the suit up to date in addition to the costs which

1. ('27) 14 A.I.R. 1927 P.C. 1 : 99 I.C. 686 : 54 I.A. 1 : 54 Cal. 161 (P.C.), Jagannath Prosad v. Surajmal Jalal.
2. ('36) 23 A.I.R. 1936 P.C. 63 : 160 I.C. 285 : 15 Pat. 210 : 63 I.A. 114 (P.C.), Kusum Kumari v. Debi Prosad.

a shall be incurred by reason of the reopening of the decree and the passing of this decree.

G.N./R.K. *Order accordingly.*

C. P. C. —
(a) ('40) Chitaley, O. 34. R. 11, N. 2 Pt. 25.
('41) Mulla, O. 34, R. 11, P. 1097, Pt. (z).
(b) ('40) Chitaley, O. 34, R. 2, N. 3, Pt. 1.

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NASIM ALI AND PAL JJ.

Prafulla Kumar Roy and others — Judgment-debtors — Appellants

v.

b *Sm. Bibhabati Roy widow of Jatindra Nath Roy, Decree-holder, Judgment-debtor and others — Respondents.*

Appeal No. 213 of 1940, Decided on 9th March 1942, from original order of Sub-Judge, Jessore, D/- 29th April 1940.

(a) Execution— Objection to — Objection not raised in previous execution held could not be raised in subsequent execution.

Where an objection regarding the maintainability of the execution petition and the extent of liability of the judgment-debtor were not raised in the previous execution cases and the decree-holder realised portions of the decretal amount :

Held that it was not open to the judgment-debtor to take such objection in subsequent execution proceedings. [P 369 C 1, 2]

c **(b) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A — S 168A does not affect sales confirmed before Act of 1940 came into force.**

Section 168A introduced by Act 18 of 1940 was never intended to affect the sales which were confirmed before the Act came into operation. Therefore where a sale is confirmed and possession taken by the auction purchaser before the Act of 1940 came into operation, the execution proceedings have terminated and an objection under S. 168A cannot be raised thereafter. [P 369 C 2]

Gunada Charan Sen and Surendra Nath Basu (Sr) — for Appellants.

Ramaprosad Mookerjee and Ajoy Kumar Basu — for Respondents.

JUDGMENT. — This is an appeal by the judg-
d ment-debtors Nos. 3 to 6 in an execution proceeding. The objections of the appellants to the execution of the decree are these : (i) that the present execution petition is not at all maintainable in view of the fact that the decree-holder is also one of the judgment-debtors; (ii) that in any view of the case the appellants are liable to pay only their share of the judgment-debt in view of the fact that the decree-holder who was liable for 1/12th share of the judgment-debt has deducted the amount for which she is liable under the decree out of the total decretal amount; (iii) that the provisions of S 168A which were introduced in the Bengal Tenancy Act by Bengal Act 18 of 1940 prohibits the sale of the properties of the appellants which have been sold by the decree holder in execution of the decree.

As regards the first two objections, it appears that the present decree holder in the previous execution cases realised portions of the decretal amount from the present appellants by execution. The present appellants, however, in those execution cases did not raise these objections. If these objections e had been raised in the previous execution cases, the previous execution cases would have been dismissed and the decree-holder could not have realised the amount which she realised from the present appellants. It is therefore not now open to the appellants to take the first two objections. As regards the third objection, it is an admitted fact in this case that before the Act 18 of 1940 came into operation, the properties of the judgment-debtors were sold and the sale was confirmed. It further appears that the decree-holder auction purchaser took possession of these properties before the amending Act came into force. Mr. Sen's contention is that the sale was confirmed and possession was taken during the pendency of the proceeding under S. 47, Civil P. C. and consequently it must be taken that the execution proceeding had not terminated before the Act came into operation. We are unable to accept f this contention. The execution proceeding terminated before the Act came into operation. No doubt, certain objections were taken to the sale before the sale was confirmed; but the present objection under S. 168A was not open to the judgment-debtors at the time as that section came into force after the sale was confirmed. If this objection would have been available to the judgment-debtors at the time when the objection under S. 47, Civil P. C., was taken by the judgment-debtors before the sale, the position might have been different. The position therefore is that before the Act came into operation, the sale was confirmed and possession was taken by the auction purchasers and the execution proceeding terminated. After S. 168A was introduced by the amending Act, the position was that the properties of the judgment-debtors other than the defaulting g tenure could not be attached or sold in execution of the decree for arrears of rent whether having the effect of a rent decree or not. This section was never intended to affect the sales which were confirmed before the Act came into operation. The three points urged in support of the appeal therefore fail. The appeal is accordingly dismissed with costs. Hearing-fee is assessed at two gold mohurs.

K.S./R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 11, N. 23 Pt. 16.
('41) Mulla, Page 90 Pt. (e).

A. I. R. (29) 1942 Calcutta 369 (2)

NASIM ALI AND PAL JJ.

Nrisingha Chandra Pal Chaudhury and others — Judgment-debtors — Petitioners

v.

Sm. Kanaklata Dasi w/o Anantapada Madak, Decree-holder and another, Judgment-debtor — Opposite Party.

Civil Rule No. 1770 of 1941, Decided on 29th January 1942, issued from judgment and order of Dist. Judge, Nadia, D/- 19th September 1941.

Bengal Money-lenders Act (10 of 1940), S. 36 (1), Proviso (i) — Words "date of the suit" in S. 36 (1), Proviso (i) — Meaning of.

Section 36 (1) contemplates a suit to which the Bengal Money-lenders Act applies as well as a suit which may be brought by a borrower for relief under that section. The words 'the date of the suit" in S. 36 (1), Proviso (i) must, therefore, mean the

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date when the suit contemplated by S. 36 (1) is brought and not the date of any application by the borrower under the Bengal Money-lenders Act.

[P 370 C 1]

Jajneswar Majumdar — for Petitioners.

Gopendra Nath Das and Sisir Kumar Basu — for Opposite Party.

ORDER. — This is an application for revising the order of the District Judge of Nadia, dated 19th September 1941, whereby the learned Judge has dismissed the petitioners' application for re-opening a decree under S. 36, Bengal Money-lenders Act. The only ground on which the learned Judge has dismissed the application is that the application was not filed within the period of limitation prescribed by S. 36, cl. (1), proviso (i). It appears from the judgment of the learned Judge that the learned Judge has interpreted the words "the date of the suit" in proviso (i) to mean "the date of the application" under the Bengal Money-lenders Act.

We are unable to accept this interpretation of the learned Judge. Section 36, cl. (1) contemplates a suit to which the Bengal Money-lenders Act applied as well as a suit which may be brought by a borrower for relief under that section. The words "the date of the suit" in proviso (i) must, therefore, mean the date when the suit contemplated by S. 36, cl. (1) is brought and not the date of any application by the borrower under the Bengal Money-lenders Act. The learned Judge was, therefore, wrong in holding that the petitioners' application was barred by limitation. The result, therefore, is that this rule is made absolute. The order of the learned District Judge complained of is set aside and the order of the trial Judge re-opening the decree is affirmed. The parties will bear their own costs in this Court as well as in the lower appellate Court.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 370

SEN J.

Bhupendra Nath Dutt — Plaintiff

v.

Debendra Nath Ash and another — Defendants.

Application in Suit No. 244 of 1940, Decided on 26th August 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 36 (5) — Applicability.

Section 36 (5) applies to both 'ante-Act' and 'post-Act' assignees. [P 371 C 1, 2]

(b) Bengal Money-lenders Act (10 of 1940)— Interpretation of — Principles explained.

In applying an Act which takes away vested rights and curtails freedom of contract in order to give relief to a particular class, like the Bengal Money-lenders Act one should guard against giving it an interpretation which would extend its scope. The terms of the Act should be interpreted literally and strictly. It is no part of the Court's business to comment upon the policy of a statute. It has merely to interpret and apply it. An Act of this nature will necessarily contain provisions which are arbitrary and disjointed, otherwise it will fail in its very object which is to relieve persons of certain contractual liabilities which hitherto were enforceable against them under the law. In such an Act one cannot expect to find any consistent principle binding all the different sections together. To a large extent the Act must be in the nature of patch work and one should not seek for symmetry and design in its composition. Each patch should first be examined independently in order to understand its utility and purpose; it is only when such an examination does not disclose its purpose that recourse should be had to the other portions of the Act. An attempt to blend the patches into a design in circumstances other than the above would only lead one to profitless speculation and uncertainty.

[P 371 C 1, 2]

B. C. Dutt — for Plaintiff.

S. Chowdhuri — for Defendants.

ORDER. — The only point for determination in this application is whether the protection given to assignees by sub-s. (5) of S. 36, Bengal Money-lenders Act, extends to an assignee who took his assignment before the Act. On 26th August 1935, Debendra Nath Ash borrowed the sum of Rs. 15,501 from Srimati Kumudmoni Dassi and deposited the title deeds of certain property belonging to him with her as security for the loan. The loan carried interest at 10 per cent. Kumudmoni assigned her rights under this mortgage to Bhupendra Nath Dutt for consideration on 11th April 1938. Bhupendra Nath Dutt instituted a suit against Debendra and obtained a preliminary mortgage decree on 21st March 1940. He now applies for a final decree. Debendra Nath Ash has applied under S. 36, Bengal Money-lenders Act, for relief on the ground that the interest payable on the mortgage is above the maximum allowed by S. 30 of the aforesaid Act. Both applications have been heard together. The plaintiff contends that no relief can be granted to the mortgagor as the plaintiff is protected by the provisions of S. 36 (5), Bengal Money-lenders Act. The section runs as follows :

"Nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assignment to him was bona fide, and that he had not received the notice referred to in cl. (a) of sub-s. (1) of S. 28."

Now the relief claimed by the mortgagor can be granted only by the aid of the terms of S. 36 and if this section does not affect the rights of the plaintiff then the mortgagor can get no relief. It has been established and indeed it is not challenged before me that the plaintiff is a bona fide assignee for value. As the assignment was made long before the Act, no notice as prescribed by S. 28, sub-s. 1 (a) was given or could have been given to him. In these circumstances, can it be said that he is an assignee of the kind described in sub-s. (5) ? I can see no reason why he should not be considered to be such an assignee. As assignee is protected by this sub-section if he can establish that he has two qualifications : (1) That he is a bona fide assignee for value, and (2) that he has not received the notice referred to in cl. (a) of sub-s. (1) of S. 28. Both these qualifications are present in the plaintiff and he is therefore entitled to claim the benefit of S. 36 (5).

It was pointed out on behalf of the mortgagor that the scheme of the Act is to place assignees in the same position as original creditors so far as the operation of the Act is concerned. The intention behind S. 36 (5), it is said, is to give protection only to assignees whose assignments originated after the Act; it was contended that the provision regarding notice, made it plain that sub-s. (5) of S. 36 contemplated only 'post-Act' assignees inasmuch as an 'ante-Act' assignee could not possibly have received such notice. I was referred to Ss. 28 and 29 and was

told that if these sections were read together with S. 36 (5) this intention would become perfectly plain. Now, S. 28 deals with assignments after the Act of loans advanced both before or after the Act; it provides that the assignor shall give notice to the assignee that the debt is affected by the operation of the Act when the debt is so affected. This is followed by a threat that any contravention of the section would entail punishment by imprisonment. I must express my sympathy with the assignor. He has no easy task to perform. I have often found it difficult to decide what debts would be affected by the Act and from the reports it seems that the same difficulty has been experienced by some of my learned brothers. It is hardly fair to impose upon a lender in addition to his other burdens the duty of deciding which debts would be affected by the Act. Any how, this section does not help at all in deciding the question involved. I now turn to S. 29. It consists of two parts. Sub-section (1) deals with loans advanced after the Act and sub-s. (2) with loans advanced before the Act. In both cases the assignee is made subject to the same conditions as are imposed by the Act on the original creditor.

There is a proviso to sub-s. (1) which says that "any agreement with, or security taken by, a lender or money-lender in respect of a loan advanced by him after the commencement of the Act shall be valid in favour of any bona fide assignee or holder for value without notice of any defect due to the operation of the Act and of any person deriving title under him." There is no such proviso to sub-s. (2) which deals with loans advanced before the Act. What this proviso exactly means and why it has been introduced are matters which I find it difficult to appreciate. I am not called upon to construe it now. All I need say is that the absence of such a proviso to sub-s. (2) does not necessarily indicate that an assignment effected before the Act is not protected by S. 36 (5). Sub-sections (1) and (2) of S. 29 make separate provisions for post-Act and ante-Act debts respectively but they do not differentiate between post-Act and ante-Act assignments. Sub-section (2) would apply to both kinds of assignments. I have not been able to find anything in the Act which would compel me to hold that S. 36 (5) contemplates only post-Act assignees. To give the sub-section such a meaning would be to re-draft it by adding the words underlined (here italicized): "(5) Nothing in this section shall affect the rights of any assignee or holder for value *to whom the debt had been assigned after the Act* if the Court is satisfied that the assignment to him was bona fide, and that he had not received the notice referred to in cl. (a) of sub-s. (1) of S. 28."

In applying an Act which takes away vested rights and curtails freedom of contract in order to give relief to a particular class, one should guard against giving it an interpretation which would extend its scope. The terms of the Act should be interpreted literally and strictly. I do not say this in any cavilling spirit. It is no part of my business to comment upon the policy of a statute. I am merely to interpret and apply it. All that I wish to point out is that an Act of this nature will necessarily contain provisions which are arbitrary and disjointed otherwise it will fail in its very object which is to relieve persons of certain contractual liabilities which hitherto were enforceable against them under the law. In such an Act one cannot expect to find any consistent principle binding all the different sections together. To a large extent the Act must be in the nature of patch work and one should not seek for symmetry and design in its composition. Each patch should first be examined independently in order to understand its utility and purpose; it is only when such an examination does not disclose its purpose that recourse should be had to the other portions of the Act. An attempt to blend the patches into a design in circumstances other than the above would only lead one to profitless speculation and uncertainty. Taking S. 36 (5) as it stands and without attemptiug to make it consistent with some imaginary general scheme by reading into it something which is not there, I come to the conclusion that it applies to both "ante-Act" and "post-Act" assignees. In the result the application under the Bengal Money-lenders Act must be dismissed with costs and the application for a final decree must be allowed also with costs.

K.S./R.K. *Application dismissed.*

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R. C. MITTER AND KHUNDKAR JJ.

Mohaluxmi Bank Ltd., Chittagong — Plaintiff — Appellant

v.

Province of Bengal — Defendant — Respondent.

Appeal No. 238 of 1938, Decided on 6th January 1942, from original decree of Sub-Judge, Third Court, Chittagong, D/- 29th June 1938.

(a) Tenure—Noabad lands—Except 360 permanent settlements of Noabad lands between 1865 and 1867 Noabad lands were all along settled temporarily — Conditions of temporary settlement stated.

Except for the brief period between 1865 and 1867, when only 360 permanent settlements of Noabad lands were made Noabad lands had all along been settled by the Government temporarily. Settlements for fixed periods became the invariable rule in respect of Noabad lands. The conditions of the temporary settlements were as follows: (1) the settlements were not proprietary ones, (2) the settlements were temporary — for terms of years, (3) the settlement holder had no right to those portions of land which had not been brought under cultivation by him within the period of his settlement, (4) at the end of the term of settlement the Government had the right to take away the unreclaimed land without paying any compensation, and (5) the term of every settlement concluded after 1898 was to end in April 1925 except with regard to lands in Thana Ramu, where the date fixed was April 1924. [P 374 C 1]

(b) Forest Act (1927), Ss. 6 (c), 7, 17 and 18 —Claim in respect of certain waste land dismissed by forest settlement officer—Appeal to Collector under S. 17 dismissed — No revision filed — Civil Court cannot restore that land or grant compensation with respect thereto.

Where an appellate order of the Collector under S. 17 upholding the decision of the forest settlement officer rejecting a claim made under S. 6 (c) in respect of certain waste land has become final under S. 18 (4) by reason of no revision having been filed to the Local Government therefrom, the civil Court has no power to restore the said piece of land or to grant compensation in respect thereto when the order of the Collector in the appeal was that the claimants had no interest therein and were not entitled to compensation. [P 375 C 1]

(c) Forest Act (1927), Ss. 20 and 7—Notification under S. 20 published—Rights in respect of which no claim is preferred become extinguished.

On the publication of the notification under S. 20 the rights in the waste area in respect of which no claim was preferred and of which the forest settlement officer had acquired no knowledge in the course of enquiry under S. 7 become extinguished by virtue of the provisions of S. 9 of the Act. [P 375 C 1]

(d) Practice—New plea—Appeal—No prayer for mesne profits made in plaint—Defendant confessing judgment at hearing — Question of mesne profits held should not be allowed to be raised in appeal as it would be unfair to defendant.

No prayer for mesne profits of the property sought to be recovered was made in the plaint. At the hearing the defendant confessed judgment and a decree for possession was passed in favour of the plaintiff:

Held that had there been a claim for mesne profits in the plaint the contest in respect of the property would not have been withdrawn by the defendant and therefore it would not be fair to the defendant to allow the plaintiff to introduce the prayer for mesne profits by amending the plaint at the appellate stage. [P 375 C 2]

G. C. Sen, Surendra Nath Das Gupta and Amalendu Sen — for Appellant.

Rama Prosad Mookerjee and Bankim Chandra Banerjee — for Respondent.

R. C. MITTER J. — In 1907 one Mobarak Ali applied to the Government for settlement of 174 drones 8 kanis 1 ganda and 2 cottas (=1138·72 acres) of Noabad land belonging to the Government. That area was then covered with jungle. In his application he stated that he was willing to take the settlement "according to the practice of settlement of such lands." That meant that he was prepared to take settlement according to usual terms and conditions on which Noabad lands are settled by the Government. That application was granted and a tenure, Jote No. $\frac{114}{1}$ was created. There was a jamabandi which fixed the rent at Rs. 175 a year (Ex 5, II. 6) from 1314 B. S. He was let into possession. Later on he was asked to execute the kabuliat but he evaded the request with the result that there is no written document which shows the terms and conditions of the settlement. In the jamabandi, Ex. 5, there is a column for entering the date and the terms "as mentioned in the patta." There being no patta or kabuliat in this case, the terms and conditions of the settlement were not noted in that column but only the date of commencement of the settlement was mentioned. As the purpose of the jamabandi was to fix the rent, the rent assessed was mentioned in the appropriate column and the date from which the rent so assessed was to run was also stated.

Later on, Mobarak Ali sold 8 annas of his interest to one Nilambar and the remaining 8 annas to Santinidhan. Nilambar in his turn sold his share to one Nritya Ranjan, who could not pay down the whole of the price, for the balance of which (Rupees 3000) both Nritya Ranjan and Santinidhan executed a mortgage in favour of Nilambar charging their interest in the said land. In 1927 Nilambar sued Nritya Ranjan and Santinidhan for his money and ultimately got a final decree for Rs. 7752. In execution thereof, the mortgaged premises were sold and were purchased by the appellant bank for Rs. 400 only, on 11th March 1936. The said bank took symbolical possession on 18th October 1936, but could not get actual possession in the circumstances to be narrated hereafter. The said bank accordingly brought this suit on 2nd October 1937 for possession of the said area of land included in Jote No. $\frac{114.}{1}$ There was an alternative prayer, namely for "compensation and mesne profits," in case it cannot for any reason get possession.

Mobarak Ali and his successors-in-interest, Nilambar, Santinidhan and Nitya Ranjan could not reclaim the whole area of Jote No. $\frac{114.}{1}$ By the end of 1929 only 437.29 acres had been cleared and brought under cultivation. The remaining area of 701.43 acres was uncleared. A portion of this unreclaimed area of 701.43 acres, namely 464.05 acres was then covered with forest and the remaining portion namely 237.38 acres was the site of forest-clad hillocks. Some time in the year 1924 or 1925, (the exact date or year does not appear from the record nor is the precise date material) a survey and settlement under Chap. 10, Bengal Tenancy Act, was started. This survey and settlement is called the revisional settlement in this suit. In the course of that survey, the area reclaimed and the area not reclaimed were surveyed and mapped separately. We have mentioned above the area that was found to have been cleared and brought under cultivation and the area still unreclaimed. The area unreclaimed portion was classified in the manner indicated above. The area reclaimed namely 437.39 acres and the area of 237.38 acres of unreclaimed lands were recorded in the draft khatian in the name of Santinidhan and Nritya Ranjan and the remaining area of unreclaimed land, namely 464.05 acres was recorded in the khas khatian of the Government. Under Part 2 of Chap. 10, Bengal Tenancy Act, only the reclaimed area of 437.29 acres was assessed at Rs. 252, a year and in the finally published Record of Rights that area of 437.29 acres was recorded as a separate tenure, Jote No 96 at a rent of Rs. 252 and was recorded in the names of Santinidhan and Nritya Ranjan and the remaining area, namely 701.43 acres, made up of the aforesaid two blocks of unreclaimed land, namely, 237.38 and 464.05 acres, was recorded as the khas lands of the Government. As the Government had a mind to include the said area of 701.43 acres within a reserved forest, the requisite preliminary notification under S. 4, Forest Act, was issued and duly published and a proclamation inviting claims was duly promulgated in accordance with the provisions of that Act.

Santinidhan and Nritya Ranjan filed a claim under S. 6, sub-s. (c) of that Act before the Forest Settlement Officer in respect of the said 237.38 acres of land which had been recorded in their possession in the draft khatian but no claim was preferred by them in respect of the other piece of unreclaimed land, namely 464.05 acres which had been recorded in the draft khatian in the name of the Government. This claim was rejected by the Forest Settlement Officer by an order dated 4th August 1930 (Ex. G, II. 14). Against that order the claimants preferred an appeal to the Collector under the provisions of S. 17 of that Act. The claimants urged before the Collector, as they had done before the Forest Settlement Officer, that they held the said area in per-

manent tenure right. The Collector dismissed the appeal by an order dated 17th January 1931 (Ex. C not printed). He held that the claimants had failed to prove that their tenure, (Jote No. $\frac{114}{1}$) was a permanent one, that they having failed to clear the jungle in time the Government had the right to resume the said area of land and that the Government had rightfully resumed the same. He held that they were not entitled to any compensation for the said area of land. Thereatter, on 26th May 1931, the notification under S. 20, Forest Act was published and the whole area of 701.43 acres was included in a reserved forest. Santinidhan and Nritya Ranjan who had taken the settlement of the reclaimed area of 437.29 acres recorded as Jote No. 96 at the settled rent of Rs. 252, fell into arrears and that tenure was put up to sale under the Public Demands Recovery Act and the Government purchased the same at the nominal price of three pies on 4th November 1933. The plaintiff having purported to have purchased the lands of the said tenure, Jote No. $\frac{114}{1}$ at the mortgage sale has sued the Province of Bengal for the reliefs which we have noticed above. The claim rests upon two grounds namely, (1) that Jote No. $\frac{114}{1}$ was a permanent tenure and the Government had no right to split up and resume a portion thereof and (2) in any event even if the tenure was a non-permanent one the Government had not terminated it in a legal manner and the whole proceeding, including the proceeding taken under the Forest Act, is illegal. The Province of Bengal in its written statement denied that Santinidhan and Nritya Ranjan's heirs and thereafter the plaintiff bank had any subsisting right to any portion of the said area of 1138.72 acres but at the hearing did not resist the plaintiff's claim to the lands of Jote No. 96. The learned Subordinate Judge held that the plaintiff had no right to the lands in claim save and except the lands of Jote No. 96. He made a decree in respect of the lands of that jote and dismissed the plaintiff's claim to the rest. Hence this appeal by the bank.

The first question in the appeal is what were the rights of Mobarak Ali in Jote No. $\frac{114}{1}$. It is clear from his application that he offered to take settlement on the usual terms and conditions on which Noabad lands were being settled. That offer was accepted. The settlement to him was in tenure right. The terms and conditions imported into the settlement were therefore the terms and conditions on which Noabad taluks were being then granted by the Government. To determine the said question it would be necessary to go into the revenue history of Noabad lands in the District of Chittagong.

In 1760 Nawab Mir Jafar Khan was deposed from the Governorship of Bengal and his son-in-law Nawab Mir Kasim was elevated in his place by the East India Company. By a treaty of that year the three districts of Burdwan, Midnapore and Chittagong were ceded by the Nawab to the company ostensibly for the purpose of enabling the latter to meet the expenses of the army which the company agreed to maintain for the support and assistance of the Nawab. In 1763 Nawab Mir Kasim was deposed and Nawab Mir Jafar was reinstated. He confirmed the grant of Mir Kasim of the said three districts. At that time, more than 5/7th of the District of Chittagong was unreclaimed and only about 2/7th had been brought under cultivation since the Mogul conquest of 1666 by the refugees from Arakan, the Mughs, and some settlers from Bengal. The reclaimed lands which were mostly in the northern part of the district did not form a compact block but lay scattered about like oases in a desert. This was the condition which the East India Company found in 1760. In 1761 the Government published a general advertisement to settle the waste lands on favourable terms and Joy Narayan Ghoshal, the nephew of the then Diwan of the company in charge of the revenue administration of the district applied for such a settlement and his prayer was granted. This grant is known as Jaynagar Taluk. In 1764-1765 a rough survey and measurement was made of all lands which had been brought under cultivation. The area of such reclaimed lands was found to be 609 square miles, of which 575 square miles were included in various estates called Taraps and the remainder, 34 square miles, was measured as appertaining to Jaynagar Taluk. The first mentioned area was settled with the tarafdars in 1790 for ten years under the Decennial Settlement Regulation which was made permanent in 1793. (O'Malley's District Gazetteer of Chittagong, p. 143) Taluk Jaynagar was never settled permanently. The lands of Taluk Jaynagar and the lands reclaimed after the measurement of 1764-1765 are known as Noabad lands and the Government is the proprietor thereof. About the year 1790 or so, Joy Narayan Ghoshal claimed all the lands of the district which were waste in 1763 as within his grant and set up a forged sanad in support of his claim. The Government thereupon attached all his lands. A suit resulted and in 1815 the Sudder Dewany Adalat held that Joy Narayan was entitled to be restored to possession of so much of the land which he had brought under cultivation before 1764 and which were recorded as cultivated in the survey and measurement of 1764-1765 but he had no right to the rest of the land. An infructuous survey was made thereafter to work out that decree.

It is unnecessary for the purpose of the point before us to detail what took place between 1815 and 1837. As the tarafdars had been going on since 1764 reclaiming lands adjoining their estates and professing to hold the lands so encroached upon as parts of their estates and many persons had been setting up false claims to hold reclaimed lands as lakhiraj a general survey of the whole district was ordered in 1837. This survey and the work of settlement was eventually conducted by Mr. Ricketts who concluded his work in 1848. The lands of the tarafs were demarcated from the lands encroached upon by the tarafdars and the area brought under cultivation by other agencies since 1765 were also defined and demarcated. The excess lands occupied by the tarafdars were assessed and settled with them separately, that is not included in the tarafs, and for term of years. Other lands were also settled for term of years. In some cases the period of the settlement was for 30 years, later extended by 20 years more, and in some cases for terms of five to ten years, subsequently extended to 25 years. Mr. Rickett had recommended permanent settlement but the Board of Revenue as a matter of general policy in respect of Noabad lands did not accede to his proposal but directed settlement for terms of years as stated above. One of the conditions of the settlement of Noabad lands was that the settlement holder would have no right to the area of land that may be found unreclaimed at the expiry of the period of his settlement. (Allen's report of the Survey and Settlement of Chittagong p. 70, para. 224). This

a has been the feature of settlement of all Noabad lands and it is one of the usual condition of such settlements. (Hunter's Statistical Accounts of Bengal, Vol. 6, pp. 170 and 171). Under some misconception, Lord Dalhousie after his visit to Chittagong in 1853 directed that the Noabad lands which had been settled as Noabad taluks for terms of years should be incorporated with the tarafs and settled permanently with the tarafdars. The misconception was that all Noabad lands had been separated from some taraf or other. Whereas, it was in fact not so, as would appear from the summary of Ricketts survey given by Sir Charles Allen (Allen's report p. 66 para. 212). Lord Dalhousie's orders were not communicated to the talukdars by the Commissioner. In 1863, however, Sir Cecil Beadon, directed the permanent settlement of all Noabad lands but the offer of permanent settlement made by the b Government was hedged in by conditions which wrecked the scheme of permanent settlement of Noabad lands. Only 360 talukdars out of 297.43 accepted the offer and those taluks were permanently settled (Allen's report, p. 70, Hunter's Statistical Account, Vol. 6, pp. 172 to 173).

In 1869 the Board of Revenue again recommended permanent settlements of Noabad lands but the Government turned it down. Except for the brief period between 1865 and 1867 when only 360 permanent settlements of Noabad lands were made Noabad lands had all along been settled temporarily. Settlements for fixed periods became the invariable rule in respect of Noabad lands (Allen's report, p. 69, para. 220). Three things are apparent from the revenue history of Noabad lands of Chittagong, namely, (1) that the settlements were not proprie- c tary ones, (2) that the settlements were temporary —for terms of years, and (3) that the settlement holder had no right to those portions of land which had not been brought under cultivation by him within the period of his settlement. At the end of the term of settlement the Government had the right to take away the unreclaimed land without paying any compensation. On these materials the appellant bank cannot claim any permanent interest in the lands of Jote No. $\frac{114}{1}$. Mobarak Ali prayed for and was granted the settlement on the usual terms and conditions on which Noabad lands were being settled by Government. For the same reason the appellant bank cannot have any right to that portion which was not brought under cultivation within the period of the settlement concluded with d Mobarak Ali and the Government had the right to take possession thereof at the expiry of that settlement which was made in 1907. The only other question therefore that remains is what was the term or period of that settlement. If that settlement expired on or before 1929, when the area of 701.43 acres of land which has been included in the reserved forest, was found to be unreclaimed, Santinidhan and Nitya Ranjan's right to the same ceased and the Government had the right to do whatever it liked with that area of waste land.

Between 1842 and 1848 settlements were made for terms of years. The terms of all those settlements were to expire by 1898. Since Ricketts' Survey and Settlement the district as a whole had not been surveyed. Mr. Fasson made a partial survey in 1875 and some re-settlements had been made between 1875 to 1882 but the terms of those settlements were also to expire in or before 1898. For the purpose of re-assessment and re-settlement of those taluks and also to find out new lands brought under cultivation since Ricketts' general survey, Govern- e ment thought it advisable to survey the entire district in time so that re-settlements may be made in 1898 when the periods of settlement of all the Noabad lands which had hitherto been settled would expire. In 1889 a notification was issued for survey of the whole district and settlement under Chap. 10, Ben. Ten. Act, and Sir Charles Allen was put in charge of the operations as the Settlement Officer. He completed his work in 1898. The old Noabad taluks were re-settled as also the other clearances which were discovered at that survey. Many other settlements for reclamation of more jungle lands were made. All these new settlements and re-settlements were made for terms of years. The Noabad lands within Thana Ramu were settled up to Chaitra 1330 (April 1924) and the rest up to Chaitra 1331 (April 1925). Paragraph 429, p. 125 of Sir Charles Allen's Settlement Report, to which we f have referred before, deals with these settlements only, namely those made in 1898. As Jote No. $\frac{114}{1}$ was created after 1898 that paragraph does not in terms apply to it. After the conclusion of the survey and settlement under Chap. 10, Ben. Ten. Act, Sir Charles Allen the Settlement Officer ceased to function and the matter of settlement of Noabad lands thereafter was made over, as is usual in such cases, to the Collector of the District.

During the course of the survey and settlement operations by Sir Charles Allen matters of general importance relating to Noabad lands were discussed and a definite and general scheme for settlement and re-settlement in future was discussed and settled. That scheme is of importance in the case before us. One of the matters formulated in that scheme g related to the period for which such settlements were to be made in future. For the purpose of convenience and methodical dealing Sir Charles Allen proposed that the period of all settlements of Noabad land should be so fixed that they may terminate at the same time. That principle was accepted by the Government. In a minute dated 23rd January 1893 he suggested that a fixed expiring date of all settlements should be made for lands within each thana. In that minute he also suggested other rules for general observance in settlements of Noabad land. After some correspondence he embodied his suggestions in draft rules which he forwarded to the Commissioner of the Chittagong Division by his letter No. 761G, dated 6th September 1893 (Noabad Selections, Vol. 6, pp. 151 and 152). He suggested that those rules were to be observed in all settle- h ments that may be made then or in future. Rule 5 of the draft rules runs as follows :

"Term of settlement : The settlement should ordinarily be granted for a term which will expire at the same time as the Noabad taluki settlement of the Thana in which the lands are situate."

In respect of R. 5 the only modification that was made by the Government was that instead of separate expiring dates being fixed for each thana, one expiring date should be fixed for the whole of the district (*see* Noabad Selections, Vol. 6, page 132, para. 8). The draft rules as made by Sir Charles Allen with the said and some other modification were accepted and promulgated by the Board of Revenue's Circular No. 5 of May 1895 (Allen's Report, p. 125, para. 427 and Boards Revenue Circulars 1894 and 1895, p. 100). The position thus is that settlement of Noabad lands whenever to be made were to be made according to these rules and the aforesaid circular order of the Board laid down

that the term of all settlements of Noabad land to be made thereafter is to be so fixed that the expiry of all such settlements may be on the same date (*see* para. 11 of the Rules as printed at p. 102 of the Board's Circulars of 1894 and 1895). This date the Board subsequently fixed to be April 1924 for the Noabad lands within Thana Ramu and April 1925 for Noabad lands in the rest of the District by an order embodied in letter No. 986A dated 10th October 1896 written by the Secretary to the Board of Revenue to the Secretary to the Government of Bengal, Revenue Department (Noabad Selections, Vol. 6, p. 130). Paragraphs 8 to 11 of that letter are important. The conclusion to which we come from the above materials which we have gathered from books of authority and Government publications and which support the evidence given by Bidhushan Gupta is that the usual conditions on which Noabad lands were being settled at the relevant time are (i) that the settlements were to be for fixed periods, (ii) that the term of every settlement concluded after 1898 was to end in April 1925 except with regard to lands in Thana Ramu, where the date fixed was April 1924, and (iii) the settlement holder would lose all rights to the area of land which was not brought under cultivation during the period of his settlement.

Those terms were incorporated into the settlement of Jote No. $\frac{114}{1}$ by reason of the form of Mobarak Ali's application. Santinidhan and Nitya Ranjan had therefore no right after April 1924 to any portion of the aforesaid area of 701.43 acres of land which were found waste at the revisional settlement operations of 1925-1929 and which was thereafter included in the reserved forest. Apart from the reasons given above we are of opinion that the plaintiff is not entitled to any relief as to that area of land for the following additional reasons. Santinidhan and Nitya Ranjan preferred claims before the Forest Settlement Officer in respect of 237.38 acres out of that waste area under S. 6 (c), Forest Act. That claim was investigated under S. 7 and rejected by that Officer. They preferred an appeal to the Collector under S. 17. That appeal was dismissed. No application in revision was made to the Local Government. The appellate order thus has become final under S. 18 (4) and the civil Court has no power to restore the said piece of land or to grant compensation in respect thereto to Santinidhan or Nritya Ranjan or to their successor-in-interest, when the order of the Collector in the appeal was that they had no interest therein and were not entitled to compensation. With regard to the balance, namely 464.05 acres of waste land no claim was preferred to the Forest Settlement Officer under S. 6 (c). It does not appear that that Officer had acquired any knowledge about the rights of Santinidhan and Nritya Ranjan in the same in the course of an inquiry under S. 7. On the publication of the notification under S. 20, whatever rights those persons had in that area became extinguished by virtue of the provisions of S. 9. For the above reasons we hold that the appellant is not entitled to succeed in respect of the said area of 701.43 acres which has been included in the reserved forest.

The last point that has been argued by the appellant's Advocate is that the Court below ought to have granted the plaintiff bank a decree for mesne profits in respect of the lands of Jote No. 96 for which a decree for possession has been made in its favour. The learned Subordinate Judge has rightly held that no such prayer was made in the plaint. The said learned Advocate feels the force of the observations of the learned Subordinate Judge and prays for permission to amend prayer No. 2 of his plaint at this stage. We cannot accede to that request. The Province of Bengal had purchased that Jote (No. 96) in execution of a certificate for arrears of rent. It pleaded in its written statement that the plaintiff bank had no right to that jote also. At the hearing it confessed judgment in respect thereto. It may be that had there been a claim for mesne profits in the plaint the contest in respect of that jote would not have been withdrawn. In these circumstances we do consider that it would not be fair to the Province of Bengal if the amendment asked be granted at this stage.

We are very much indebted to Mr. Mookerjee, Assistant Government Pleader of this Court, for valuable assistance he gave us in this case. The result is that this appeal fails. It is accordingly dismissed with costs. Hearing-fee 15 gold mohurs.

G.N./R.K. *Appeal dismissed.*

C. P. C.—
(d) ('40) Chitaley, O. 41, R. 1 N. 12 Pts. 1 and 3.
('41) Mulla, Page 1155 Pt. (l).

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BISWAS J.

Khateruddin and others —
Defendants — Appellants
v.
Tripura Sundari Debi w/o Shyama Prasanna Bhattacharjee — Plaintiff —Respondent.

Appeal No. 973 of 1939, Decided on 10th December 1941, against decree of Sub-Judge, Rangpur, D/- 16th November 1938.

(a) Bengal Tenancy Act (8 of 1885), Ss. 167, 160 and 159—Sale of holding in execution of rent decree—When sale can be said to be subject to under-raiyati interest.

Section 159 purports to enact an exception to the general rule that the tenure or holding itself shall pass at a rent sale. A sale of a holding in execution of a rent decree can be said to be subject to the under-raiyati interest therein only when the under-raiyati was an "incumbrance" within the meaning of S. 161 but had not been annulled under S. 167 by the purchaser or that it was a "protected interest" as defined in S. 160. An interest will subsist, if it is a protected interest : it will also subsist, if it is an incumbrance and is not annulled ; but an interest, which is neither a protected interest nor an incumbrance, must yield to the rights of the purchaser. If an interest is a protected interest, it cannot be an incumbrance, but the converse does not follow that if it is not an incumbrance, it must be a protected interest. An interest is not, therefore, necessarily saved from a rent sale by merely showing that it is not an incumbrance ; it can be saved only where it is not an incumbance because it is a protected interest. [P 377 C 1,2]

(b) Bengal Tenancy Act (8 of 1885), S. 160 (c) —"Dwelling house."

Dwelling-houses in cl. (c) of S. 160 mean permanent dwelling-houses : 3 C. W. N. 212, *Rel. on.* [P 378 C 1]

Priyanath Bhattacharjee — for Appellants.
Hemendra Chandra Sen and Santosh Nath Sen — for Respondent.

JUDGMENT.— This appeal is on behalf of defendant 1, who, it is conceded, is the principal contesting party, the other defendants deriving their title from him. The plaintiff brought this suit for recovery of khas possession on declaration of her title as purchaser at a sale in execution of a rent decree. The trial Court decreed the suit, holding that defendant 1 was an under-raiyat, and that his interest, being an incumbrance within the meaning of S. 161, Bengal Tenancy Act, had been annulled by service of notice under S. 167. On appeal by the defendants, the lower appellate Court reversed that judgment. The learned Subordinate Judge was of opinion that defendant 1 had acquired the status of an occupancy raiyat and as such, his interest was not liable to be annulled. A second appeal was preferred to this Court by the plaintiff (S. A. No. 1969 of 1936), and Mukherjea J., held that defendant 1 was an under-raiyat; and not a raiyat as claimed by him. He accordingly remanded the case to the lower appellate Court for decision of the question as to whether defendant 1's interest was an incumbrance, and whether such interest had been annulled. On the re-hearing, the learned Subordinate Judge came to a definite finding that the notice under S. 167 had been duly served. As regards the nature of defendant 1's interest, he did not think it necessary to go into that question fully, for he took the view that if it was an incumbrance, it had been annulled in fact, and that if it was not, the defendants could succeed only by showing that it was a protected interest under S. 160, which, he held, they had not been able to do. In the result, he passed a decree for recovery of khas possession in favour of the plaintiff. Hence, the present appeal by the defendants.

The material facts of the case were set out fully in the previous judgment of this Court. It appears that under the Maharaja of Cossimbazar as proprietor, there was a non-permanent tenure held by certain persons who may be described as the Sahas at an annual rental of Rs. 73-12-0 and under the Sahas there was an occupancy holding held by one Mongal Paik at a rental of Rs. 15 per year. It is admitted that defendant 1 held a korfa or under-raiyati jama under Mongal Paik in respect of the entire lands of the tenancy from before the year 1298 B. S. Whether or not there was a written lease at the inception of the under-raiyati holding, defendant 1 appears to have obtained a potta, Ex. B, from Mongal Paik in the year 1304 B. S. Mongal Paik afterwards transferred his interest to Gouri Prasad Roy, and thereupon in 1308 B. S. defendant 1 executed a fresh kabuliyat in his favour, Ex. A, which was similar in terms to Ex. B. Subsequently, the Sahas obtained a rent decree against Gouri Prasad, and in execution of it purchased the holding themselves, the sale certificate being Ex. 8 and dated 11th November 1921. It does not appear that upon their auction purchase the Sahas took any steps to annul the under-raiyati jama. The Maharaja afterwards sued the Sahas for arrears of rent of their non-permanent tenure, and in execution of his rent decree, purchased the tenure himself on 7th March 1923. Four years later, namely, on 23rd May 1927, the Maharaja purported to grant a raiyati settlement of the lands to the Sahas, and the Sahas executed a kabuliyat, Ex. 9, in his favour, by which they agreed to pay an enhanced rent at the rate of Rs. 16-4-0 per year. As the Sahas afterwards made default in payment of rent, the Maharaja obtained a rent decree against them and in execution thereof, put up the holding to sale on 8th January 1931. It was at this sale that the holding was purchased by the plaintiff.

It is the plaintiff's case that the occupancy holding which the Sahas had purchased at their rent sale of 11th November 1921, continued to subsist after the Maharaja's purchase of their tenure on 7th March 1923, and that the kabuliyat, Ex. 9, which the Sahas gave to the Maharaja on 23rd May 1927, was in respect of the same holding, and not for a new tenancy, the enhancement of rent from Rs. 15 to Rs. 16-4-0 per year being within the limits prescribed in S. 29, Ben. Ten. Act. Defendant 1's interest accordingly continued to be that of an under-raiyat under the said holding, and was thus liable to be annulled, and was in fact annulled, by the plaintiff upon her purchase of the holding at the rent sale. Mr. Sen on behalf of the plaintiff-respondent maintained that this was in effect the decision of this Court in the previous appeal, and he referred to the express finding of Mukherjea J., that "defendant 1 still remained an under-raiyat, and the raiyati holding, whether bereft of the occupancy right or not, still existed." The only point, said Mr. Sen, on which a remand was directed was whether the under-raiyati interest was an incumbrance and had been annulled in accordance with law. Mr. Bhattacharyya on behalf of the appellants, however, strenuously argued before me—an argument which his clients had unsuccessfully pressed in the trial Court, that Ex. 9 really created a new raiyati tenancy in favour of the Sahas, and that as defendant 1 had been holding the lands from before as an under-raiyat, it must be taken that the Sahas took subject to this interest of defendant 1, and that the plaintiff's purchase at the Maharaja's rent sale was, therefore, equally subject to such interest. The plaintiff was not accordingly entitled to evict the defendants except under S. 48C, Ben. Ten. Act.

The argument seems to me to betray a confusion of ideas, and I find myself wholly unable to accept it. An under-raiyati holding implies the existence of a raiyati interest under which it is held. If, therefore, at the date of Ex. 9, defendant 1 was an under-raiyat, it must follow that there was then already a raiyati interest between him and the Maharaja, and it was not possible in that case for the Maharaja to create a new raiyati holding, as he is supposed to have done. One can understand an argument that after the Maharaja's purchase of the Sahas' tenure, defendant 1 came to hold the lands directly under him, but this would make defendant 1 a raiyat under him, and not an under-raiyat; it would mean that on the Maharaja's purchase, the occupancy holding which the Sahas had previously purchased at their rent sale was extinguished, and defendant 1's status was in consequence raised to that of a raiyat. This is, however, a position which was definitely negatived by Mukherjea J., on the last occasion. It would really involve a mutual contradiction to say that the raiyati interest of the Sahas ceased to exist, but that defendant 1 still continued to hold as an under-raiyat. The more consistent view would be that the raiyati interest of the Sahas continued to subsist, and that Ex. 9 was only a confirmatory settlement of the same holding.

In my judgment, the position was this. When in November 1921, the Sahas purchased the holding of Gouri Prosad, there was no merger of the raiyati interest in the superior interest of the Sahas as they were only non-permanent tenure-holders, and S. 22, Ben. Ten. Act, had, therefore, no application. The consequence was that the Sahas acquired a raiyati holding under themselves as tenure-holders. When later on in March 1923, the Maharaja purchased

the tenure of the Sahas, the raiyati holding remained, as being an occupancy holding, it could not be annulled by the Maharaja as an incumbrance, and there is also nothing to show that the tenancy might have come to an end otherwise, such as by surrender or abandonment. It follows that when four years later the Sahas executed the kabuliyat, Ex. 9, in favour of the Maharaja, no new tenancy was created thereby, which might be supposed to have been subject to defendant 1's interest, so that the plaintiff as purchaser at the subsequent rent sale must also be taken to have acquired the holding subject to that interest

Mr. Bhattacharya referred in this connexion to certain recitals in Ex. 9 to show that the raiyati holding must have been extinguished on the Maharaja's purchase of the tenure in 1923. It is stated in the kabuliyat that after the purchase the lands were in the Maharaja's khas possession, and that he invited applications for settlement by a general notice. I do not think, however, that these recitals can be accepted as sufficient to establish the position contended for by Mr. Bhattacharyya. This is in fact negatived by the defendants' own case that the lands were at the time in the actual possession of defendant 1. Mr. Bhattacharyya sought to make out that the Maharaja's khas possession was exercised through defendant 1, but this would imply a direct relationship of landlord and tenant between the Maharaja and defendant 1. Such relationship could however exist only on the basis either that the Maharaja was a tenure holder and defendant 1 held under him as a raiyat, or that the Mabaraja was himself a raiyat and defendant 1 an under-raiyat under him. The first alternative is ruled out not only by the previous judgment of this Court, but by the further consideration that in that case the Maharaja could not make another raiyati settlement of the same lands in favour of the Sahas. The second alternative is equally untenable, for it would mean a raiyat creating a raiyati settlement himself, and also go against the terms of the kabuliyat itself which certainly gave the Maharaja a higher status than that of a raiyat.

The first branch of the appellants' argument that the plaintiff's purchase was subject to defendant 1's interest, because the Sahas themselves had acquired their raiyati holding subject to that interest, must therefore fail. This takes us to the main question for which the case had been remanded to the lower appellate Court, namely, whether on the basis that defendant 1 held as an under-raiyat under the Sahas both before and after the execution of the kabuliyat, Ex. 9, the sale to the plaintiff could be said to have been subject to the under-raiyati interest under the provisions of Chap 14, Bengal Tenancy Act.

It seems to me that the learned Subordinate Judge took a correct view in the matter in holding that such a position could be maintained only by showing either that defendant 1's interest was an "incumbrance" within the meaning of S. 161, but that it had not been annulled by the plaintiff under S. 167, or that it was a "protected interest" as defined in S. 160 of the Act. Section 159 in fact makes it clear that on no other basis could defendant 1's interest be held to be binding on the plaintiff. This is a section which purports to enact an exception to the general rule that the tenure or holding itself shall pass at a rent sale, and it makes an exception only in favour of "protected interest" on the one hand, and "incumbrances" on the other, provided in the case of the latter, the purchaser takes no steps to annul the same. It follows that all other interests will ipso facto stand determined by such sale. In other words, an interest will subsist, if it is a protected interest: it will also subsist, if it is an incumbrance and is not annulled; but an interest, which is neither a protected interest nor an incumbrance, must yield to the rights of the purchaser.

It is hardly necessary to point out, as the definition of the term "incumbrance" in S. 161, cl. (a) shows, that if an interest is a protected interest, it cannot be an incumbrance, but the converse does not follow that if it is not an incumbrance, it must be a protected interest. An interest is not therefore necessarily saved from a rent sale by merely showing that it is not an incumbrance: it can be saved only where it is not an incumbrance, because it is a protected interest. Now, in the present case, the learned Judge has come to a definite finding that a valid notice under S. 167 had been duly served by the plaintiff on defendant 1. That being so, it is obvious that the defendants gain nothing by showing that defendant 1's interest was an incumbrance, for if it was, the service of that notice was sufficient to annul it. Nor will it avail the defendants merely to show that defendant 1's interest was not an incumbrance: they must further show that it was a protected interest. The learned Judge was thus right in holding that the only material question to consider in this case was whether or not defendant 1's interest came within the definition of a protected interest as contained in S. 160.

Section 160 contains eight clauses. It is conceded that the only clauses which might conceivably be relied on by the defendants are cls. (c), (d) and (g). Neither cl. (d) nor cl. (g) can obviously have any application. Clause (d) speaks of a right of occupancy, but admittedly defendant 1's interest was only that of an under-raiyat. Clause (g) speaks of any right or interest which the landlord at whose instance the tenure or holding is sold, or his predecessor-in-title, has expressly and in writing given the tenant for the time being permission to create. But defendant 1's interest was certainly not an interest created by the tenant for the time being, much less with any permission in that behalf granted by the landlord. Mr. Bhattacharyya attempted to bring the case under cl. (c) by reference to the terms of Ex. A, the kabuliyat, which was executed by Gouri Prosad in favour of the Sahas in 1308 B. S. Incidentally, this involves an admission that the holding which was settled by the Maharaja with the Sahas in 1927 was the same holding as was held by Gouri Prosad under this kabuliyat. The clause in the kabuliyat on which reliance is placed is that relating to the residential houses. It is said that the lease was a lease of land whereon dwelling-houses had been erected within the meaning of cl. (c). The difficulty in the appellants' way is that there is nothing to show that the dwelling-houses mentioned in the lease were permanent dwelling-houses. Mr. Sen has argued that dwelling houses in cl. (c) mean permanent dwelling-houses, and has cited a case reported in 3 C. W. N. 212,[1] in support of his contention. That was a case arising under S. 37 of the Bengal Revenue Sale Law. But the clause which fell to be construed there is expressed in almost identical terms as cl. (c), and I see no reason why the same construction should not be applied. The collocation of the words in cl. (c) of S. 160, as in the corresponding section in the Revenue Sale Law, goes to show that the object is to protect leases on which permanent structures have been erected. The words used are "dwelling-houses, manufactories or other permanent build-

1. ('98) 3 C.W.N. 212, Makar Ali v. Shyama Charan Das.

a ings." The words "other permanent buildings" clearly indicate that the structures referred to in the preceding part of the clause must also be permanent in character, otherwise, there would be no point in using the word "other." It is not disputed that if dwelling houses in cl. (c) mean permanent dwelling-houses, the kabuliyat here does not answer the requirements of this clause. I see no reason therefore to differ from the learned Judge in his conclusion that defendant 1's interest was not a protected interest. All the grounds urged on behalf of the appellants for resisting the plaintiff's claim to khas possession thus fail. The result is that the appeal is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 378

b BISWAS J.

Abdul Karim Master — Defendant 1 — Appellant

v.

Raj Chandra Ghose and others — Respondents.

Appeal No. 1348 of 1939, Decided on 30th January 1942, from appellate decree of District Judge, Chittagong, D/- 28th April 1939.

(a) Revenue records — Value of — Entry made upto particular year is not inadmissible on question relating to subsequent years.

The mere fact that the settlement was for the period upto a particular year would not make the record inadmissible in evidence on the question as c to whether a person's status as recorded therein continued to be such or not after that year.

[P 378 C 2]

(b) Bengal Land Revenue Sales Act (7 of 1868), S. 12 — Interests of raiyats are not protected.

The word 'tenure' does not include the interest of a jotedar or raiyat. At any rate, the interests referred to as "tenures" in the various exceptions under S. 12 are something distinct from raiyati interests which are separately dealt with in Sec. 14. The interests which a purchaser is entitled to avoid under S. 12 are all described as "under-tenures," and the exceptions in the section must obviously refer to interests of a similar character, and cannot therefore include the interests of raiyats. [P 378 C 2; P 379 C 1]

d *Rohinibinod Rakshit* — for Appellant.

Nripendra Chandra Das — for Respondents.

JUDGMENT. — This is an appeal on behalf of defendant 1 in a suit which was instituted by the plaintiff for his ejectment on declaration of plaintiff's title. The plaintiff claimed to be the purchaser of a Noabad taluk at a revenue sale held on 8th January 1937, and his case was that as such he was entitled to annul the interest of defendant 1 under S. 12 of Act 7 of 1868 (B. C.). The defence was that defendant 1 was protected under S. 14 of the Act inasmuch as he was a raiyat having a right of occupancy at a fixed rate, and in support of this plea, he relied upon the entry in the last revisional survey of Chittagong held in 1930 wherein he was recorded as a jotedar. Both the Courts below negatived this defence and decreed the plaintiff's suit. Hence the present appeal. The first point taken on behalf of the appellant is directed against the finding that the entry in the revisional khatian was wrong. It appears that in the previous cadastral survey which e took place in 1898, defendant 1 was recorded as an etmamdar. A note was added in the remark column against this entry that this was not binding on Government. That, to my mind, only meant that although the tenancy was recorded as a tenure, it was not to be treated as a tenure created or recognized by the settlement proceedings. The note did not in any way weaken the effect of the entry that the interest was that of a tenure-holder. The learned Judge in the Court of appeal below as well as the trial Court held that this record, taken with the other evidence in the case, was sufficient to negative the entry in the R. S. Khatian. As regards the other evidence, reference was made by both Courts to a mortgage deed in which defendant 1 himself had described his interest as that of an etmamdar. This mortgage deed was executed in 1921. Mr. Rakshit contends that as the settlement under the f cadastral survey was for the period ending in 1925, any entry made therein could not be regarded as good evidence as to the status of the defendant for a subsequent period. I am not prepared to accept that argument. The mere fact that that settlement was for the period upto 1925, would not, in my opinion, make the c. s. record inadmissible in evidence on the question as to whether defendant 1's status as recorded therein continued to be such or not after that year. The mortgage deed of 1921 would, in my judgment, be equally relevant evidence on the point. That being so, I think the Courts below were justified in relying on these materials for the purpose of holding that the revisional survey khatian was incorrect. The first point urged on behalf of the appellant must consequently fail, and defendant 1 cannot, accordingly, claim protection g under S. 14 as an occupancy raiyat.

It is next urged that if defendant 1's interest is that of a tenure-holder, he comes under the third exception of section 12 of Act 7 of 1868 (B. C.) and is entitled to exemption from eviction on that basis. This clause refers to "tenures created or recognized by the settlement proceedings of any current temporary settlement as tenures bearing a rent which is fixed for the period of such settlement." The difficulty in the appellant's way is that although the learned Judge has held that his interest is that of a tenure-holder, the tenure cannot be regarded as a tenure recognized by the current settlement proceedings. The current settlement is the revisional settlement, and ex hypothesi the defendant is recorded therein as a jotedar, though wrongly. It is difficult to see therefore how he can bring himself under cl. (3). Mr. Rakshit refers to the definition of h "tenure" in the Act, according to which it includes all interests in land. The argument is that the interest of a jotedar must therefore be held to be a tenure within the meaning of cl. (3) of S. 12. Reading the definition as a whole, I do not think that it can be given so wide a meaning. 'Tenure' is no doubt said there to include "all interests in land," but although this expression is used, it will be observed that the real object of the definition is to be found in the rest of the paragraph containing the definition, and it could not have been intended to include the interest of a jotedar or raiyat. At any rate, it seems to be fairly clear that the interests referred to as "tenures" in the various exceptions under Sec. 12 are something distinct from raiyati interests which are separately dealt with in S. 14. The interests which a purchaser is entitled to avoid under Sec. 12 are all described as "under-tenures," and the exceptions in the section must obviously refer to interests of a similar character, and cannot

a therefore include the interests of raiyats. In this view of the matter, I must hold that the second branch of Mr. Rakshit's argument is also untenable. The result is that this appeal fails, and is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 379

B. K. MUKHERJEA AND SEN JJ.

Naresh Chandra Gupta and others — Decree-holders — Petitioners

v.

Lal Mamud Bhuiya and another — Judgment-debtors—Opposite Party.

b Civil Rule No. 1410 of 1941, Decided on 6th February 1942, issued in matter of application for setting aside order of Sub-Judge, Second Court, Mymensingh, D/- 23rd August 1941.

(a) Bengal Money-lenders Act (10 of 1940), S. 36, Proviso (ii) — Applicability — Conditions for, explained.

The Court in granting relief under the Act must refrain from doing anything which would affect a decree of Court. The only exception made is in respect of a decree which has two qualities, viz., (a) that it has been passed in a suit to which the Act applies and (b) that it was not fully satisfied by 1st January 1939. These two qualities must co-exist otherwise the decree cannot be touched. [P 380 C 2]

(b) Bengal Money-lenders Act (10 of 1940), S. 36, Proviso (ii)—"Fully satisfied"—Preliminary decree in mortgage suit is satisfied only when amount due on mortgage is realized in full.

c A preliminary decree in a mortgage suit gives the mortgagee the right to realize the amount declared to be due on the mortgage. Until that amount is realized in full either by direct payment by the mortgagor or by the proceeds of the sale of the mortgaged property held in execution of the final decree or by the execution of a personal decree, it cannot be said that the preliminary decree is satisfied. [P 380 C 2]

(c) Bengal Money-lenders Act (10 of 1940), S. 36, Proviso (ii)—"Affect"—Meaning—Direct interference with decree is not necessary—Preliminary decree liable to be reopened but final decree protected from interference—Preliminary

d **decree should not be reopened as it will affect final decree.**

Proviso (ii) of S. 36 does not merely prohibit direct interference with a decree; it says that the Court in granting relief "shall not do anything which affects any decree of a Court, other than a decree, etc." The words are very wide and cannot be interpreted as laying down a prohibition against direct interference only. Therefore, where a preliminary decree is not satisfied and is liable to be reopened but the final decree is satisfied and is protected from interference, the preliminary decree cannot be scaled down as the scaling down of the preliminary decree would most certainly affect the final decree and the sale held thereunder and consequently it would amount to a disregard of the prohibition contained in the proviso. [P 381 C 1]

(d) Bengal Money-lenders Act (10 of 1940), S. 36—Personal decree in mortgage suit—Execution proceeding pending—It can be reopened.

A personal decree in a mortgage suit, the execution proceedings in which are still pending can be reopened. [P 381 C 1] e

(e) Bengal Money-lenders Act (10 of 1940), S. 36, Proviso (ii) — "Fully satisfied" — Final decree in mortgage suit is satisfied if property is sold and sale proceeds applied towards satisfaction of mortgage debt even though claim on mortgage is not fully satisfied.

A final decree for sale directs that the mortgaged property mentioned in the preliminary decree, or a sufficient part of it, be sold and the sale proceeds applied in payment of the amount payable to the plaintiff under the preliminary decree. In case any surplus is left that is to be paid to the defendant or other persons entitled to recover the same. Hence, where the mortgaged property is sold, and the sale proceeds are applied towards the satisfaction of the f mortgage debt, all that could be done under the decree is fully and completely done; and the final decree for sale is fully and completely satisfied, even if the entire mortgage money is not realized as proviso (ii) of S. 36 speaks of satisfaction of decree and not of the claim. [P 381 C 2]

(f) Bengal Money-lenders Act (10 of 1940), S. 36 — Only personal decree in mortgage suit liable to be opened — Mode of reopening it explained.

Where the only decree that can be reopened and scaled down is the personal decree passed under O. 34, R. 6, Civil P. C., the personal decree is only for a residuary sum and rarely carries interest exceeding 6 per cent. per annum. For the purpose of determining whether the decree contravenes the provisions of cls. (1) and (2) of S. 30 of the Act, the g Court will have to look to the original claim in the mortgage suit and the amount allowed to the mortgagee by the preliminary decree. Although the preliminary decree cannot be amended, the Court will have to calculate the amount that can be allowed to the mortgagee if a new preliminary decree was made. From this the amount realized by sale of the mortgaged properties should be deducted and for the balance only a personal decree can be passed. If the balance is negative, nothing would be recoverable under the personal decree but the mortgagor cannot claim refund of any amount as that would be doing something which affects the final decree. [P 382 C 1]

Priya Nath Dutt — for Petitioners.

Birendra Kr. De — for Opposite Party.

h **SEN J.** — The petitioners in the year 1925 advanced Rs. 1400 to the opposite parties on a mortgage. The interest payable was 15 per cent. per annum with annual rests. They instituted a suit on that mortgage and obtained a preliminary decree on 6th December 1930, and a final decree on 14th January 1931. In execution of the mortgage decree the mortgaged property was sold on 22nd June 1933, and the sale proceeds were applied towards payment of the mortgage dues. The sum realized was insufficient to liquidate the dues and on 9th March 1935, the petitioners obtained a personal decree for the balance of Rs. 586 odd. The personal decree was put into execution when the opposite parties got the execution case stayed by an application to the Debt Settlement Board. Thereafter, they applied for relief under Sec. 36, Bengal Money-lenders Act, on the ground that the interest payable under the mortgage was in excess of that allowed under S. 30 of the Act and also on the ground that by the decrees the petitioners have obtained more than twice the principal

sum advanced. They claim that not only the personal decree but also the preliminary and final mortgage decrees should be reopened and recast. The petitioners resisted the application on several grounds. The learned Subordinate Judge has, I regret to say, dealt with the matter somewhat perfunctorily. He said : "Prima facie, therefore, there is reason to reopen the mortgage decrees. I hold that the preliminary, final and personal decrees should be reopened ; I direct accordingly." The questions involved are of some nicety and certainly merit a fuller discussion than that bestowed upon them by the learned Judge. The decree-holders now move against the order deciding to reopen the mortgage decrees.

It is not disputed that by the mortgage decrees the opposite parties have been made liable to pay interest at a rate higher than that fixed in S. 30, Bengal Money-lenders Act, and that they have also been made liable to pay more than double the principal sum borrowed. It is further admitted that the suit in which these decrees have been passed is 'a suit to which the Act applies' within the meaning of S. 2 (22), Bengal Money-lenders Act, inasmuch as the proceedings in execution of the personal decree are still pending. The petitioners contend that although all the elements necessary to justify the Court in granting relief under S. 36, Bengal Money-lenders Act, appear to be present nevertheless no relief can be granted inasmuch as proviso (ii) to S. 36 (1) which prohibits the Court from doing anything which would affect decrees of a certain type operates in this case and protects the decrees passed in their favour from any interference. Their argument is of a two-fold character. Firstly, it is contended that the preliminary and final mortgage decrees cannot be touched as they are decrees which have been fully satisfied prior to 1st January 1939 and therefore protected by proviso (ii) to S. 36. The personal decree, it is admitted, is liable to be reopened as it has not been fully satisfied. The second branch of the argument depends on certain other facts which I now propose to state. After the petitioners obtained their final decree they purchased the mortgaged property in execution of their decree. As they had purchased an undivided share and could not get actual possession, they instituted a partition suit being partition suit No. 166 of 1938 with respect to the property purchased by them, obtained a decree on 28th September 1939, and thereafter took possession of the property. It is pointed out that if the preliminary and final mortgage decrees are interfered with the partition decree will be affected and it is argued that the proviso mentioned above prohibits the Court from doing anything which would affect such a decree, it not being a decree passed in a suit to which the Bengal Money-lenders Act applies.

On behalf of the opposite parties, the argument is that the mortgage decrees do not fall within the protection of the proviso as they were not fully satisfied by 1st January 1939, and that consequently the Court may modify them in order to make them conform to the provisions of the Act. It was further contended in answer to the second branch of the argument that as the Court was not directly interfering with the partition decree the proviso to S. 36 (1) had no application. It will be necessary to examine the terms of S. 36 of the Act in order to determine the questions which have been raised. Section 36 is the section which empowers the Court to grant relief to a borrower in the various ways mentioned therein ; but there is a proviso to the section which is in the following terms :

" Provided that in the exercise of these powers the Court shall not (i) . . . . (ii) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the first day of January 1939, etc."

It is clear from the proviso that the Court in granting relief under the Act must refrain from doing anything which would affect a decree of Court. The only exception made is in respect of a decree which has two qualities, viz. : (a) that it has been passed in a suit to which the Act applies and (b) that it was not fully satisfied by the first of January 1939. These two qualities must co-exist otherwise the decree cannot be touched.

I now take up for consideration the first branch of the argument addressed to us on behalf of the petitioners, viz., that the mortgage decrees are of the kind protected by the proviso. I shall first examine the preliminary decree. Admittedly, it is a decree passed in a suit to which the Act applies. Can it be said that it was fully satisfied by 1st January 1939 ? The argument on behalf of the petitioners is that the preliminary decree merely declares the amount due on the mortgage and provides that if the amount is not realised the mortgagee may apply for a final decree and thereafter if the dues are still not satisfied for a personal decree. It is pointed out that in this case both applications have been made and granted before 1st January 1939, and it is suggested that upon the disposal of these applications the power of the preliminary decree is exhausted and the decree is therefore fully satisfied. I am not impressed by this argument. Even assuming that the power of the preliminary decree is exhausted it does not follow from this that it is satisfied. The force of a decree may be exhausted for various reasons other than satisfaction, e. g., it may be exhausted because its execution is barred by limitation. In such a case it cannot be said that the decree is fully satisfied. A decree grants the decree-holder certain rights, it can be said to be fully satisfied only when those rights have been fully realised and not otherwise. Satisfaction means obtaining the fruits of a decree. The preliminary decree not only declares the amount due on the mortgage but it directs the mortgagor to pay that amount : *vide* S. 5 of Appendix D, Civil P. C. It then goes on to provide that if the amount is not paid the decree-holder may apply for a final decree and thereafter in certain circumstances for a personal decree. The preliminary decree therefore gives the mortgagee the right to realise the amount declared to be due on the mortgage. Until that amount is realised in full either by direct payment by the mortgagor or by the proceeds of the sale of the mortgaged property held in execution of the final decree or by the execution of a personal decree, it cannot be said that the preliminary decree is satisfied. The preliminary mortgage decree in this suit is therefore a decree which was not fully satisfied before 1st January 1939. It is not a decree protected from interference by the proviso mentioned above as it falls within the exception to the proviso and it would have been liable to be reopened were it not for certain other circumstances which I shall presently state.

I next take up the final decree for consideration. Can it be said that it was fully satisfied by 1st January 1939 ? Long before that date, the mortgaged property was sold in execution of the final decree and the sale proceeds applied towards the liquidation of the mortgage debt. It is also admitted before us that before the aforesaid date, possession was given by the Court to the decree holder purchaser of the share purchased. The purchase being of an undivi-

ded share possession was given in the only way possible, viz., by the planting of a bamboo pole and a declaration by beat of drum. The final decree was merely for sale and for the application of the sale proceeds in a certain manner and for nothing else. All that was granted by the final decree was realised before 1st January 1939, and it seems to me that the decree must be taken to have been fully satisfied before that date. It is therefore a decree which is protected from interference by proviso (ii) to S. 36 (1) as it does not possess one of the two qualities which are necessary to bring it within the exception to the proviso.

The position therefore is this. The preliminary decree is not protected from interference by the proviso but the final decree is. Now if the preliminary decree is scaled down or otherwise interfered with, the final decree and the sale thereunder must by that very act be set aside. In these circumstances has the Court the power to modify the preliminary decree? Would not the exercise of such power 'affect' the final decree and thereby contravene the terms of the proviso? On behalf of the opposite parties the argument is that only direct interference with a decree is prohibited by the proviso. A reference to the words of the proviso would expose the unsoundness of this argument. The proviso does not merely prohibit direct interference with a decree it says that the Court in granting relief "shall not do anything which affects any decree of a Court, other than a decree, etc." The words are very wide and cannot be interpreted as laying down a prohibition against direct interference only. The scaling down of the preliminary decree would most certainly affect the final decree and the sale held thereunder and consequently it would amount to a disregard of the prohibition contained in the proviso. I am of opinion that for these reasons, the preliminary decree cannot be re-opened or scaled down.

The second branch of the argument urged on behalf of the petitioners must also succeed for the same reason. The partition decree is not a decree passed in a suit to which the Bengal Money-lenders Act applies : *vide* S 2 (22) which describes the meaning of the phrase "suit to which this Act applies." It is therefore a decree which is 'protected' and the Court is prohibited from doing anything which affects such a decree in the exercise of its powers under the Act. If the preliminary decree or final decree is re-opened the decree passed in the partition suit would most certainly be affected as its effect would be nullified and this is prohibited by the proviso to S 36 mentioned above. For these reasons, I hold that the order of the learned Judge is wrong and must be set aside. The preliminary and final mortgage decrees shall not be re-opened and shall remain unchanged. The personal decree being a decree which was passed in a suit to which this Act applies and which was not fully satisfied before 1st January 1939, is liable to be reopened and scaled down. It is admitted by the petitioners that they are debarred by the provisions of the Bengal Money-lenders Act from obtaining anything more than what they have already realised by the execution of the final decree. The personal decree cannot therefore give them anything more. It is consequently set aside. The rule is made absolute. There will be no order for costs.

B. K. MUKHERJEA J.—I agree and desire to add a few words. The decision of the question hinges upon the construction to be put upon S. 36, proviso (ii), Bengal Money-lenders Act. That proviso lays down that in exercise of the powers conferred by S. 36 of the Act "a Court cannot do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the 1st day of January 1939, ..." It is conceded by the learned Advocate for the petitioner that both the preliminary and the final decrees in this case are decrees in a suit 'to which this Act applies.' The reason is that the personal decree that is obtained under O. 34, R. 6, Civil P. C., though it is a separate decree, is passed in the mortgage suit itself; and as in the present case, a proceeding in execution of the personal decree was pending, on and after 1st January 1939, the mortgage suit must be regarded as a suit to which this Act applies, as defined in S. 2, cl. (22), Bengal Money-lenders Act. The whole controversy thus centres round the point, as to whether the preliminary and the final decrees for sale were fully satisfied by 1st January 1939. So far as the final decree is concerned, I have no hesitation in holding that it was so satisfied. A final decree for sale directs that the mortgaged property mentioned in the preliminary decree, or a sufficient part of it, be sold and the sale proceeds applied in payment of the amount payable to the plaintiff under the preliminary decree. In case any surplus is left that is to be paid to the defendant or other persons entitled to recover the same : *vide* Form No. 6, Appendix D, Civil P. C. Here the mortgaged property was sold, and the sale proceeds were applied towards the satisfaction of the mortgage debt long before 1st January 1939. All that could be done under the decree was fully and completely done, and it must be noted that S. 36, proviso (ii), Bengal Money-lenders Act, speaks of satisfaction of the decree and not of the claim. It cannot be disputed, therefore, that the final decree for sale was fully and completely satisfied even if the entire mortgage money was not realised.

So far as the preliminary decree is concerned, the position is undoubtedly different. A preliminary decree either directs the taking of accounts by a Commissioner as to what is due to the mortgagee, or the Court itself declares the amount as it finds due, and in either case there is an order on the defendant to pay the sum thus ascertained, or declared due, within a certain time, failing which the plaintiff is given the right to apply for a final decree for sale of the mortgaged property : *vide* Forms Nos. 5 and 5A, Appendix D, Civil P. C. The preliminary decree further provides that if the money realized by sale of the mortgaged property is not sufficient for payment, in full, of the amount due to the plaintiff, the latter would have the liberty to apply for a personal decree provided such remedy is open to him under the terms of the mortgage instrument, and is not barred by any provision of law. As the preliminay decree directs the defendant to pay a certain amount of money to the plaintiff, it is not certainly satisfied by sale of the mortgaged property, if the sale proceeds fall short of the decretal amount. The preliminary decree can, therefore, prima facie be reopened ; but then there is proviso (ii) to S 36 which says that the Court can do anything which affects any decree of a Court which has not been satisfied by 1st January 1939. If the preliminary decree is re-opened, the Court will have to make a new decree in conformity with the provisions of S. 34 of the Money lenders Act, and the decree-holder will have to apply for final decree again as laid down in S. 34 (a) (ii) of the Act. But that cannot be done, as it would have the effect of annulling the final decree already passed and the sale held thereunder. The preliminary decree, therefore cannot be re-opened.

The only decree that can be re-opened and scaled down is the personal decree passed under O. 34, R. 6, Civil P. C. The personal decree however is only for a residuary sum and rarely carries interest exceeding 6 per cent. per annum. The question then arises, as to how it can be re-opened. For the purpose of determining whether the decree contravenes the provisions of cls. (1) and (2) of S. 30 of the Act, the Court in my opinion will have to look to the original claim in the mortgage suit and the amount allowed to the mortgagee by the preliminary decree. Although the preliminary decree cannot be amended, the Court will have to calculate the amount that can be allowed to the mortgagee if a new preliminary decree was made. From this, the amount realised by sale of the mortgaged properties should be deducted and for the balance only a personal decree can be passed. If the balance is negative, nothing would be recoverable under the personal decree but the mortgagor cannot claim refund of any amount as that would be doing something which affects the final decree. In the present case the petitioner has expressly given up his claim under the personal decree. The result therefore is that the rule is made absolute. The order of the Court directing the re-opening of the preliminary and the final mortgage decrees is set aside. No order in respect of the personal decree is necessary as the petitioner has abandoned his claim under the same.

K.S./R.K. *Rule made absolute.*

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GENTLE J.

W. J. Younie and others — Plaintiffs

v.

Tulsiram Jankiram and others — Defendants.

Suit No. 1222 of 1940, Decided on 18th February 1942.

(a) Contract — Breach of — Person cannot be in better position by his own default.

A party to a contract cannot be in a better position by reason of his own default than if he had fulfilled his obligations : (1912) 2 K.B. 373, *Rel. on.* [P 384 C 2]

Where the defendant is to pay a security deposit under the contract and he is to forfeit that deposit in case of breach, his failure to pay the security deposit cannot affect the question whether the plaintiff is entitled to recover or to forfeit the deposit amount. That question can be approached in the same way as if such deposit had been paid to and retained by the plaintiff and the defendant was claiming its return. [P 384 C 2]

(b) Contract Act (1872), S. 74—Sum deposited as security for performance of contract — Forfeiture of—S. 74 does not apply—If amount is reasonable forfeiture is justified.

A deposit in the nature of a guarantee for performance of a contract is forfeitable upon default made by the depositor, and the forfeiture is justified if the amount is reasonable or not unreasonable and the provisions of S. 74 do not apply to such cases : *Case law referred.* [P 385 C 2]

(c) Letters Patent (Calcutta), Cl. 12 — Suit for injunction preventing party from removing materials lying on land outside jurisdiction of Court is not suit for land — Relief can be granted.

A suit for injunction with the object of preventing the defendant from taking moveable property belonging to plaintiff and lying on land outside the jurisdiction of the Court is not a suit for land outside the jurisdiction and the relief can be granted. [P 386 C 2]

S. Chaudhuri and F. Akbar — for Plaintiffs.

S. N. Banerjee (Sr.), H. N. Sanyal and S. R. Das and S. B. Sinha — for Defendants 1 and 2, respectively.

JUDGMENT. — The first three plaintiffs are the receivers appointed by defendant 4 bank on 16th July 1938 under its powers in indentures of mortgage and charge dated 7th May 1934 and 16th October 1935, by which Messrs. John King & Co. Ltd. (now in liquidation) charged their assets, including the Victoria Engine Works, Howrah, in favour of the bank. It is convenient hereafter to refer to plaintiffs 1, 2 and 3 as "the plaintiffs." No point arises with regard to vesting of the Engine Works in the plaintiffs, nor their right and authority to deal with and dispose of the property, buildings, plant and materials thereupon or to bring the present suit. In September 1939 the plaintiffs invited tenders upon the terms contained in their Conditions of Tender with the Conditions of Contract attached thereto. By letters passing between the plaintiffs and defendants 2 dated 30th September 1939 and 3rd October 1939 and by telephonic conversations between the plaintiffs and defendants 2 as agents for defendant 1, a contract was made between the plaintiffs and defendant 1. In the written statement of the latter the authority of defendants 2 to act and contract as agents for defendant 1 is denied. Mr. S. N. Banerjee, learned counsel for defendant 1, however, stated at the outset that his client admitted that throughout defendants 2 were agents for defendant 1, and the suit contract was made by them on his client's behalf upon the terms contained in the letters and abovementioned documents. In the plaint, it is alleged that by the suit contract defendant 1 agreed to pay Rs. 80,000 to the plaintiffs and to demolish the structures and buildings erected upon the site of the Victoria Engine Works and to remove the demolished and other materials, which then became his property, the contract to be completed by 28th March 1940. A further sum of Rs. 10,000, as security deposit, was payable with the tender which was to be forfeited, and all materials lying, erected or stored on the premises at the time of breach to be confiscated by the plaintiffs and to become their absolute property in the event of non-compliance by defendant 1 of the Conditions of the Contract. A further term of the contract provided that the ownership of all materials and structures should be vested in the plaintiffs so long as they were lying at the site and would only become defendant 1's property after removal.

On 4th October 1939, a meeting was held between the representatives of the plaintiffs, defendant 1 and defendants 2, respectively, when it was arranged that in addition defendant 1 should be entitled to remove the several effects set out in a record of the meeting dated 5th October 1939, in addition to the materials covered by the contract. The price of Rs. 80,000 was duly paid, but the security deposit of Rs. 10,000 was not furnished by defendant 1. On 3rd October 1939 the plaintiffs wrote to defendants 2 asking for this sum to be deposited, when the price of Rs. 80,000 was remitted, thirty days after possession was taken by defendant 1, and the letter confirmed that defendants 2's durwans had taken possession of the buildings. On 7th October 1939 defendants 2 replied stating they were calling upon

their principals to furnish them with the security deposit. On 2nd November 1939, defendants 2 wrote confirming they would be responsible for realisation and payment to the plaintiffs of the security deposit of Rs. 10,000 in the event of the purchaser failing to fulfil the terms and conditions of sale. The letter continues that in defendants 2's position as agents they had obligations to principals and buyers, and it was a recognised procedure that any amount demanded in the terms of sale by way of extra security deposit should be withheld by them as trustees until the due fulfilment of the contract. The plaintiffs replied on 4th November 1939 that they were not agreeable that defendants 2 should hold the security deposit and requested this to be forwarded immediately. Defendants 2 wrote to defendant 1 on 7th November asking for payment of the security deposit with the balance of the purchase price by 17th November 1939, failing which, without further notice, they would proceed to effect a resale of the structures. On 12th January 1940 the plaintiffs wrote to defendants 2 complaining of the removal of scrap, and that unless defendant 1 compensated them for this material already removed and suspended his salvage operations or entered into some acceptable agreement for its purchase, they would be compelled to call upon "you" for immediate payment of his deposit money. A copy of this letter was forwarded by defendants 2 to defendant 1 on 16th January.

On 23rd January the plaintiffs wrote to defendants 2 referring to a meeting on the previous Saturday. They confirmed they were prepared to accept Rs. 1200 for the purchase of the salvage rights of scrap material lying underground on the factory site. This letter appeared to terminate a dispute which had arisen regarding the right of defendant 1 to remove the scrap material from the site of the Engine Works. On 21st March 1940 (seven days before the expiration of the period for completion of the contract) defendants 2 wrote to the plaintiffs stating that it would not be possible to complete the work of clearing the site within the stipulated time and requesting an extension of three months ending June 1940. The letter continued that in view of the fact that the work of demolition had proceeded regularly from the day possession was given to defendant 1 the writers trusted the plaintiffs would see their way to allow the extension, and should they be agreeable "we" will accept the responsibility in regard to the extra security deposit of Rs. 10,000; and would undertake to be responsible for realization on the plaintiffs' behalf from defendant 1 of such expenses which would probably be incurred by way of municipal taxes.

On 6th April 1940 the plaintiffs wrote to defendants 2 that they were prepared to grant an extension up to 31st May 1940 for completion of the demolition of the structures and levelling of the site on the terms that: No further extension would be asked for or granted; the extension would not prejudice their right to call on "you" for payment to the plaintiffs of Rs. 10,000 security deposit at any time; materials and structures on the site after 31st May 1940 would remain the undisputed property of the plaintiffs; failure to complete by 31st May 1940 would be sufficient grounds to forfeit the Rs. 10,000 security deposit; "your" indemnity in respect of the foreshore land would continue; and "you" would reimburse the plaintiffs for all expenses which they might incur in consequence of the structures not having been removed by 28th March. Defendants 2 replied by letter on 8th April 1940 that the contents of the plaintiffs' letter were confirmed. On 27th May 1940 defendants 2 wrote to the plaintiffs asking for a further extension of time to the end of June 1940, to which the plaintiffs replied on 30th May that before they were prepared to consider any further extension, the security deposit of Rs. 10,000 should be forwarded. This request was repeated in another letter from the plaintiffs dated 4th June 1940. Defendants 2 wrote to defendant 1 giving the information received from the plaintiffs and asking for the security deposit to be sent to them two days later.

On 10th June 1940, the attorneys for defendant 1 wrote to defendants 2 that before their client made the original offer he was given to understand five months time would be allowed for demolition and removal, and possession of the premises would be afforded to defendant 1 immediately. The transaction was completed on 28th September 1939, and completion was to take place by 28th March 1940. It was a matter of record that possession of only a portion of the buildings was made over on 15th November 1939 and the plaintiffs continued to remain in occupation of a substantial portion of the buildings until the end of April 1940, and some portions still remained in their occupation, and their clients were entitled to have time until the end of September 1940 for completion of the demolition and removal of the materials. A copy of this letter was forwarded to the plaintiffs, and their solicitors wrote to defendants 2 on 15th June 1940 that the allegations in the letter of 10th June were not admitted and payment of the Rs. 10,000 was demanded to be made not later than 18th June. On that date the present suit was filed. The plaint alleges the time for completion, after the extension, expired on 31st May 1940, after which date defendant 1 wrongfully removed materials from the site and intended to continue such removal, the value of the property so taken was Rs. 5000. The plaintiffs claim, (1) an injunction (a) restraining defendant 1 from demolishing the buildings and structures or removing materials from the site and (b) restraining defendant 1 from entering upon the site, (2) a decree against both defendants for Rupees 10,000, (3) a decree against defendant 1 for Rupees 5000 or alternatively for an account of the value of the property removed after 1st June 1940, and a decree for the amount, and (4) a decree for Rupees 1000, the estimated additional taxes payable by the plaintiffs.

In his written statement, so far as is now material, defendant 1 alleges that vacant possession was not given even at the end of April 1940. The question of the security deposit was first raised by the plaintiffs in June 1940. The time to complete the demolition and removal had not expired by 1st June and would not expire before the end of September 1940, and he denied he had committed any breach of the agreement or was not entitled to remove the materials after 1st June, or the value of materials so removed was Rs. 5000. Further, that the forfeiture of Rs. 10,000 security deposit was a penalty, and the plaintiffs were entitled only to reasonable compensation, if any. In their written statement, defendants 2 admit they were agents for defendant 1 and took possession of some of the buildings and structures under the agreement. They acted solely as agents for defendant 1 and denied they are personally liable for the sum of Rs. 10,000 and in the event of being held to be responsible for this amount, they claim to be reimbursed by defendant 1.

Defendants 2 have made no claim against defendant 1 by way of a suit or by third party procedure, and the reimbursement mentioned in their written statement does not therefore arise. On 19th June 1940, an injunction was granted against defendant 1 restraining the removal of building and materials from the site, which injunction continues up to date. (After referring to the oral evidence in the case, the judgment proceeded.) I come to consider now the claim for Rs. 10,000 against both defendants. As against defendant 1, the claim is that under the contract he was to pay Rs 10,000 as security deposit, which was to be forfeited upon breach by him of a condition. Having failed to complete the demolition and removal by 31st May 1940, after an extension of time from 28th March 1940 (the date provided in the contract) there was a breach of the contract condition entitling the plaintiffs to forfeit the security deposit. This security deposit was not paid, as the contract required, and is now recoverable by the plaintiffs. The claim against defendants 2 is under two agreements made in November 1939 and April 1940, in which they agreed personally to be responsible for payment of the security deposit and are now liable for this sum upon the failure of defendant 1 to complete his contract on the due date.

The contract between the plaintiffs and defendant 1 was upon the terms contained in the tender form and the conditions of sale attached thereto and in the two letters dated 30th September and 3rd October 1939. The material terms are as follows : (1) All tenders should be accompanied by a security deposit of Rs. 10,000. (2) Defendant 1 to carry out the work of demolition strictly in accordance with the terms and conditions of the contract. (3) In the event of non-compliance with the conditions of the contract by defendant 1, the plaintiffs should have the right to forfeit the security deposit and in addition, to confiscate all materials lying, erected or stored on the premises at the time of the breach which again should become the absolute property of the plaintiffs, without any claim thereto by defendant 1. (4) The ownership of all materials in the buildings and structures to be demolished should be vested in the plaintiffs so long as such materials are lying on the site and to become the property of defendant 1 after removal from the site. (5) The work to be completed by 28th March 1940. (6) Defendant 1 to pay the plaintiffs Rs. 80,000.

Mr. Banerji contended that term 3 shows that upon the making of the contract the property in all structures and materials passed to defendant 1, as it was provided that in the event of a breach by him the materials then upon the site should be confiscated and again become the property of the plaintiffs. This, he argued, indicated that from the making of the contract the materials belonged to defendant 1, otherwise they could not again become the plaintiffs' property. This term, he said, is at variance with the provisions in term 4, which comes later in the contract and should be ignored as having no effect. In my opinion, this is not correct. Term 3 is subject to term 4, by which the property in the materials remained in the plaintiffs until removal. Term 3 makes it clear that after the breach by defendant 1 he had no right to remove the materials in order to perfect his title. Reading these two terms together, the contract provides that the ownership or property in the materials remained with the plaintiffs until actually removed by defendant 1 and he could not perfect his title to materials not removed by the specified date.

Whilst term 1 provides that the security deposit should accompany the tender, the suit contract having been made upon the terms contained in the tender form in which this provision appears, the sum of Rs. 10,000 was payable by defendant 1 to the plaintiffs as security deposit upon the making of the agreement. In para. 2 of his written statement defendant 1 alleges that he purchased the structures lying on the site, and there can be no doubt that the suit contract was for the sale of the structures and materials as well as for the work of demolition. The property in the materials did not pass under the contract until the buildings were demolished and the materials removed. The sum of Rs. 10,000 was payable in addition to the contract price of Rs. 80,000, and it was expressed to be a security deposit. It was a guarantee that defendant 1 would carry out his part of the contract and as a form of earnest to show he meant business.

The date of completion under the contract was 28th March 1940, which was subsequently extended to 31st May 1940 It has not been contended that this extension affected the plaintiffs' right of forfeiture, nor that time was not the essence of the contract. Further, it is not disputed that defendant 1 failed to demolish and remove all the structures and materials by 31st May 1940. Whilst defendant 1 did not pay the security deposit as the contract required, his failure to do so cannot affect the question whether the plaintiffs are entitled to recover or to forfeit the sum of Rs. 10,000. Defendant 1 cannot be in a better position by reason of his own default than if he had fulfilled his obligations : *see* (1912) 2 K.B. 373.[1] The claim by the plaintiffs for Rs. 10,000 and the question whether the security deposit is forfeitable can therefore be approached in the same way as if it had been paid to and retained by the plaintiffs and defendant 1 was claiming its return. Defendant 1 relies upon S. 74, Contract Act, which provides as follows :

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, or if the contract contains any other stipulation by way of penalty the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for."

The argument against the plaintiffs' claim is that the sum of Rs. 10,000 is a penalty, and under S. 74 the plaintiffs can recover only reasonable compensation for the breach by defendant 1 to complete the demolition and removal. In the plaint no damage is alleged to have been sustained and no claim as such is made, and as no loss has been proved, consequently the claim must fail. In support of this argument, three decisions of the Judicial Committee were cited. In 33 C. W. N. 949,[2] there was a contract for the sale of a serai in Peshawar, which provided that the party retracting from the contract should pay Rs. 10,000 as damages. The purchasers were held to be in default and the sellers sought to recover this sum. In the judgment at p. 951 their Lordships of the Privy Council said

"The effect of the Indian Contract Act of 1872, S 74, is to disentitle the plaintiffs to recover simpliciter the sum of Rs 10,000 whether as penalty or

1. (1912) 2 K. B. 373 : 81 L.J.K.B. 885 : 106 L. T. 763 : 28 T.L.R. 324, Dewar v. Mintoft.
2. ('29) 16 A.I R. 1929 P.C. 179 : 117 I.C. 485 : 33 C. W. N. 949 (P.C.), Bhai Panna Singh v. Arjun Singh Bhajan Singh.

liquidated damages. The plaintiffs must prove the damages they have suffered."

The evidence was that Rs. 1000 was the loss which was treated as the sum to which the plaintiffs were entitled, subject to setting off a sum of Rs. 500 earnest money. In (1913) A. C. 319,[3] payment of the purchase price was to be by instalments in a contract for the sale of land. Upon default of any instalment the agreement was to be null and void and all payments made were to be forfeited to the vendor. It was pointed out that this provision became more and more severe as the agreement approached completion and the money liable to confiscation became larger. The defaulting purchaser was relieved from what was held to be a penalty. In both these two cases no sum was payable as earnest money or as security or guarantee for performance of the contract. In the first case, the sum of Rupees 10,000 was payable as damages for the breach, and in the second case the instalment payments towards the purchase price became forfeitable. In 27 C.W.N. 77[4] by cl. G of a contract the respondent was to accept the title to some property upon the appellant making out a marketable title thereto, and if the purchase was not completed within one month thereof the interest upon the part of the principal money secured by a mortgage and further charges should cease to run and the respondent should be deemed to be the owner of the property, subject to the charges and mortgage in cl. A of the contract, as well as to all existing encumbrances. The appellant did not make out a marketable title and could not therefore enforce the provisions in cl. G. At p. 82 their Lordships observed that they thought that even if he had not been in default and the provision in cl. G might be regarded as one in the nature of a penalty, the appellant had not made out any loss. In this case again, there was nothing paid as security deposit or as earnest or guarantee for the performance of the contract, which was to be forfeited upon the failure to make performance.

In (1884) 27 Ch.D. 89[5] £500 was paid as deposit and part payment of the purchase money. The purchaser failed to complete by the contract date and the vendors sold to someone else. The purchaser sued for specific performance, which was refused, and for the return of his deposit. It was held that the deposit, being in the nature of a guarantee, was forfeited and should not be returned. Fry L. J. observed ; "It (the deposit) is not merely a part payment, but is then also an earnest to bind the bargain." This decision was referred to with approval and applied by the Judicial Committee in 1924 A.C. 980.[6] In 29 Mad. 118[7] it was held that neither S. 74, Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums upon a breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling while others are not, and the forfeiture of a sum deposited as security for performance will not be interfered with, if reasonable in amount. This decision was referred to with approval by a Division Bench of this Court in 36 Cal. 960[8] in which Rs. 20 was paid upon the making of a hire purchase agreement for a sewing machine, for which monthly instalments of Rs. 5 were payable until Rs. 145 had been paid, when the deposit of Rs. 20 would be credited to the hirer and the machine would become his property. The contract provided that if the hiring was terminated by the hirer and/or the machine returned to the owner, the hirer should not be entitled to the credit or return of any money paid by him. The hirer defaulted. Later, the machine was returned to the owners. It was held that the owners were entitled to forfeit the deposit of Rs. 20 the amount not being unreasonable. 38 Mad. 178,[9] followed the decision in 29 Mad. 118.[7]

In my opinion, the three decisions of the Judicial Committee cited by Mr. Banerji do not cover the present case. In none of them was a deposit made to secure or guarantee the performance of a contract. In all the other cases to which reference has been made, particularly in (1884) 27 Ch.D. 89,[5] which the Judicial Committee referred to with approval in 1924 A.C. 980[6] it was held that a deposit in the nature of a guarantee for performance of a contract is forfeitable upon default made by the depositor, and in the Indian cases the forfeiture was held to be justified if the amount was reasonable or not unreasonable. In my view, these cases are in point and cover the present case. The sum of Rs. 10,000 was expressly agreed to be a payment as a security deposit. It was by way of guarantee and to show the earnestness of defendant 1 to complete his part of the contract. The price payable under the agreement was Rs. 80,000 and the subject-matter of the contract was considerable. Substantial buildings and structures upon a large site were to be demolished and the materials removed. The original time for completion was six months, later extended to eight months, indicating the extent of the subject-matter. I do not think that Rs. 10,000 in all the circumstances was an unreasonable sum as security by way of guarantee for due performance by defendant 1 nor that the right to confiscate unremoved materials makes the provisions unreasonable. I hold that the provisions of S. 74, Contract Act, do not apply, and the plaintiffs are entitled to recover from defendant 1 the sum of Rs. 10,000 which had it been deposited as the contract required, the plaintiffs would have been entitled to forfeit for defendant 1's failure to complete the contract within time.

The claim for Rs. 10,000 against defendants 2 is on the ground, as stated earlier, that in November 1939 they agreed to be responsible for the realisation of payment of this sum if defendant 1 failed to fulfil the terms of his contract, and further under an agreement contained in two letters dated 6th and 8th April 1940. No question arises of an oral contract by which the plaintiffs are entitled to recover against defendants 2. Learned counsel for the plaintiffs conceded that the only contract in November upon which he could rely must be obtained from letters passing between the plaintiffs and defendants 2 dated 2nd and 4th November. In the first letter defendants 2 wrote that they confirm they would be responsible for realization and

3. (1913) 1913 A.C. 319 : 82 L.J.P.C. 77 : 108 L.T. 306: 57 S.J. 338: 29 T.L.R. 319, Kilmer v. British Columbia Orchard Lands Ltd.

4. ('22) 9 A. I. R. 1922 P. C. 339 : 69 I. C. 163 : 27 C. W. N. 77 (P. C.), Banku Behari Dhur v. J. C. Galstaun.

5. (1884) 27 Ch.D. 89 : 53 L.J.Ch. 1055 : 50 L. T. 573 : 32 W.R. 802 : 48 J.P. 773, Howe v. Smith.

6. (1924) 1924 A.C. 980 : 93 L.J.P.C. 237 : 131 L.T. 645 : 40 T.L.R. 678, Mayson v. Clouet.

7. ('06) 29 Mad. 118 : 16 M.L.J. 37, Manian Patter v. Madras Railway Co.

8. ('09) 36 Cal. 960 : 4 I.C. 418, Singer Manufacturing Co. v. Raja Prosad.

9. ('15) 2 A.I.R. 1915 Mad. 896 : 19 I.C. 462 : 38 Mad. 178 : 24 M.L.J. 488 (F.B.), Natesa Aiyer v. Appavu Padayachi.

payment to the plaintiffs of the security deposit of Rs. 10,000 in the event of the purchaser failing to fulfil the terms and conditions of same, and that as agents defendants 2 had obligations both to principals and buyers, and that any extra security deposit should be held by them as trustees. This was an offer which defendants 2 made to the plaintiffs. The plaintiffs replied on 4th November. They recorded they were not agreeable that defendants 2 should hold the security deposit and requested it to be forwarded to the plaintiffs immediately. The offer by defendants 2 was therefore not accepted. Consequently, there was no contract at this time between the plaintiffs and defendants 2 and no obligation fell upon the latter to pay Rs. 10,000 to the plaintiffs and the plaintiffs therefore had no right to call upon them to make such payment. Between November 1939 and April 1940 there is no question that the plaintiffs acquired any right to call upon defendants 2 to pay to them Rs. 10,000 the security deposit. On 6th April 1940, the plaintiffs wrote to defendants 2 setting out the terms upon which the time to complete the work under the contract between themselves and defendant 1 would be extended to 31st May 1940. These terms were accepted by defendants 2 in their letter of 8th April 1940, defendants 2 at that time being the agents for defendant 1. Para. 2 of the plaintiffs' letter of 6th April reads as follows : " The extension of time will not prejudice our right to call on you 'for payment to us of the Rs. 10,000 security deposit at any time'."

This provision presupposes that at the date the letter was written the plaintiffs had a right to look to defendants 2 for payment, which existing right was not to be prejudiced. There was no such existing right, as no concluded contract was made in November 1939 under which defendants 2 were under an obligation to make the payment of Rs. 10,000 and no right had been acquired subsequently. At the date this letter was written, the plaintiffs were solely entitled to look to defendant 1 alone for payment of this sum under the contract with him, but they had not a similar right which they could exercise against defendants 2. The words which I have quoted above do not, in my view, create a new obligation by defendants 2 to pay Rs. 10,000 to the plaintiffs but retain the existing right enforceable against defendant 1. In my opinion, and I hold, there was no contract either in November 1939 or in April 1940 by which defendants 2 were to pay Rs. 10,000 to the plaintiffs upon the failure by defendant 1 to carry out the terms of his agreement.

The next matter for consideration is whether the plaintiffs are entitled to an injunction. The site of the Victoria Engine Works is in Howrah, which is outside the original jurisdiction of this Court. It is contended therefore that an injunction cannot be granted, as it affects the proprietary and possessory title to land outside the jurisdiction and is therefore a suit for land within cl. 12 of the Letters Patent of 1865. The case in 54 Cal. 655[10] was cited in support of this contention. Learned counsel for the plaintiffs abandoned the claim to an injunction restraining defendant 1 from entering upon the site and stated that his clients would restrict their claim to part of the injunction sought in para. 1 of the plaint, namely, to restrain defendant 1, his servants or agents from removing any materials whatsoever from the site. This being so, there is nothing in the pleadings raising an issue as to the plaintiffs' title. Under the terms of the contract, when defendant 1 failed to complete the contract by 31st May 1940, he had no longer any right to remove the materials after that date, and the property in them remained with the plaintiffs and could not be acquired or passed to defendant 1. The claim to an injunction which is now sought is not a suit for land outside the jurisdiction, although the materials are lying on such land, the object being to prevent defendant 1 from taking moveable property belonging to the plaintiffs. The statements in the affidavit of Tulsiram Shaw, to which reference has been made, are admissions that defendant 1 had removed materials after 31st May, which he had no right to do, and an assertion that those materials were his property. This justified the application for, and the grant of, the interim injunction, although the injunction which was granted was wider in its terms than that which is now sought. In my view, the plaintiffs are entitled to the relief which they now seek. No other grounds by way of want of jurisdiction were urged against the injunction being granted.

As pointed out already, there is no evidence of the value of the materials removed after 31st May 1940, nor any grounds justifying a direction for an account to be taken. Further, there is also no evidence that the sum of Rs. 1000 or any sum was paid or is a liability of the plaintiffs for additional taxes payable in consequence of the extension of the time for completion of the contract. There will be a decree in favour of the plaintiffs against defendant 1 for an injunction restraining him, his servants or agents from removing any materials belonging to the plaintiff from the site of the Victoria Engine Works, Howrah, and for the sum of Rs. 10,000, with interest at the rate of 6 per cent. together with the costs of the suit, which will carry interest at the same rate from taxation. Defendants 2 are dismissed from the suit with costs against the plaintiffs, with a like order as to interest. All other claims fail and are dismissed, but without costs. Certificate for two counsel for all parties.

K.S./R.K. *Order accordingly.*

10. ('27) 14 A.I.R. 1927 Cal. 768 : 104 I. C. 721 : 54 Cal. 655, Goculdas v. Chaganlal.

C. P. C.—

(c) ('40) Chitaley, L. P. (Cal.) Clause 12 N. 3 Heading "Calcutta High Court."

('41) Mulla, Page 1390 Note "Suit for land .... property."

A. I. R. (29) 1942 Calcutta 386

B. K. MUKHERJEA AND BLANK JJ.

Purna Chandra Chakrabarty and others — *Plaintiffs* — *Appellants*

v.

Kalipada Roy and another — *Defendants* — *Respondents.*

Appeal No. 810 of 1939, Decided on 18th February 1942, from appellate decree of Addl. Dist. Judge, 2nd Court, Dacca, D/- 30th January 1939.

(a) Hindu law—Religious endowment—Permanent image of deity is not necessary.

A permanent image of a deity is not necessary before a valid gift can be made under Hindu law: ('17) 4 A.I.R. 1917 Cal. 292 and 37 Cal. 128 (F.B.), *Rel. on.* [P 387 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 63, 58 — Scope of suit under R. 63 — Claim by one of

beneficiaries under trust disputing alienability of property allowed—Scope of suit explained.

Where one of the beneficiaries under a trust prefers a claim under O. 21, R. 58 and disputes the alienability of the property which was attached, the scope of a suit under O. 21, R. 63 is not only to determine whether that particular claimant has any right or not. The suit is to establish that the property belongs to the judgment-debtor and is consequently saleable in execution of the decree.

[P 388 C 2]

(c) Hindu law—Religious endowment — Absolute debuttar held created.

Where under a will the entire income of the properties was to be used for religious purposes, and the heirs of the testator should not have a right to appropriate the residue, if any, after defraying the expenses:

Held that the testator certainly did not contemplate that any surplus would be left and an absolute debuttar in respect of the property was created.

[P 388 C 2]

(d) Transfer of Property Act (1882), S. 122—Failure to stamp document does not affect validity of transaction.

Failure to stamp a document which has got to be stamped under the provisions of the Stamp Act does not affect the validity of the transaction embodied in the document; it merely renders the document inadmissible in evidence: ('26) 13 A.I.R. 1926 Cal. 877, *Rel. on.* [P 389 C 1]

Therefore where the deed is delivered over to the donee immediately after execution it would be sufficient acceptance of the transfer by the donee under S. 122 and the deed becomes effectual from the very moment of its execution subject to its being stamped and registered as required by law: ('27) 14 A.I.R. 1927 P. C. 42, *Rel. on.* [P 389 C 1]

Prokash Chandra Pakrashi, Jatindra Nath Sanyal and Sibakali Bagchi — for Appellants.

Dr. S. C. Basak, Jatindra Mohan Chaudhuri and Rabindra Mohan Chaudhuri — for Respondents.

JUDGMENT. — This is an appeal on behalf of the plaintiffs and it arises out of a suit commenced by them under O. 21, R. 63, Civil P. C., following an adverse order in a claim case. The material facts may be shortly stated as follows: There were two money decrees obtained against the minor defendants as heirs and legal representatives of their father, Ashutosh Roy, on 19th June 1933—one by plaintiff 1 alone and the other by all the three plaintiffs together. Both these decrees were put into execution, in Execution Cases Nos. 81 and 82 of 1936, and the decree-holders got an order for attachment of certain properties in the hands of the judgment-debtors, including the properties in suit. Thereupon two claim petitions were filed — one on behalf of Idol Sarat Kali and the other by Idol Joy Kali, both the deities being represented by the judgment-debtors as shebaits, for release of the properties described in Schs. 1 and 2 of the present plaint, on the allegation that they were debutter properties owned and possessed by these two deities, and hence could not be attached and sold in execution of personal decrees against the shebaits. Both the claims were allowed and the plaintiffs decree-holders thereupon commenced this present suit for a declaration that they were entitled to attach and sell these properties in execution of their decrees. The two deities, who were made defendants 1 and 2 in the suit, were represented by the judgment-debtors as shebaits. The judgment-debtors were also made parties in their personal capacity. Both the Courts below have dismissed the plaintiffs' suit and they have come up on appeal to this Court.

For the purpose of proving that the properties in suit were debutter properties, the shebaits relied upon two documents; one was a will executed by Ram Kishore, a maternal ancestor of Akshoy, the father of Ashutosh, in 1274 B.S. by which the properties described in Sch. 1 to the plaint were alleged to have been dedicated to Idol Sarat Kali; the other was an arpannama created by Akshoy himself shortly before his death in 1323 B.S. by which a debutter was made in favour of deity Joy Kali in respect to the property described in Sch. 2 to the plaint. The Courts below were of opinion that both these documents were genuine and bona fide deeds and that they created a valid and absolute debutter in respect of both the properties. It is the propriety of these findings that has been challenged before us in this second appeal.

With regard to the will of Ram Kisore, Mr. Pakrashi, who appears for the appellants, has contended before us that even if it was a genuine document it did not create either a valid or an absolute debutter. It is said, in the first place, that there was no deity by the name of Sarat Kali; it was the name of Goddess Durga herself who is worshipped once every year during the autumn months, and as there was no permanent image of the Goddess, who is only worshipped for four days in the year, no dedication of property to such deity was permissible or valid in law. It is argued, in the second place, that under the will of Ram Kishore the property was not set apart for the worship of Sarat Kali alone; it was to be used for a variety of purposes including the daily worship of the household deities the performance of the Sradh of the ancestors, and gifts to spiritual preceptors and Brahmins, etc., and it cannot be said that the property was owned by Sarat Kali. The third argument is that in any view of the case what was created was not an absolute or complete debutter, but a mere charge for the expenses of worship of Sarat Kali and the performance of other religious and charitable duties. As regards the arpannama created by Akshoy, the learned advocate contends that it failed as a deed of gift as defined in the Transfer of Property Act, and as it was neither stamped nor registered during the life-time of the donor there was no acceptance of the property by the donee prior to the death of the donor as is necessary under S. 122, T. P. Act. We will deal with these points in their proper order. So far as the first point is concerned, it is perfectly true that the deity Sarat Kali has no permanent image, it is the Goddess Durga that is worshipped by that name in the autumn season every year; and, as is well known, an earthen image of the deity is prepared each year and after the ceremonies, which last for four days, are over, it is immersed in a river. It cannot be said, however, that a permanent image of a deity is necessary before a valid gift can be made under Hindu law. The same question was raised in 20 C.W.N. 901[1] and a Division Bench of this Court answered it in the following manner:

"The absence of a permanent image has also been commented upon. Such an image is not absolutely essential for dedication to a Thakur. The Durga Puja is a periodical festival in Bengal and clay images of the Thakur are built every year and thrown into a river after the Puja is over. We agree

1. ('17) 4 A.I.R. 1917 Cal. 292 : 35 I.C. 127 ; 20 C.W.N. 901, Asita Mohon v. Nirode Mohon.

with the trial Court that Harishpur is debutter property."

This is quite in accordance with what was laid down in the Full Bench case in 37 Cal. 128.[2] It was observed by more than one learned Judge in that case that according to Hindu Scriptures the god by whatever name he is adored is ever existent and whether a particular image did or did not exist at a particular time was not at all material. "It is immaterial" so runs the judgment of Mookerjee J. "that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in course of the year." One of the reasons put forward by Chatterjea J. in that case in support of the decision of the Full Bench was that gifts of property for the purpose of periodical Pujas of Durga, Kali, etc., or for the celebration of periodical festivals were from very ancient times given effect to by our Courts. "If a gift in favour of the deity whose image has to be prepared and destroyed periodically" thus observed the learned Judge, "is valid, I do not see any reason why a gift in favour of a deity whose image is to be prepared once and for all, except for any reason for reconstruction coming to pass, should be invalid." The first point raised by Mr. Pakrashi must therefore be overruled.

To appreciate the second point raised by him it would be necessary to refer to the relevant clause in the will of Ram Kisore where the bequest in favour of Sarat Kali was made. The provision is contained in para. 2 of the will which reads as follows :

"The great Puja of the Goddess in the Autumn season and the celebration of Syama Puja on the Mahastami day is being performed by me since 1235 B. S. Further, unless immovable properties having income commensurate with the expenses of the daily worship of the deities and those of Sradh, etc., are set apart it would be difficult for the Ejmali heirs to perform these rites properly. Therefore, I fix hereby the property mentioned in Sch. 2, and with the income of this property the aforesaid rites as well as the annual gifts to the families of the spiritual preceptor and the priest as also to pious Brahmins should be made."

It would be clear from this passage that the property mentioned in Sch. 2 of the will, which corresponds to Sch. 1 of the present plaint, was given not merely for the worship of deity Sarat Kali, but it was to be used for several and other religious and charitable purposes expressly specified in the will. Of course, the household gods, for whose daily worship the debutter was created, were not mentioned by name, and the provision regarding gifts to pious Brahmins priests, and spiritual preceptors, etc., was also very general. The document was certainly not drawn up artistically, and the view put forward by Dr. Basak that the named deity Sarat Kali was to hold the property subject to the obligation of meeting the expenses of the household idols and the Sradh of the ancestors, etc., though not altogether untenable, obviously implies an undue straining of the language used by the testator. The document, however, is an ancient one and we have this further fact in support of Dr. Basak's contention that for a period of 70 years since the execution of the document, the deity Sarat Kali was the recorded owner of this property in the Collectorate as also in the zamindary papers. The plaintiffs themselves were co-owners in respect to this property, and to their knowledge the property was all along treated as belonging to Sarat Kali. But even if we do not accept this view, the only other conclusion that one can arrive at is that there was no gift of the property to any particular deity in the proper sense of the word, but that the testator created a trust for certain specific religious and charitable purposes. The property would in that event be regarded as a trust property in the hands of the legal representatives, and it would be equally incompetent to the plaintiffs' decree-holders to proceed against it for satisfaction of a decree obtained against the heirs personally.

Mr. Pakrashi argues that the claim under O. 21, R. 58, Civil P. C., was preferred in respect of this property on behalf of deity Sarat Kali alone and the scope of a suit under O. 21, R. 63 is only to determine whether that particular claimant has any right or not. This contention is manifestly unsound. The person who is aggrieved by an adverse order in a claim case files the suit under O. 21. R. 63 of the Code to establish the right he claims to the property in suit. The right which the plaintiffs assert is that the property belonged to the judgment-debtors and was consequently saleable in execution of the decree obtained by them. If it is held that the property is trust property and does not belong to the judgment-debtors personally then also the plaintiffs' suit must fail. The deity Sarat Kali in that event would be regarded as one of the beneficiaries under the trust, and it is enough that one of the beneficiaries preferred a claim under O. 21, R. 58 of the Code and disputed the alienability of the property which was attached by the decree-holder. So in any view of the case the plaintiffs' contention must fail.

The next point raised by Mr. Pakrashi is that no absolute debuttar was created by the will of Ram Kisore and at the most the expenses of the worship of the deity and the performance of other religious duties were made a charge upon the property. Mr. Pakrashi lays stress upon the fact that there were no words in the will signifying gift or dedication of the property to any of the deities, and there was no indication also that the entire income of the property was to be spent for the particular religious purposes. In para. 2 of the will quoted above, the testator has used the word "*nirdista*" which means fixed or set apart, but para. 16, which is the penultimate paragraph in the will, clearly says that the testator's son and grandson "will as shebaits look after and arrange for the cultivation and settlement and disposal, etc., of the properties that have been made a gift of for the purpose of the performance of the worship of the deities in the manner aforesaid." This proves that there was in fact a gift of the property to the deity or deities and the son and grandson of the testator were to hold it as mere Shebaits of the latter. The words "*kharacher pariman*" which mean commensurate with the expenses used in para 2 of the will set out above indicates, in our opinion, that the entire income of the properties is to be used for religious purposes, and the heirs should not have a right to appropriate the residue, if any, after defraying the expenses. The testator certainly did not contemplate that any surplus would be left. Our conclusion therefore is that the will of Ram Kisore did create an absolute debuttar in respect of the property No. 1.

We now come to property No. 2 with regard to which there is the arpannama executed by Akshoy in August 1916. It has been found as a fact by both the Courts below that the arpannama was a bona fide document and was not executed to delay or de-

2. ('10) 37 Cal. 128 : 3 I. C. 642 : 10 C.L.J. 355 : 14 C.W.N. 18 (F.B.), Bhupati Nath v. Ram Lal.

feat the creditors of the grantor. The document was executed just two days before the death of Akshoy, and as no stamps could be procured at that time it was written on plain demi paper and signed by the donor. The document was stamped after the death of Akshoy under orders of the Collector of the district and was thereafter duly registered, the document being presented for registration by Ashutosh the son and heir of Akshoy. Mr. Pakrashi argues that the arpannama was neither a complete nor a legally valid document when it was signed by Akshoy without the requisite stamps being attached to it, and as Akshoy died before the deed was completed there could not be an acceptance by the donee during the lifetime of the donor as is required under S. 122, T. P. Act. We do not think that we can accept this contention as sound. Failure to stamp a document which has got to be stamped under the provisions of the Stamp Act does not affect the validity of the transaction embodied in the document ; it merely renders the document inadmissible in evidence : *vide* the case in 53 Cal. 515.[3]

Under S. 35, Stamp Act, with the exception of certain specified classes of instruments, all such unstamped or insufficiently stamped documents may be admitted in evidence on payment of the requisite stamp and penalty prescribed therein. In this case the stamps payable under the Act were actually paid by Ashutosh after the death of the donor under orders of the Collector and it was a duly stamped document when it was presented for registration. No exception can be or has been taken to the validity of the document as it now stands. The donee had done all he could possibly do to perfect the transaction, and we cannot say that the gift was incomplete at the time of the execution of the deed simply because certain fiscal requirements were not complied with. It is not disputed that the deed was delivered over to the donee immediately after execution and it would be sufficient acceptance of the transfer by the donee under S. 122, T. P. Act. The deed therefore became effectual from the very moment of its execution subject to its being stamped and registered as required by law: *vide* in this connection the case in 54 I.A. 89.[4] Thus, all the contentions raised by the appellants fail and the appeal is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

3. ('26) 13 A.I.R. 1926 Cal. 877 : 95 I.C. 483 : 53 Cal. 515 : 43 C.L.J. 493 : 30 C.W.N. 609, Joyman Bewa v. Easin Sarkar.

4. ('27) 14 A.I.R. 1927 P.C. 42 : 100 I.C. 105 : 50 Mad. 193 : 54 I.A. 89 (P.C.), Kalyana Sundaram v. Karuppa Mooppanar.

Hindu law —
(a) ('40) Mulla, Page 478, Pt. (b).
('38) Gour, Page 739 Pt. 6.
(c) ('40) Mulla, Page 476, Section 408.
('38) Gour, Page 812, Notes 1990-1991.
C. P. C. —
(b) ('40) Chitaley, O. 21, R. 63, N. 7.
('41) Mulla, Page 847 Note "Scope of suit under this rule."
T. P. Act —
(d) ('36) Mulla, Page 672, Pt. (t).
('34) Mitra, Page 651, N. 629.

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B. K. MUKHERJEA AND BLANK JJ.

Barada Charan Nandi — Judgment-debtor — Petitioner

v.

Eastern Union Bank, Ltd., Decree-holder and others — Judgment-debtors — Opposite Party.

Civil Rule No. 169 of 1942, Decided on 13th March 1942, issued in matter of application for setting aside order of Sub-Judge, First Court, Chittagong, D/- 29th November 1941.

Bengal Money-lenders Act (10 of 1940), Ss. 36, 2 (22)—Applicability of S. 36 (6)—Decree must be one passed in suit to which Act applies — Decree passed on hundi—Section does not apply.

To bring a case within the purview of S. 36 (6), it is necessary that the decree must be one passed in a suit to which the Act applies and which was not fully satisfied on the 1st day of January 1939. Therefore, where a decree has been passed on a hundi, the Act does not apply and the decree cannot be re-opened under S. 36 : ('41) 28 A.I.R. 1941 Cal. 498 (S.B.), *Expl.* [P 390 C 1]

Anil Kumar Das Gupta — for Petitioner.

Naresh Chandra Banerji and Nalini Ranjan Bhattacharji — for Opposite Party.

B. K. MUKHERJEA J.—This rule was obtained on behalf of the judgment-debtor, and it is directed against an order made by the Subordinate Judge, First Court, Chittagong, rejecting an application of the petitioner for re-opening of the decree under S. 36, Bengal Money-lenders Act. The facts are very simple. The opposite party No. 1 advanced a sum Rs. 5000 to the petitioner on a hundi or bill of exchange drawn by the latter and accepted by opposite party No. 2 and the predecessor of opposite party No. 3. Some payments were made by one of the acceptors, but there being default in payment of the rest, the opposite party No. 1 instituted a suit upon the bill of exchange and obtained a decree on 13th February 1932. The decree was executed several times and the last execution case is still pending. The Court below has rejected the application of the borrower on the ground that the money being advanced on the basis of a hundi which was a negotiable instrument other than a promissory note, was not a loan within the meaning of the Bengal Money-lenders Act, and consequently the provisions of the Act were not attracted to this case. The Subordinate Judge further found that the loan was a commercial loan and on that ground too it was excluded from the operation of the Act. We may say at the outset that we are not at all satisfied that the learned Subordinate Judge was right in holding that the loan was a commercial loan. The evidence adduced on the point is pure hearsay and is totally insufficient to support the finding. Be that as it may, the other finding remains, and the learned advocate for the petitioner frankly admits that the money was advanced on a hundi which is not a promissory note. On the face of it therefore the provisions of the Money-lenders Act are not applicable to the present case. The learned advocate for the petitioner says however that as on the hundi a decree had been passed, it is to recover a judgment debt and not a debt due on a hundi that the proceedings are now pending. As the debt created by the hundi is now merged in the decree, the prohibition contained in S. 2 (12) (e), Bengal Money-lenders

Act, is no longer applicable. In support of his contention the learned advocate has placed reliance on the decision of the Special Bench of this Court in 45 C.W.N. 609.[1]

In our opinion there is no substance in this contention. To bring a case within the purview of S. 36 (6), Bengal Money-lenders Act, it is necessary that the decree must be one passed in a suit to which the Act applies and which was not fully satisfied on the 1st day of January 1939. The expression "suit to which this Act applies" has been defined in S. 2(22) of the Act. It must be a suit or a proceeding for the recovery of a loan advanced before or after the commencement of the Act and money advanced on a negotiable instrument which is not a promissory note is not a loan within the meaning of the Act at all. It is argued by the learned advocate for the petitioner that the proceeding now pending is a proceeding in execution and it is for recovery of a judgment debt and not of the debt created by the hundi; but in that view, no decree could be said to have been passed in the suit to which the Act applies and which can be re-opened under S. 36, Bengal Money-lenders Act. The case in 45 C.W.N. 609[1] does not certainly support the contention of the petitioner. Here the point decided was that the Bengal Money-lenders Act was not ultra vires of the Provincial Legislature in so far as it operated on decrees made on promissory notes prior to the passing of the Act, promissory note being a matter coming within the Federal List. But money advanced on a promissory note is a loan within the meaning of the Act and it was not decided in this case that what was not a loan at the time when the suit was instituted would become a loan after the decree was passed or that the decree itself could be deemed to be passed in execution proceedings which were instituted for realisation of the judgment debt. The result therefore is that the rule is discharged with costs, hearing fee being assessed at one gold mohur.

BLANK J.—I agree.

K.S./R.K. *Rule discharged.*

1. ('41) 28 A. I. R. 1941 Cal. 498 : 196 I. C. 161 : I. L. R. (1941) 2 Cal. 107 : 73 C. L. J. 333 : 45 C. W. N. 609 (S.B.), Harsookh Das Balkissen Das v. Dhirendra Nath Roy.

A. I. R. (29) 1942 Calcutta 390

B. K. MUKHERJEA AND SEN JJ.

Annada Prasad Mitra — Petitioner — Appellant

v.

Sushil Kumar Mandal—Opposite Party — Respondent.

Appeals Nos. 37 and 38 of 1940, Decided on 11th December 1941, from appellate orders of Addl. Dist. Judge, 24 Parganas, D/- 11th December 1939.

(a) Hindu law—Religious endowment — Idol — Rights and position of shebait explained — Shebait's right to sue is analogous to that of guardian of infant—Managing shebait obtaining decree in favour of idol and dying pending execution proceedings — Death of shebait has no further legal effect than death of infant's guardian—Legal representative can continue execution proceedings—When there is none on record to carry on proceedings Court may strike them off and revive on proper cause being shown (Per *B. K. Mukherjea J.*).

No doubt, the right to possession and management of the dedicated properties which belongs to the shebait carries with it the right to bring suits whenever necessary for the protection of the idol's property : 32 Cal. 129 (P. C.), *Rel. on.* [P 392 C 1]

But the shebait's right to sue is analogous to that of a guardian of an infant : ('42) 29 A. I. R. 1942 Cal. 99, *Rel. on.* [P 392 C 1]

The idol of a Hindu temple is a juridical entity which holds and enjoys property dedicated to it in an ideal sense. The shebait or manager is the earthly representative who manifests the will of the deity and represents its dealings with the outside world. Consequently, where the managing shebait dies pending proceedings in execution of a decree obtained by him in favour of the idol, the death of the shebait can have no further legal effect than the death of the guardian of an infant. The execution proceedings cannot be continued unless the idol is properly represented. No question of substitution really arises, nor can an application by the new guardian or representative of the deity to carry on execution proceedings be regarded as a fresh application for execution. It may be that the Court is not bound to wait indefinitely and keep the execution proceedings in its file when there is none on the record to carry on the proceedings. In such circumstances, the Court can strike off the proceedings. But the striking off would not really amount to a dismissal of the execution case and it could be revived by the Court on proper cause being shown. [P 392 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 1, 12, 3 and 4 and S. 151—Decree-holder dying pending execution proceedings — Proceedings do not abate by failure to substitute legal representative — Legal representative can continue old proceedings after substitution—Court can order substitution under S. 151.

In view of the provisions of O. 22, R. 12, execution proceedings do not abate by reason of the failure to substitute the legal representatives of the decree-holder. In a suit in which the right to sue survives the abatement of the suit is caused not by the death of one or other of the parties; it is occasioned by the failure of the parties to comply with the particular provisions of O. 22, Rr. 3 and 4. When those provisions do not apply to execution proceedings obviously there can be no abatement for their breach. Consequently, where the decree-holder dies pending execution proceedings a fresh application is not necessary and the old proceedings can be continued by the legal representatives of the decree-holder after substitution. There are no provisions in the Code which lay down a procedure for substituting parties in execution proceedings but the Code is not exhaustive. Order 22, Rr. 3 and 4 do not confer a right upon parties to get themselves substituted, they merely provide procedure to be adopted. The right is inherent in the parties and arises from the fact that the suit or proceeding has not abated. The Court therefore may in the exercise of its inherent power under S. 151 substitute parties in execution proceedings : ('32) 19 A. I. R. 1932 Mad. 73 (F. B.), *Rel. on*; ('26) 13 A. I. R. 1926 Cal. 957, *Not approved.* [P 393 C 1]

(c) Limitation Act (1908), Art. 181—Art. 181 applies only to applications under Civil Procedure Code — Decree-holder dying pending execution—Application by legal representative for substitution is not one under Civil Procedure Code but one invoking inherent powers of Court —Application invoking inherent powers of Court

under S. 151 is not one under Civil Procedure Code and hence is not governed by Art. 181 or any other Article—Court when will exercise inherent power—Construction of S. 151, Civil P. C.

Article 181 applies only to application made under Civil Procedure Code: ('33) 20 A. I. R. 1933 P. C. 63, *Rel. on.* [P 393 C 2]

An application by the legal representatives of a deceased decree-holder for substitution and continuing the execution proceedings is not application under the Civil Procedure Code. The Code no where provides for such applications. They are proceedings by which the inherent jurisdiction of the Court is invoked. Section 151 does not deal with any application nor does it prescribe the procedure for any application; it is a clause whereby the inherent power which is in the Court to act *ex debito justitiæ* is recognized and left unfettered by the Code. This power is independent of the Code. An application invoking this power is one which is not made under any provisions of the Civil Procedure Code and therefore it is not governed by Art. 181 or any other Article of the Limitation Act. The Court will exercise its inherent powers if it considers that justice requires its exercise and if it is satisfied that there are no such laches on the part of the applicant, which would disentitle him to relief. The Limitation Act will not govern such application. [P 393 C 2]

Panchanan Ghose and Harideb Chatterjee — for Appellant.

Shyama Charan Mitra — for Respondent.

B. K. MUKHERJEA J. — These two appeals are on behalf of the judgment-debtor and they arise out of two analogous proceedings under S. 47, Civil P. C., which were heard together and were disposed of by one and the same judgment in both the Courts below. The material facts are not in controversy and may be shortly stated as follows: There were two rent decrees obtained by one Naba Kishore Mandal as the managing shebait of certain deities against the appellant, Annada Prosad Mitra, one on 31st May 1928, and the other on 23rd June 1934. After certain proceedings with which we are not concerned at present both these decrees were put into execution in the year 1935 and the two execution cases were registered as Cases Nos. 109 and 110 of 1935. In course of these proceedings, sale proclamations were duly issued directing the sales to be held on 10th January 1936. Before the sales were held, Naba Kishore died on 12th November 1935. The matter was reported to the Court and the Court granted several adjournments in order that proper steps might be taken in the matter. As no steps were taken, the two execution cases were dismissed for default on 17th December 1935.

It appears from the records that the shebaits of the deities who were fairly large in number took the opinion of the Government Pleader at Alipore as to the proper way of proceeding in the matter and the opinion given was to the effect that all the shebaits together should file a suit for settling a scheme for management of the debutter property and get a Receiver appointed in the suit, and the Receiver thus appointed should continue the execution proceedings. Owing to various dissensions amongst the shebaits themselves there was considerable delay in instituting the suit and it was brought only in the year 1938. On 21st December 1938, the present respondent was appointed a Receiver in respect of the debutter property and on 9th January 1939, he filed applications in the two execution cases for setting aside the orders of dismissal for default passed in them and for leave to continue the proceedings on behalf of all the shebaits. The trial Court allowed these applications and set aside the orders of dismissal for default. On appeal the judgment was affirmed. The judgment-debtor has now come up to this Court.

Mr. Panchanan Ghose who appears in support of the appeal has argued before us that the Courts below ought to have thrown out the applications of the Receiver on the ground of limitation. His contention is really of a two-fold character. In the first place, he says that under O. 22, R. 12, Civil P. C., no application for substitution can be made by the heirs of a deceased decree-holder. They can only make a fresh application for execution which must be governed by Art. 182, Limitation Act. In the second place, it is urged that even if the application is for leave to continue the proceedings started by Naba Kishore, it is hit by Art. 181, Limitation Act, as it has not been made within three years from the death of Naba Kishore. I have no doubt that there may be some force in these arguments. O. 22, R. 12, Civil P. C., lays down that nothing in Rr. 3, 4 and 8 of the order would apply to proceedings in execution of a decree or order.

There is divergence of judicial opinion as to the proper interpretation of this rule. According to one view as there is no provision or machinery provided by the Code of Civil Procedure for substitution of the legal representatives of a deceased decree-holder and as these proceedings can never abate, the heirs or legal representatives can only file a fresh application for execution. This was the view taken by the Madras High Court in 50 Mad. 1,[1] which was subsequently overruled by a Full Bench decision of the same Court in 55 Mad. 352.[2] A somewhat similar view was taken by this Court in 30 C.W.N. 735[3] where it was held by the learned Judges that it was neither competent nor necessary for the legal representatives of a decree-holder to make an application for substitution. B. B. Ghose J., who delivered the judgment observed, however, that on the death of the applicant for execution it was open to the legal representatives to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under O. 21, R. 16, Civil P. C. In an earlier Calcutta case, 14 C. W. N. 752,[4] the question arose at the appellate stage as the appellant died during the pendency of an appeal from an order in an execution proceeding. It was held that it was open to the legal representatives to apply for leave to prosecute the appeal. The Madras Full Bench decision referred to above, namely, 55 Mad. 352,[2] laid down the proposition that the legal representatives of a deceased decree-holder could be substituted under S. 146 and O. 21, R. 16, Civil P. C., and allowed to continue the proceeding. It was not to be treated as a fresh application and, consequently, was not hit by S. 48, Civil P. C. This view found favour with the Bombay High Court in 57 Bom. 616,[5] and the

1. ('27) 14 A.I.R. 1927 Mad. 184 : 99 I. C. 627 : 50 Mad. 1 : 51 M. L. J. 745, Palaniappa Chettiar v. Valliammai Achi.
2. ('32) 19 A.I.R. 1932 Mad. 73 : 135 I. C. 561 : 55 Mad. 352 : 62 M. L. J. 1 (F.B.), Venkatachalam Chetti v. Ramaswamy Servai.
3. ('26) 13 A.I.R. 1926 Cal. 957 : 96 I. C. 378 : 30 C. W. N. 735, Akshoy Kumar v. Surendra Lal.
4. ('10) 14 C.W.N. 752: 3 I. C. 324: 10 C.L.J. 396, Manmatha Nath Mitter v. Rakhal Chandra.
5. ('33) 20 A. I. R. 1933 Bom. 358: 145 I. C. 773: 57 Bom. 616: 35 Bom. L. R. 769, Annacharya v. Narayan Pandurang.

Patna High Court expressed the same opinion in 13 Pat. 777.[6] The majority of judicial decisions are thus in favour of the view that the deceased decree-holder's legal representatives can carry on the execution proceedings started by the decree-holder and need not file a fresh application. If it is not a fresh application Article 182, Limitation Act, would not certainly be applicable.

The question still arises whether the application for leave to continue the proceedings would come within the purview of Art. 181, Limitation Act. Mr. Ghose argues that such application must come within the residuary article: where as it is contended on the other side that the application being not one contemplated by the Civil Procedure Code it is not one to which the provision of Art. 181, Limitation Act, is attracted. In my opinion, none of the questions discussed above do really arise for decision in the present case. The decrees in question were obtained by Naba Kishore as a managing shebait of a certain idol. The person beneficially interested in the suit and in whose favour the decree was really obtained was the idol. It is true, as has been laid down in 31 I. A. 203,[7] that the right to possession and management of the dedicated properties which belongs to the shebait carries with it the right to bring suits whenever necessary for the protection of the idol's property. But the shebait's right to sue is analogous to that of a guardian of an infant: *vide* 45 C. W. N. 932.[8] The idol of a Hindu temple is a juridical entity which holds and enjoys property dedicated to it in an ideal sense. The shebait or manager is the earthly representative who manifests the will of the deity and represents its dealings with the outside world.

In these circumstances I think that the decrees in the present case were really decrees in favour of the idol. The death of the manager or shebait could have no further legal effect than the death of the guardian of an infant. The execution proceedings indeed could not be continued unless the idol was properly represented. But no question of substitution really arises, nor can it be said that the application by the new guardian or representative of the deity is a fresh application for execution. It may be that the Court is not bound to wait indefinitely and keep the execution proceedings in its file when there is none on the record to carry on the proceedings. In such circumstances the Court can certainly strike off the proceedings. But the striking off would not really amount to a dismissal of the execution case and it could be revived by the Court on proper cause being shown. In the present case both the Courts below were satisfied that there were sufficient grounds which prevented the applicant from coming up earlier and we are not inclined to interfere with the discretion exercised by the Courts below. The result is that we dismiss the appeals; in the circumstances of the case, we direct each party to bear its own costs throughout.

SEN J.—I have had the opportunity of reading the judgment of my learned brother where all the facts have been fully set out. I agree with the conclusion at which my learned brother has arrived but for somewhat different reasons. I shall therefore, state only those facts which are necessary for the purpose of explaining the points with which I shall deal. The managing shebait of the deity obtained two decrees for rent which he put into execution. He died pending the application and as no one appeared to continue them they were dismissed for default on 17th December 1935. In 1938 the other shebaits brought a suit for settling a scheme of management and got a receiver appointed. He has applied to the executing Court to continue the execution cases which had been dismissed. The applications were made on 9th January 1939. The Courts below have allowed the applications. The judgment-debtor has appealed. On his behalf two contentions have been raised which may be stated thus: (1) As there is no provision for the substitution of parties in execution proceedings, on the death of the decree-holder shebait his legal representatives could not continue the proceedings and the proceedings terminated. The decrees could be executed thereafter only by fresh applications for execution. Such applications are governed by Art. 182, Limitation Act and must be made within three years of the last execution petition and within 12 years of the decree. The present applications being made beyond the time prescribed by Art. 182, they are barred. (2) Even if it be held that the proceedings in execution could have been continued after substitution, in the present case there was no such substitution and the applications were dismissed for default. An application to revive and continue the execution proceedings would be governed by Art. 181, Limitation Act, and must be made within three years of the death of the shebait. The present applications having been made beyond that period they are barred.

I propose to examine the first contention that the execution proceedings must terminate on the death of the decree-holder pending the execution proceedings by reference to the relevant provisions of the Code of Civil Procedure. Order 22, R. 1, Civil P. C., says that the death of a plaintiff shall not cause the suit to abate if the right to sue continues. Order 22, R. 12 says that Rr. 3, 4 and 8 of the order are not applicable to execution proceedings. The other rules must therefore apply to execution proceedings unless they are excluded by necessary implication. Now O. 22, R. 1 has not been expressly or impliedly excluded from application to execution proceedings. Applying it to such proceedings, it would read thus: "The death of a decree-holder shall not cause execution proceedings to abate if the right to execute survives." The execution proceedings therefore did not abate by reason of the death of the decree-holder shebait. Now can it be said that they have abated by reason of the failure to substitute the legal representatives of the decree-holder ?

I think it best to seek the answer to this question in the provisions of the Civil Procedure Code dealing with this matter: Order 22, R. 1 lays down the general principles regarding abatement, viz., that when the right of suit survives death will not cause abatement. If it stood by itself there could be no abatement of a suit for failure to substitute the legal representatives of a deceased plaintiff or defendant when the right to sue survived. The suit would remain pending for ever. Order 22, R. 3 and R. 4 were introduced to meet this difficulty. These rules make it obligatory on the legal representative to apply for substitution within a specified period by providing a penalty that if there is no substitution within that period the suit shall abate.

6. ('35) 22 A.I.R. 1935 Pat. 117: 155 I.C. 969: 13 Pat. 777, McNaught v. Mt. Saraswati.
7. ('05) 32 Cal. 129: 31 I. A. 203: 8 C.W.N. 809: 8 Sar. 698 (P. C.), Jagadindra Nath v. Hemanta Kumari.
8. ('42) 29 A. I. R. 1942 Cal. 99: 199 I. C. 486: I.L.R. (1941) 2 Cal. 477: 74 C.L.J. 13: 45 C.W.N. 932, Tarit Bhusan v. Iswar Sridhar Salagram Shila.

There are no other provisions in the Code which cause a suit to abate by reason of the failure to substitute the legal representatives of a deceased plaintiff or defendant. These rules however are expressly made inapplicable to execution proceedings by R. 12 of O. 22. Execution proceedings do not therefore abate by reason of the failure to substitute the legal representatives of the decree-holder. What I would like to emphasise is this. In a suit in which the right to sue survives the abatement of the suit is caused not by the death of one or other of the parties, it is occasioned by the failure of the parties to comply with the particular provisions of O. 22, Rr. 3 and 4. When those provisions do not apply obviously there can be no abatement for their breach. The acceptance of the view that in execution proceedings the death of the decree-holder causes the proceedings to terminate and necessitates a fresh application for execution would lead to grave injustice as the following example will show: An execution petition is filed just within 12 years of a decree; before it is disposed of, the period of 12 years elapses and the decree-holder dies. If the old application cannot be continued then the decree can never be executed as a fresh application would be barred by the 12 years' rule. Thus, for no fault of the decree-holder the decree becomes incapable of execution.

One must hesitate before one accepts an interpretation of law which leads to such manifest injustice. This aspect of the matter was considered by the Madras High Court in 55 Mad. 352[2] where it was held by the Full Bench that where the decree-holder died pending execution proceedings a fresh application was not necessary and that the old proceedings could be continued by the legal representatives of the decree-holder after substitution. It was argued on behalf of the appellants that there was no provision in the Code for substitution in the case of execution proceedings and that consequently the Court could not substitute the legal representatives of a deceased decree-holder. My attention was drawn to the fact that Rr. 3 and 4 were the only rules which dealt with substitution and it was contended these rules not being applicable to execution proceedings there could be no substitution. It is quite true that there are no provisions in the Code which lay down a procedure for substituting parties in execution proceedings. The Code however is not exhaustive and the inherent powers of the Court to make such orders as may be necessary for the ends of justice have been preserved by S. 151, Civil P. C. O. 22, Rr. 3 and 4 do not confer a right upon parties to get themselves substituted, they merely provide the procedure to be adopted. The right is inherent in the parties and it arises from the fact that the suit or proceeding has not abated. The Court therefore may in the exercise of its inherent powers substitute parties in execution proceedings. Reliance was placed by learned advocate for the appellant on the case in 30 C.W.N. 735[3] where B. B. Ghosh and Panton JJ. made the following observations at page 737 :

"Order 22, R. 12, Civil P. C., provides that R. 3 which refers to substitution of legal representatives of a deceased plaintiff does not apply to proceedings in execution of a decree. On the death of the applicant for execution it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under O. 21, R. 16, Civil P. C. It was not necessary for them nor was it competent to make an application for substitution."

The remarks are 'obiter dicta' and with great respect I am unable to accept the view therein expressed. The learned Judges say that the legal representatives of the deceased decree-holder could apply for carrying on the proceedings. It seems to me that the right to continue or carry on proceedings presupposes a right to be substituted and an application 'to carry on' proceedings includes in itself an application for substitution. I consider that the correct view was laid down by the Full Bench of the Madras High Court in the case mentioned above. This disposes of the first point raised. The second point that applications for reviving the proceedings dismissed for default are barred by limitation by reason of Art. 181, Limitation Act, does not appear to me to be sound, Article 181 applies only to application made under the Code: *see* 60 I.A. 13[9] at p. 20. The applications for setting aside the orders of dismissal and for continuing the execution proceedings are not applications under the Code of Civil Procedure. The Code nowhere provides for such applications. They are proceedings by which the inherent jurisdiction of the Court is invoked. It was argued that they were applications under S. 151 of the Code and therefore governed by Art. 181, Limitation Act. In my opinion, this view has arisen owing to the loose language which is sometimes employed in describing application as being under one section or another. Section 151 does not deal with any application nor does it prescribe the procedure for any application ; it is a clause whereby the inherent power which is in the Court to act *ex debito justitiæ*, is recognized and left unfettered by the Code. This power is independent of the Code. An application invoking this power is one which is not made under any provisions of the Code and therefore it is not governed by Art. 181 or any other Article of the Limitation Act. The Court will exercise its inherent powers if it considers that justice requires its exercise and if it is satisfied that there are no such laches on the part of the applicant which would disentitle him to relief. The Limitation Act will not govern such application. The only question which has to be considered then is whether there has been such delay as would justify the Court in refusing relief upon the principle *vigilantibus non dormientibus leges adjuvant*. Upon the facts disclosed in this case I am satisfied that there has really been no such culpable delay and I consider that the Courts below acted rightly in reviving the proceedings and in allowing the receiver to continue them. For these reasons I agree in the order that has been made.

G.N./R.K. *Appeals dismissed.*

9. ('33) 20 A. I. R. 1933 P. C. 63 : 142 I. C. 7 : 54 All. 1067 : 60 I. A. 13 (P. C.), Hansraj Gupta v. Official Liquidators of the Dehra Dun Mussoorie Electric Tramway Co. Ltd.

Hindu law—

(a) ('40) Mulla, Page 479 Pt. (j); Page 480 (m) and Section 414.

('38) Gour, Page 806 N. 1978 and Page 874 S. 282 and Page 875 N. 2131.

C. P. C.—

(b) ('40) Chitaley, O. 22, R. 12 N 1 Pt. 7 and S. 151 N. 2 Pt. 53.

('41) Mulla, Page 774 N. "Transfer pending execution"; Page 950 Note "Execution proceedings"; Page 951, Illustration (2) and Pages 477-478 Note "Inherent powers of Court."

a **Limitation Act—**
(c) ('42) Chitaley, Art. 181 N. 2.
('38) Rustomji, Page 1631 Note "Article restricted to Procedure Code."

C. P. C.—
('40) Chitaley, S. 151 N. 1.
('41) Mulla, Page 475 Note "Inherent powers of Court."

A. I. R. (29) 1942 Calcutta 394

MOHAMAD AKRAM AND PAL JJ.

Sm. Annapurna Dasi w/o Upendra Nath Basu and others — *Appellants*

b v.

Sarat Chandra Bhattacharjee and others — *Respondents.*

Appeals Nos. 1192 and 1260 of 1938, Decided on 9th December 1941, from appellate decrees of Dist. Judge, Hooghly, D/- 17th March 1938.

(a) Specific Relief Act (1877), S. 42 — Partition suit — Receiver appointed — Mortgage by receiver with Court's permission—Mortgagee obtaining decree against receiver and putting same into execution — Suit by owners of property against mortgagee and receiver for declaration that mortgage decree did not bind them or estate in charge of receiver — Subsequently on application of plaintiffs Court impleading purchaser at sale in execution of mortgage c **decree without saying anything about plaintiffs' prayer for possession—Plaintiffs' failure to ask for further relief by way of permanent injunction at time of institution of suit restraining mortgagee decree-holder from proceeding with execution of his decree did not render suit incompetent under S. 42—Nor did their failure to press for further relief for possession at time of impleading auction-purchaser render suit incompetent under S. 42 — Nor was there any omission on plaintiffs' part to pray for any available relief.**

The receiver appointed in a suit by the widow for partition of the estate left by her husband raised a loan with the permission of the Court by mortgaging certain property. The mortgagee obtained a decree against the Receiver on his mortgage. Sub- d sequently the widow and the other owners of the estate instituted a suit against the mortgagee defendant 1 and the receiver defendant 2 for a declaration that the mortgage and the mortgage decree were not binding on the plaintiffs and the estate in respect of which the receiver was appointed. Execution of the mortgage decree had started before the institution of the declaratory suit by the plaintiffs. The plaintiffs did not make any prayer for permanent injunction restraining the decree-holder from executing his decree. Their attempt to obtain a temporary injunction to that effect pending the disposal of the suit was unsuccessful and the mortgaged property was sold in execution of the decree and was purchased by *K* who was duly put in possession. Thereafter, the plaintiffs made an application for amendment of their plaint by adding *K* as defendant 3 and also adding a prayer for possession of the property. The Court granted their prayer for amendment by adding *K* as defendant 3 but without saying anything about the other prayer. The plaintiffs too did not press that prayer any further. e It was contended that the suit as framed was not maintainable, being hit by the provisions of S. 42 firstly, inasmuch as even on the date when the suit was originally instituted the plaintiffs were able to seek further relief in the shape of a permanent injunction restraining the defendant decree-holder from proceeding with the execution of his decree but omitted to do so and secondly, inasmuch as after the addition of defendant 3 as party defendants the plaintiffs should have sought further relief by claiming recovery of possession :

Held that the mortgage decree sought to be assailed in the suit was not obtained against the plaintiffs and consequently they were not bound to pray for an injunction. [P 398 C 2]

Held further that the second ground was not available to defendant 1, at all. The suit as originally framed against him had not the alleged defect. f The disturbance of possession, if any, took place subsequent to the institution of the suit and if the original relief claimed became by reason of any subsequent change of circumstances, inappropriate, it was open to the Court to take notice of such events as had happened since the institution of the suit and to mould its decree according to the circumstances as they stood at the time the decree was made : 6 C. L. J. 102; ('15) 2 A.I.R. 1915 Cal. 103; ('21) 8 A.I.R. 1921 Cal. 792 and ('17) 4 A.I.R. 1917 Cal. 716, *Rel. on.* [P 398 C 2; P 399 C 1]

The Court therefore ought to have allowed the prayer for possession and the suit of the plaintiffs' could not be thrown out on the second ground and if necessary, the Court would have allowed them to amend the plaint even at the stage of second appeal g by introducing the prayer for possession. [P 399 C 1]

Held also that the auction purchaser *K* took possession not from the plaintiffs but from the receiver. The property was at that time in the custody of the Court and was in the possession of the receiver. The plaintiffs were not entitled to present possession on that date and consequently relief in the shape of recovery of possession was not open to them. At the time the auction purchaser was added as defendant 3 the estate was in the custody of the Court and the receiver gave up the estate only subsequently. This fact made the relief by way of recovery of possession unavailable to the plaintiffs at the time when *K* was made a party. Consequently there was no omission on their part to pray for any available relief: ('38) 25 A.I.R. 1938 P. C. 73, *Rel. on.* [P 399 C 1] h

(b) Civil P. C. (1908), S. 100 — Question of fraud and collusion—First appellate Court relying on circumstances forming evidence in case —Finding of first appellate Court cannot be interfered with in second appeal.

Where on the question of fraud and collusion the circumstances relied on by the first appellate Court are also evidence in the case and the final Court of fact has relied on that evidence and come to its own conclusion based on the same, the second appellate Court cannot interfere with that finding. It is not for the second appellate Court to say whether the final Court of fact has attached any undue weight to the circumstances which are evidence in the case. [P 399 C 1, 2]

(c) Civil P. C. (1908), O. 40, R. 1 — Order sanctioning loan at simple interest held could not be construed to include sanction to compound interest.

The receiver in his application for permission to raise a loan mentioned the rate of interest of the proposed loan as 18 per cent. per annum. The Court granted permission but pointed out that the interest was rather too high and directed that an attempt should be made to have a loan at a lower rate of interest. On this permission the receiver took a loan, the interest stipulated for being compound interest at 18 per cent. per annum with six monthly rests and reported the loan to the Court stating that interest at a rate lower than 18 per cent. per annum could not be had. In the report, however, he did not mention that the loan taken by him was to bear compound interest :

Held that the order sanctioning the loan could not be construed to include a sanction to the compound interest and therefore the estate was not liable for the compound interest. [P 399 C 2]

(d) Civil P. C. (1908), S. 80—Partition suit—Receiver appointed—Mortgage by receiver with Court's permission — Mortgagee obtaining decree against receiver—Suit by parties to partition suit against mortgagee and receiver for declaration that mortgage and mortgage decree were not binding on them and estate — As no relief was sought for against receiver notice under S. 80 held not necessary.

The receiver in a partition suit raised a loan with the Court's permission by mortgage of certain property. After the mortgagee obtained a decree against the receiver on his mortgage, the parties to the partition suit brought a suit against the receiver and the mortgagee for a declaration that the mortgage and the mortgage decree were not binding on them or the estate :

Held that as no relief was sought for in the suit against the receiver notice under S. 80 was not necessary. [P 399 C 2]

(e) Civil P. C. (1908), O. 40, R. 1 — Partition suit—Court appointing receiver — Suit referred to arbitration—According to award receiver to be discharged and another person appointed as common manager — Decree passed in terms of award—In spite of order of discharge in award and decree and formal order of Court in 1917 receiver continuing to act as such and continuing to manage estate till 1931—Custody of Court and receivership held in circumstances of case and on construction of award continued till 1931 — Permission by Court to receiver to raise loan in 1921 held valid.

The parties to the partition suit referred their dispute to arbitration. According to the award the acting receiver appointed by the Court was to be discharged and another person appointed as common manager. The award vested the common manager with all the powers of a receiver appointed by the Court and directed that he was to be governed by all the provisions laid down in the Civil Procedure Code applicable to receivers. A decree was passed in terms of the award. But in spite of the order of discharge in the award and in the decree and the formal order of the Court dated 21st December 1917 discharging the receiver, the receiver continued in possession for 14 years up to 1931 with the knowledge and consent of the parties and managed the estate and the Court all along functioned as if the estate was still in its custody by virtue of the order appointing the receiver. Both the order of discharge in the award and the order of the Court dated 21st December 1917 were understood by the parties including the receiver and Court as mere conditional orders. No final order of the Court terminating the functions of the receiver was made and the parties also never attempted to get the custody of the Court terminated by such final order :

Held that the estate continued to be in the custody of the Court and the receivership also continued till 1931. In the circumstances of the case the Court did not cease to have jurisdiction over the estate and it acted within its competence when it permitted the receiver to raise the loan in 1921. The terms of appointment of the common manager given in the award indicated that the parties contemplated thereby the continuation of the Court's custody though the person through whom the Court will continue in custody of the estate was to change from the then receiver to the common manager named in the award. [P 399 C 2]

(f) Civil P. C. (1908), O. 34, R. 1 and O. 40 R. 1 — Receiver appointed under O. 40, R. 1—Property does not vest in receiver — Mortgage by receiver with Court's permission is binding on real owners—Action on mortgage—Receiver may be proper party—But owners interested in right of redemption are also necessary parties —Decree obtained without joining them cannot bind them—Assuming receiver as representing true owners — Fraud and collusion between receiver and mortgagee—Receiver would cease to represent owners.

The property does not vest in the receiver appointed under O. 40, R. 1. The property is only in the custody of the Court and the receiver simply manages the estate as an officer of that Court. No doubt when he mortgages the property with the sanction of the Court he must be taken to have represented the owners of the property. But that is the effect of the express sanction given by the Court. The mortgage by the receiver, in these circumstances will no doubt be binding on the real owner. But in an action in enforcement of the mortgage the receiver cannot be said to continue to represent the owners as a result of the Court's sanctioning the loan under the morgtage especially when there is no express order of the Court appointing the receiver allowing the receiver to represent the true owners in the mortgage suit. As the property is in custodia legis the receiver might be a proper party to the mortgage suit but the real owners who had interest in the right of redemption are also the necessary parties and a decree passed without joining them cannot bind them. Even assuming that the receiver would normally represent the owners in a suit of this character as soon as he is found to have been in collusion with the mortgagee he would cease to represent the interest of the owners and the decree passed against him would not bind the real owners : 34 Cal. 305, *Ref.* [P 400 C 1, 2; P 401 C 1]

(g) Civil P. C. (1908), O. 40, R. 1 — Partition suit — Receiver appointed — Receiver with Court's permission raising loan by mortgage of property—Defence of collusion between receiver and mortgagee though not open to receiver is available to owners of property.

Where the receiver in a partition suit raises a loan with Court's permission on a mortgage of the properties in respect of which he has been appointed a receiver, the defence of fraud and collusion between the receiver and mortgagee may not be open to the receiver but is available to the owners of the property : 17 Cal. 291 (P. C.) and ('36) 23 A.I.R. 1936 P. C. 70, *Rel. on.* [P 400 C 2; P 401 C 1]

(h) Civil P. C. (1908), O. 40, R. 1 — Receiver appointed under O. 40, R. 1 — Mortgage by receiver with Court's sanction — Action on mortgage — Whether Court can make order directing receiver to represent fully right of redemption *(Quære)*.

In an action on a mortgage executed with the Court's sanction by the receiver appointed under O. 40, R. 1 whether it is within the competence of the Court to make an order sanctioning the suit against the receiver alone and directing him to represent fully the right of redemption. [P 400 C 2]

(i) Transfer of Property Act (1882), S. 52 — Doctrine of lis pendens does not extend so as to affect proceedings in earlier instituted suits.

The doctrine of lis pendens does not extend so as to affect the proceedings in earlier instituted suits. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not lis pendens but something else : ('32) 19 A.I.R. 1932 Mad. 566 and 32 Cal. 891, *Rel. on.* [P 401 C 1]

Consequently, a sale in execution of a mortgage decree pending a subsequent suit challenging the validity of that decree is not hit by the doctrine of lis pendens. [P 401 C 1]

Dr. Naresh Chandra Sen Gupta, Hirendra Chandra Ghose and Tapendra Chandra Ghose (in 1192); *Gopendra Nath Das and Sachindra Chandra Das Gupta* (in 1260) — for Appellants.

Gopendra Nath Das and Sachindra Chandra Das Gupta; *Atul Chandra Gupta and Kali Pada Chakravarti*; *Dr. Naresh Chandra Sen Gupta and Hirendra Chandra Ghose and Atul Chandra Gupta and Kali Pada Chakravarti* — for Respondents 1, 3, 1 to 5, and 7 respectively.

PAL J.—These two appeals arise out of the same suit. The Appeal No. 1192 of 1938 is by the plaintiffs and the other one is by defendant 1. The suit is for a declaration that a certain mortgage by an alleged receiver and the decree obtained in enforcement of that mortgage against that receiver are not binding on the parties. The relevant facts giving rise to this litigation are the following: Plaintiff 1, Annapurna Dasi, instituted suit in 1916 which has been characterised as an administration suit by the Courts below but which the plaintiffs-appellants characterise as a partition suit. This was title Suit No. 10 of 1916. In this suit the present plaintiff 1, Annapurna Dassi, was the sole plaintiff and plaintiffs 2, 3, 4 and 5 were defendants 1, 2, 3 and 4 respectively. In this suit defendant 2 of the present suit was appointed receiver on 14th July 1917 under O. 40, R. 1, Civil P. C. That suit was ultimately referred to arbitration on 17th July 1917. The arbitrator based his award on the consent of the parties and pronounced the same on 30th November 1917. According to this award the receiver was to be discharged and one Mr. Gunendra Chandra Ghose, a common relation of the parties, was appointed common manager of the estates. On 14th December 1917, the Court accepted this award and decreed the suit in terms of the same. The portion of the award relevant for our present purposes and relating to the discharge of the receiver ran as follows :

"I also direct with like consent as aforesaid that the present receiver appointed by the Court be discharged from further acting as such after making suitable provision for immediate payment of Government revenue and superior landlord's rent and other pressing debts of the estate and make over all cash balances, books, documents appertaining to the estate to the common manager and file his accounts in usual course."

In order to see the real nature of the dispute involved in that suit and the manner in which that dispute was settled a portion of the award may be quoted here. The arbitrator stated in his award:

"All the parties are related to me. They are inexperienced and uneducated and are physically and intellectually incapable to look after and manage or take intelligent interest of their respective right, title and interest. The defendants are sons of Upendra Nath Bose the well-known zamindar of Panisheshala, who died leaving a will. They lost their father at a tender age and were then infants. After attaining majority defendant 1, Gobordhan Behari Bose took up the management, he is a self-sufficient youth who dressed up his little with the attitude of much. His management as executor of the last will of his father brought about disastrous results followed by sale of valuable landed properties and limitation of several joint debts due to the estate. I, therefore, declare with the consent of all parties that the said defendant Gobordhan Behari Bose be and he is hereby discharged from further acting as executor and that he is hereby directed to render a true and faithful account of his dealings with the estate of his father in the plaint in this suit mentioned. For the benefit of all parties concerned and with such like consent as aforesaid I do hereby declare that Gunendra Chandra Ghose a near relation of the parties of No. 142, Baranashi Ghosh's Street, Calcutta, be and he is hereby appointed with the consent of all parties as the common manager of the estate and effects left by the said Upendra Nath Bose to act as such without remuneration with the help and co-operation of all parties especially of defendant 1 Gobordhan Behari Bose for the purpose of looking after and managing the estate and especially for realizing outstanding assets and payment of all just and subsisting debts. . . . . I find, declare, and award with like consent as aforesaid that the plaintiff as the sole heiress of her deceased son Sailaraj Bose who died intestate and unmarried after the death of his father, be and she is hereby entitled to one-fifth part or share of and in the estate and effects, moveable as well as immovable, left by her deceased husband Upendra Nath Bose in severalty and absolutely. I do also find, declare and award with like consent as aforesaid that the said plaintiff is also entitled to the bequest of Rs. 15 per month made to her in and by the last will and testament of her said deceased husband. . . . . I also do find, declare, award with like consent as aforesaid that such of the said defendants . . . . . is entitled to one-fifth part or share of and in the estate and effects, moveable and immovable left by the said Upendra Nath Bose deceased, in severalty and absolutely. . . . . ."

The award then vested the common manager with all the powers of a receiver appointed by Court and directed that "he is to be governed by all the provisions laid down in the Civil Procedure Code applicable to receiver." The common manager named in the award expressed his consent in writing. The actual drawing up of the decree was delayed as the Court at first demanded a non-judicial stamp from the parties, the suit being for partition. Ultimately on 20th December 1917 the Court directed: "It appears from the award that the arbitrator did not make any partition of the lands in suit between the parties. So no non-judicial stamp for the purpose of

drawing the decree is required. Let usual decree be drawn up."

On 21st December 1917 the Court made the following order :

The receiver will be discharged according to the arbitrator's award on his payment of all rents and revenue due in respect of the properties in his possession and all pressing debts and on his submission of proper accounts."

The receiver, defendant 2, however, continued in possession for the next fourteen years with the full knowledge of the parties and the Court all along functioned in respect of the estate as if the same was in its custody through that receiver. The powers that were conferred upon the receiver by his appointment dated 14th July 1917 were in terms of the provisions of O. 40, R. 1 (d), Civil P. C., and ran as follows :

"He shall have all such powers, as to bringing and defending suits and for the realization, management, protection, preservation of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, as the owners themselves have, and in all important matters he shall take the instructions of the Court (*vide* Ex. T, order sheet in title Suit No. 10 of 1916, order No. 58)."

On 4th May 1921 the receiver asked for permission of the Court to raise a loan of Rs. 3000 on mortgage of some property belonging to the estate to pay off the rent decree against the estate and the putni rent. The receiver in his application for permission mentioned the rate of interest of the proposed loan as 18 per cent. per annum. The Court granted permission but pointed out that the interest was rather too high and directed that an attempt should be made to have a loan at a lower rate of interest. On this permission the receiver took the loan of Rs. 3000 from defendant 1, the interest stipulated for being compound interest at 18 per cent. per annum with six monthly rests. On 10th May 1921 he reported the loan to the Court, stating that interest at a rate lower than 18 per cent. per annum could not be had. In this report, however, he did not mention that the loan taken by him was to bear compound interest. Defendant 1 instituted his suit for enforcement of this mortgage in November 1929, making the receiver alone the party defendant. Before instituting this suit defendant 1 applied to the Court for leave to sue the receiver and the Court by its order dated 29th June 1929 permitted him "to sue the receiver Nagendra Nath Bose." The owners (the present plaintiffs) applied to be made parties to this suit on 25th January 1930 but their application was resisted by the mortgagee and was rejected by the Court. On the same day the receiver made an application for adjournment of the suit. That application was also rejected and an ex parte mortgage decree was made for Rs. 13000. The present suit was, thereupon, instituted by the present plaintiffs on 9th May 1930 making the mortgagee decree-holder defendant 1 and the receiver defendant 2.

In the original plaint the relief claimed was only a declaration that the mortgage and the mortgage decree were not binding on the plaintiffs and on the estate left by Upendra Nath Bose. It transpires on evidence that execution of the aforesaid mortgage decree had already been started before the institution of the present suit. The plaintiffs did not make any prayer for permanent injunction restraining the decree-holder from executing his decree. But they made an attempt to have a temporary injunction restraining defendant 1 from executing the decree pending the disposal of the present suit. The plaintiffs were unsuccessful in this attempt and the mortgaged property was sold in execution of the decree on 18th November 1930 and it was purchased for Rs. 12000 odd by Kshetra Mohan Pal who is now defendant 3 in the suit. The purchaser took delivery of possession of the property on 15th March 1931. Thereafter, on 26th March 1931, the plaintiffs made an application for amendment of their plaint by adding Kshetra Mohan Pal as defendant 3 and also adding a prayer for possession of the property. The Court dealt with this application for amendment by its order No. 29 dated 1st April 1931 and granted their prayer for amendment by adding the purchaser as defendant 3 but without saying anything about the other prayer. The plaintiffs do not seem to have pressed that other prayer of theirs any further. There was an episode relating to the amount of court-fees payable on the plaint, but that is not relevant for our present purposes. In their plaint the plaintiffs based the reliefs claimed on the following grounds :

(1) That after the decree in the partition suit dated 14th December 1917 discharging the receiver and after the order dated 21st December 1917 discharging the receiver pursuant to the decree there was no receiver of the estate. The Court ceased to have any custody over the estate. Consequently, the permission dated 4th May 1921 granted by the Court for the loan and the loan taken by the alleged receiver on that permission were ultra vires and not binding on the estate.

(2) That even assuming that the Court had jurisdiction to grant permission to take loan and that the receiver functioned as receiver the loan taken and the mortgage given were in excess of the terms of the permission inasmuch as the Court never sanctioned compound interest at 18 per cent. per annum with six monthly rests : (a) consequently the loan and the mortgage are not binding on the estate : (b) at least that portion of the loan which is in excess of the terms of the sanction is not binding on the plaintiffs.

(3) That the loan and the mortgage was the result of fraud and collusion between the defendants 1 and 2, the mortgagee and the receiver, and, consequently, was not binding on the estate.

(4) That the suit in enforcement of the mortgage was only against the alleged receiver and that though the plaintiffs applied for being made parties to that suit twice their applications were resisted by the mortgagee and were rejected on 18th September 1929 and 25th January 1930.

(5) That the loan was not for the benefit of the estate.

The Court of first instance overruled all these contentions of the plaintiffs and held—(1) that as a matter of fact the Court did not give up the custody of the property and that the receiver continued to function as such till 4th February 1931 when the receiver by a petition gave up possession of the property ; (2) that the loan was taken for the necessity of the estate ; that money was needed for payment of astam dues to save putni mahals and to make deposit to set aside some rent execution sales, and that there was evidence to establish that the money realised by loan was actually applied to those purposes ; that one of the plaintiffs, Gobordhan Babu, accompanied the receiver while the latter approached defendant 1, for the loan and that there was real pressure on the estate and the loan was a necessity, there was nothing to show any fraud or collusion on the part of the mortgagee; (3) that as the Court's order sanctioning the loan did not prohibit com-

pound interest, stipulation for compound interest was a not in excess of the terms of the sanction. In this view the Court of first instance dismissed the suit.

On appeal by the plaintiffs the learned District Judge modified this decree. He affirmed the finding that the receiver in fact remained in possession of the estate as such receiver with the knowledge and consent of the parties and while taking the loan he functioned as receiver. The learned District Judge, however, found that the compound interest was never sanctioned by the Court and that the stipulation about compound interest was entered fraudulently and collusively in the bond, that this stipulation was the result of collusion between the receiver and the mortgagee, and that the decree so far as it allowed the compound interest was also obtained collusively. He, therefore, held that the estate would not be liable for the compound interest b and would only be liable for a portion of the decretal amount, namely Rs. 7354. As regards the auction-purchaser the learned District Judge treated him as a purchaser pendente lite and, therefore, bound by the decision in the suit. In the result he declared "that the estate of late Upendra Nath Basu will be liable only to the extent of Rs. 7354 and proportionate costs of the decree in suit No. 72 of 1929." He further directed in the following terms :

"As it appears that the mortgagee defendant 1 has already realized the entire decretal amount by selling the properties and defendant 3 has purchased the property, it is ordered, in exercise of the inherent jurisdiction of the Court, that the plaintiffs would deposit in the lower Court Rs. 7354 and proportionate costs of the mortgage suit within a month from this date and the auction-purchaser will have a lien over this amount and will be entitled to with- c draw it on his giving up possession of the properties to the plaintiffs. The auction-purchaser will be entitled to realise the balance of his purchase money with interest at 6 per cent. per annum from the date of payment on the entire purchase money from the mortgagee under S. 44, Civil P. C.* The plaintiffs may recover the mesne profits in appropriate proceedings."

Both the plaintiffs and defendant 1 have preferred appeals against this decision. S. A. No. 1192 is by the plaintiffs and S. A. No. 1260 is by defendant 1. Defendant 3 has preferred cross-objections in both these appeals. Dr. Sen Gupta, in support of the appeal by the plaintiffs, reiterates the points raised in the plaint and contends that after the decree in the partition suit the receiver ceased to exist as receiver. Thereafter he became a mere d intermeddler with the estate of the plaintiff. The Court also ceased to have any jurisdiction over the estate and consequently the loan and mortgage by the intermeddler even with the permission of the Court, which had no jurisdiction in the matter, would not be binding on the estate. He further contends that under the provisions of O. 34, R. 1, Civil P. C., the owners were the necessary parties in the mortgage suit and as they were not made parties the decree obtained therein was not binding on them and consequently the sale in execution of that decree did not affect their title. Mr. Das appearing in support of the appeal by the mortgagee defendant 1, raised the following points :

(1) That the suit as framed is not maintainable, being hit by the provisions of S. 42, Specific Relief Act : (a) inasmuch as even on the date when the suit was originally instituted the plaintiffs were able to seek further relief in the shape of a permanent injunction restraining the defendant decree-holder e from proceeding with the execution of his decree but omitted to do so; (b) inasmuch as after the addition of defendant 3 as party defendant the plaintiffs should have sought further relief by claiming recovery of possession ;

(2) That the finding as to fraud and collusion was not based on any evidence on record ;

(3) That on a proper construction of the order sanctioning the loan, the loan and the mortgage were not in excess of its terms ;

(4) That on his own finding the learned District Judge ought to have directed interest to run at the sanctioned rate up to the period of grace ;

(5) That inasmuch as the plaintiffs sought relief on the basis of fraud committed by the receiver the suit was bad for want of notice under S. 80, Civil P. C.; and

(6) That in a pure declaratory suit where there f was no claim by one defendant against another and after the dismissal of the suit by the Court of first instance, there was no appeal or cross-objection by defendant 3, the Court of appeal had no jurisdiction to direct defendant 1 to make any payment to defendant 3.

In reply to Dr. Sen Gupta's contention that the decree in the mortgage suit was not binding on the plaintiffs on the ground that they were necessary parties under O. 34, R. 1, Civil P. C., and were not made parties, Mr. Das contended (1) That this is a new case which the plaintiffs are making for the first time in second appeal ; and (2) That the decree obtained against the receiver as such was binding on the plaintiffs. Mr. Gupta appearing for defendant 3, the auction purchaser, contended in support of his cross-objections : (1) That the receiver was g functioning as receiver when he created the mortgage; consequently the mortgage was binding on the estate ; (2) That in the mortgage suit the receiver functioning as such was really representing the estate and consequently he was there on behalf of the owners of the estate; (3) That his purchase was unaffected by the decision in the present suit reversing or modifying the mortgage decree and that the Court of appeal below was wrong in applying the doctrine of lis pendens to his case.

We shall, first of all, take up some of the points raised by Mr. Das in support of the appeal by defendant 1. The first point raised by Mr. Das is that the suit as filed is not maintainable, being hit by the provisions of S. 42, Specific Relief Act, inasmuch as the plaintiff, being able to seek further relief in the shape of a permanent injunction restraining the defendant decree-holder from proceeding with the h execution of his decree, omitted to do so. The point was not raised in this form in any of the Courts below and in our opinion it has no substance. The decree sought to be assailed in the present suit was not obtained against the present plaintiffs and consequently as was held in 17 C. L. J. 30,[1] the plaintiff, in such a case, was not bound to pray for an injunction. The other ground on which Mr. Das urges that the frame of the suit was bad under S. 42, Specific Relief Act, is not available to his client, defendant 1, at all. The suit as originally framed against him had not this alleged defect. The disturbance of possession, if any, took place subsequent to the institution of the present suit and if the original relief claimed became, by reason of any subsequent change of circumstances, inappropriate, it was open to a Court of justice to take

[* Seems to be a mistake for S. 144—*Ed.*]

1. ('13) 17 C. L. J. 30 : 18 I. C. 633, Aisa Siddika v. Bidhu Sekhar Banerjee.

notice of such events as had happened since the institution of the suit and to mould its decree according to the circumstances as they stood at the time the decree was made. It has been laid down in several cases that it is incumbent upon a Court of justice to take notice of such subsequent events : 6 C. L. J. 102,[2] 20 C. L. J. 107,[3] 35 C. L. J. 332[4] and 44 Cal. 47.[5] We would not have been prepared to throw out the suit of the plaintiffs' on this ground and if necessary, we would have allowed him to amend the plaint even at this stage.

In the present case, however, the auction purchaser took possession on 5th March 1931, not from the plaintiffs but from the receiver. The property was at that time in the custody of the Court and was in the possession of the receiver. The plaintiffs were not entitled to present possession on that date and consequently the relief in the shape of recovery of possession was not open to them. They applied for the amendment of their plaint by adding the auction purchaser as defendant 3 on 26th March 1931. This prayer was granted on 1st April 1931. Even then the estate was in the custody of the Court. The receiver gave up the estate only on 14th April 1931. This fact made the relief by way of recovery of possession unavailable to the plaintiffs at the relevant date. Consequently, there was no omission on their part to pray for any available relief. The case is thus completely covered by the authority of the Judicial Committee in 65 I. A. 106=42 C. W. N. 930.[6]

As regards the second point raised by Mr. Das, namely, that the finding arrived at by the Court of appeal below as to fraud and collusion between the receiver and the mortgagee was not based on any evidence on record, we are again unable to accept his contention. The circumstances relied on by the Court of appeal below are also evidence in the case and when a final Court of fact has relied on that evidence and come to its own conclusion based on the same, we sitting on second appeal cannot interfere with that finding. The learned Judge observed: "So there is no doubt that the terms about the compound interest were collusively and fraudulently entered into the bond without the knowledge of the Court, and the decree so far as regards the contract about compound interest was also obtained collusively, for the receiver did not raise this objection and allowed the whole claim to be decreed ex parte and the plaintiffs who wanted to be made parties, were carefully shut out." The circumstances relied on by the Court of appeal below in drawing the inference that the compound interest was also obtained collusively might not have induced another Court of fact to come to that conclusion. But certainly these circumstances were evidence in the case and it is not for us to say whether the final Court of fact has attached any undue weight to this piece of evidence.

As regards the third point, it is difficult to see how the order sanctioning the loan can be construed to include a sanction to the compound interest. In our opinion, the learned District Judge has taken the correct view of the sanction. As regards the fourth point, we are of opinion that the interest should have been directed to be calculated at the rate payable on the principal up to the period of grace allowed by the preliminary decree. The Court of appeal below allowed interest only up to the date of the suit without assigning any reason why interest at that rate should not run on the principal up to the period of grace. As regards the fifth point raised by Mr. Das, namely, that the suit was bad for want of notice under S. 80, Civil P. C., we are again unable to accept this contention. No relief has been sought for in this suit against the alleged receiver, and in our opinion no notice under S. 80 was necessary in a case like this. The sixth point raised by Mr. Das need not be considered in view of the order proposed by us.

We next take the points raised in the plaintiff's appeal. The first point to be considered is whether the estate was still in the custody of the Court and whether the receiver remained in possession of the estate as such receiver of the Court at the date of the alleged loan. Both the Courts have found that in spite of the order of discharge in the award and in the decree and the formal order of the Court dated 21st December 1917, the receiver continued in possession for 14 years up to 1931 with the knowledge and consent of the plaintiffs and managed the estate. It appears from the order sheet in T. S. No. 10 of 1916 that the Court all along functioned as if the estate was still in its custody by virtue of the order appointing the receiver. It seems that both the order of discharge in the award and the order of the Court dated 21st December 1917 were understood by the parties including the receiver and the Court as mere conditional orders. No final order of the Court terminating the functions of the receiver seems to have been made and the parties also seem never to have attempted to get the custody of the Court terminated by such final order. We, therefore, agree with the Courts below that the estate continued to be in the custody of the Court and the receivership of defendant 2 also continued till 14th April 1931. In our opinion, in the circumstances of this case the Court did not cease to have jurisdiction over the estate and it acted within its competence when it permitted the receiver to raise the loan. From the terms of appointment of the common manager given in the award, it seems that the parties contemplated thereby the continuation of the Court's custody though the person through whom the Court will continue in custody of the estate was to change from the then receiver to the common manager named in the award. The award vested the common manager with all the powers of a receiver appointed by the Court and directed that 'he was to be governed by all the provisions laid down in the Civil Procedure Code applicable to receivers.'

The next point urged by Dr. Sen Gupta is that even assuming that the mortgage by the receiver was binding on the plaintiffs as owners of the property, they were necessary parties to the mortgage suit under O. 34, R. 1, Civil P. C., and as they were not made such parties, the decree in the mortgage suit is not binding on them. Order 34, Rule 1, Civil P. C., lays down that all persons having an interest

2. ('07) 6 C. L. J. 102, Ramyad Sahu v. Bindeswari Kumar.
3. ('15) 2 A. I. R. 1915 Cal. 103 : 26 I. C. 410 : 20 C. L. J. 107, Rai Charan Mandal v. Biswa Nath Mandal.
4. ('21) 8 A. I. R. 1921 Cal. 792 : 70 I. C. 542 : 35 C. L. J. 332, Dinanath Mahish v. Nabakumar Hajra.
5. ('17) 4 A. I. R. 1917 Cal. 716 : 34 I. C. 869 : 44 Cal. 47 : 24 C. L. J. 140 : 20 C. W. N. 1099, Nuri Mian v. Ambica Singh.
6. ('38) 25 A. I. R. 1938 P. C. 73 : 172 I. C. 993 : 65 I. A. 106 : 32 S. L. R. 350 : I. L. R. (1938) Lah. 63 : 42 C. W. N. 930 (P. C.), Sunder Singh-Mallah Singh, Sanatan Dharam High School, Trust Indaura v. Managing Committee, Sunder Singh-Mullah Singh, Rajput High School, Indaura.

either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It cannot be disputed, and as a matter of fact it was not disputed, that the plaintiffs had interest in the right of redemption. The appointment of the receiver did not take away their interest in the right of redemption and consequently it cannot be contended that they were not necessary parties to the mortgage suit.

Mr. Gupta, appearing for defendant 3, contended that the receiver as party defendant in the mortgage suit represented the right of redemption fully and that he was there representing the present plaintiffs. There is no express order of the Court appointing the receiver allowing the receiver to represent the true owners in the mortgage suit. Admittedly the property never vested in the receiver, his appointment being only under O. 40, R. 1, Civil P. C. The property was only in the custody of the Court and the receiver was simply managing the estate as an officer of that Court. No doubt while he mortgaged the property with the sanction of the Court he must be taken to have represented the owners of the property. But that was the effect of the express sanction given by the Court. The mortgage by the receiver, in these circumstances will no doubt be binding on the real owners, the present plaintiffs; but the question is whether in an action in enforcement of the mortgage they should have been made parties or whether even then the receiver did continue to represent them as a result of the Court's order sanctioning the loan. Mr. Gupta in support of his contention that the receiver would continue to represent the interest of the real owners, even for the purpose of the action in enforcement of the mortgage, relied on 34 Cal. 305.[7] That was a suit for arrears of rent of a taluk instituted by the receiver of the estate of the landlord in his own name. The defence inter alia was that the receiver was not competent to sue in his own name but should have brought the action in the name of the persons interested in the estate. It was held that he was entitled so to sue in his own name. It was observed in this case :

"The receiver in the present case was appointed with full powers under S. 503, Civil P. C. (now O. 40, R. 1, Civil P. C.) Now S. 503 authorizes the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section and full powers granted to the receiver, we are disposed to agree with Peter O'Kinealy J. in the view taken by him in *William Robert Fink* v. *Maharaj Bahadur Singh*[8] that power is conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. We are also disposed to agree with Wilson J. in the view indicated by him in *Oriental Bank Corporation* v. *Gobin Loll Seal*[9] that it is competent to a Court to authorize a receiver to sue in his own name."

The question in the present case is not whether the receiver can sue or be sued in his own name. The question is whether by reason of the appointment of the receiver the owners cease to have the right to be made parties under O. 34, R. 1, Civil P. C. In course of the judgment in the above case, it was observed, on the authority of Alderson on Receivers, that "a receiver by virtue of his appointment and of his character as representative of all parties interested in the property, may be regarded as a quasi assignee, and may be treated as invested with the title to all rights of action possessed by his principal, at the time of the appointment, to such an extent at least, as will enable him to sue upon them in his official character. Later on it was observed :

"The object and purpose of the appointment of a receiver may be generally stated to be the preservation of the subject-matter of the litigation, pending a judicial determination of the rights of the parties thereto. The appointment of a receiver therefore determines no right either of the parties to the controversy or of strangers thereto. But although the receiver has no title to the property and although he is a custodian to take charge of and hold the property during or pending litigation it does not necessarily follow, that if he is authorised to sue, he cannot sue in his own name. Though he is in one sense a custodian of the property of the person, whom in certain respects he is made to supplant there seems to be no reason why his power should not be held to be co-extensive with his functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter committed to him, to enable him to sue in respect thereof by virtue of his office, in his own name."

All this goes only to establish that the receiver may have certain powers co-extensive with his functions. But this does not touch the question involved in the present case. Mr. Gupta also urged the question from the point of view of convenience and pointed out that the rule allowing a receiver to be sued in a case like the present is preferable. He urged that a receiver may be appointed in a suit in which there is a dispute as to the title to the property, and that it may be necessary for him to raise a loan by mortgaging a portion of that property. In a case like this the mortgagee should not be driven to sue all the parties to the litigation but should be entitled to enforce his mortgage by making the receiver alone party. This may be a convenient rule for the mortgagee and it may be that in a case of that character the Court would sanction the suit against the receiver alone, directing him to represent fully the right of redemption. But we are not sure whether in view of the provisions of O. 34, R. 1, C. P. Code, it would be within the competence of a Court appointing a receiver to make an order like that. In any case, no such order has been made on the present occasion, and in the present case the loan was sanctioned after the dispute as to the title to the property was finally determined by the Court. If it is convenient to the mortgagee to have the law to be so, it may be highly prejudicial to the owners of the mortgaged property, and convenience of the creditor is certainly not the only consideration. The receiver may not always adequately represent the interest of the owners in a matter like this. A receiver, for example, may have only very limited resources at his disposal for the purpose of redemption. He may be the receiver only of the property that has been mortgaged and the fund available to him for redeeming the same may be very much inadequate, while the owners may have much larger resources for the purpose. Again, the defences available to the owners may not be open to the receiver. The present case itself is an illustration of the latter point. The defence that the stipulation for compound interest was inserted into the bond by the fraud and collusion between the Receiver and the mortgagee might not have been available to the

7. ('07) 34 Cal. 305 : 5 C. L. J. 270, Jagat Tarini Dassi v. Nabagopal Chaki.
8. ('98) 25 Cal. 642 : 2 C. W. N. 469.
9. ('84) 10 Cal. 713.

receiver, though there is ample authority for saying that it would have been available to the present plaintiffs : *See* 16 I. A. 233[10] and 63 I. A. 126.[11]

The bar of S. 92, Evidence Act, would not have been available against the owners as they were not parties to the instrument and though the receiver was representing them they were not the receiver's representatives in interest. Mr. Gupta contends that if the owners were possessed of larger resources, nothing would have prevented them from redeeming the property. But, if the decree against the receiver be available against them, they would have to redeem on payment of a sum which is much larger than what would be payable by them when they would be party to the suit and would thus be entitled to urge their own defence. As the property was in *custodia legis*, the receiver might have been a proper party to the mortgage suit but in our opinion the real owners who had interest in the right of redemption were also the necessary parties. Even assuming that the receiver would normally represent the owners in a suit of this character, in the present case as soon as he was in collusion with the mortgagee he ceased to represent the interest of the owners. The plaintiffs in the present case took sufficient steps to indicate that they were not allowing the receiver to represent them and if, even after that, the mortgagee proceeded only against the receiver he did so at his risk. In our opinion, at least in view of the finding of fraud and collusion arrived at by the Court of appeal below the receiver did not represent the entire right of redemption on the present occasion and the decree obtained by the mortgagee in his suit against the receiver did not affect the right of redemption of the plaintiffs. The mortgagee did not make them party. They themselves came forward to be made such parties, but on the mortgagee's opposition their prayer was rejected. In our judgment, the decree obtained in the mortgage suit in their absence would not be binding on them.

Of course, in view of the findings arrived at by the Court of appeal below the mortgage itself was binding on the plaintiffs excepting the stipulation as to the compound interest. In the above view of the matter, the sale held in execution of that decree will equally fail to bind the plaintiffs. The Court of appeal below held that the auction purchase by defendant 3 in execution of the mortgage decree was hit by the doctrine of lis pendens. It is difficult to extend the operation of the doctrine to sales of this nature. Before the present suit was instituted, there was a final decree for the sale of certain properties. This decree is given effect to when the property is sold during the pendency of the present litigation. In 63 M.L.J. 394[12] at pp. 406-7 it was pointed out that the doctrine does not extend so as to affect the proceedings in earlier instituted suits. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not lis pendens but something else. This view finds support in 32 Cal. 891[13] (per Mitra J.). But the view that we have taken of the effect of the decree obtained by defendant 1 in his suit for enforcement of the mortgage against defendant 2 makes it unnecessary for us to consider whether or not the purchase by defendant 3 at a sale held in execution of that decree was or was not affected by the doctrine of lis pendens. It appears to us that if the right of redemption of the plaintiffs was not affected by the decree it was neither affected by the sale in execution of that decree. In this view the practical result will be that defendant 3 purchased nothing as the judgment-debtor, defendant 2, had no saleable interest in the property sold.

In the result we allow S. A. No. 1192 of 1938 and dismiss S. A. No. 1260 of 1938 and the cross-objections. The judgment and decree of the Court of appeal below are set aside and in lieu therefor we declare : (1) that the stipulation for compound interest in the deed of mortgage executed by the receiver is not binding on the plaintiffs' estate; (2) that with the above modification the mortgage given by the receiver is binding on the plaintiffs' estate; (3) that the decree obtained by defendant 1 in Title Suit No. 72 of 1929 is not binding on the plaintiffs and the same did not affect their right of redemption; (4) that the sale held in execution of that decree did not affect the plaintiffs' right of redemption. The decree will be drawn in the above terms. In the circumstances of this case we direct that the parties will bear their own costs throughout.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Order accordingly.*

10. ('90) 17 Cal. 291 : 16 I. A. 233 : 5 Sar. 444 (P. C.), Pertab Chunder Ghose v. Mohendra Nath Purkait.

11. ('36) 23 A.I.R. 1936 P.C. 70 : 160 I.C. 384 : 59 Mad. 446 : 63 I.A. 126 (P.C.), Tyagaraja Mudaliar v. Vedathanni.

12. ('32) 19 A.I.R. 1932 Mad. 566 : 139 I. C. 309 : 56 Mad. 115 : 63 M. L. J. 394, Chinnaswami Padayachi v. Darma Linga Padayachi.

13. ('95) 32 Cal. 891 : 1 C. L. J. 371 : 9 C. W. N. 728, Harpershad Lal v. Dalmarden Singh.

C. P. C. —

(b) ('40) Chitaley, Ss. 100 and 101, N. 52 Pt. 4.
('41) Mulla, Page 366 Pt. (a).

(c) ('40) Chitaley, O. 40 R. 1, N, 38.
('41) Mulla, Page 1142 Sub-heading "(3) Debts incurred by receiver in business."

(d) ('40) Chitaley, O. 40, R. 1, N. 31.
('41) Mulla, Page 310, Note "Notice to Receiver necessary."

(e) ('40) Chitaley, O. 40 R. 1, N. 48.
('41) Mulla, Page 1148, Note "Continuance of office."

(f) ('40) Chitaley, O. 34 R. 1, N. 6 Pt. 18, O. 40 R. 1, Notes 31 and 44.
('41) Mulla, Pages 1058-1059, Note "Parties to Suits for redemption etc." Page 1140 Pts. (o) and (p). Page 1150, Note "When receiver should be joined as a party to a suit."

(g) ('40) Chitaley, O. 40 R. 1, N. 22.
('41) Mulla, Page 1147, Note "All such powers . . . the owner himself has."

T. P. Act —

(i) ('36) Mulla, Page 226 Pt. (k).
('34) Mitra, Page 209, N. 251.

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MOHAMAD AKRAM AND PAL JJ.

Jogendranath Banerjee

v.

Makhan Lal Banerjee and others.

Appeal No. 117 of 1939, Decided on 18th December 1941, from appellate decree of Addl. District Judge, Alipur, D/- 8th September 1938.

Succession Act (1925), S. 213—Construction —Scope — In India intestacy is general rule — Plaintiff is entitled to succeed by inheritance unless valid disposition of suit property is proved—Defendant whether he be legatee, executor or third person must prove will in order to defeat plaintiff's claim—This he cannot do under S. 213 without taking probate—Unprobated will however can be looked into for collateral purpose.

Section 213 does not say that "no claim as executor or legatee can be established", and consequently the prohibition contained in it is not limited only to case where the claimant is himself an executor or a legatee under the will. If in a case it be necessary to establish the right as executor or legatee under a will, no matter whether or not the person setting up the right claims under that right, the prohibition shall apply. Section 213 is not limited in its operation only to cases where the plaintiff brings a suit as executor or legatee or even to cases where the defendant claims as executor or legatee. It extends to all cases where it becomes necessary in the suit to decide that under the will the right as an executor or legatee accrued. It equally debars a person who is required to establish the legatee's right merely as a jus tertii for the purpose of his defence. [P 405 C 1]

In India intestacy is the general rule and unless a valid disposition of the property in suit by will is proved the plaintiff is entitled to succeed by inheritance; the defendant, whether he is the executor, legatee or a third person, therefore, should prove the will in order to defeat the plaintiff's claim and this he cannot do under the terms of S. 213 without taking probate. [P 403 C 2]

The right of a Hindu heir to take by inheritance will not be defeated simply by a provision in the will prohibiting that heir from taking. Unless and until the property is effectively disposed of by the will to others, the heir will take by inheritance. Consequently in order to defeat the title of a Hindu plaintiff it would not suffice for the defendant whether he be executor, legatee or third person simply to say that by the will the plaintiff was disinherited and the property was sought to be given to another. The defendant must establish that the disposal in favour of that another by the will was successful. This would be seeking to establish the right of that another as a legatee under the will and as the claim of the plaintiff will not be defeated till this is established the prohibitory rule contained in S. 213 will stand in the way of the defendant so long as the will remains unclothed with a probate : ('27) 14 A. I. R. 1927 Mad. 1054 (F.B.), *Rel. on*; ('25) 12 A. I. R. 1925 Mad. 861, *held impliedly overruled by* ('27) 14 A.I.R. 1927 Mad. 1054 (F.B.); ('37) 24 A.I.R. 1937 Cal. 252, *Approved*. [P 405 C 2]

The prohibition under S. 213 however does not extend beyond the question of establishment of the right as executor or legatee. The will can be looked into for all other purposes e. g. for a collateral purpose or construction of it : ('16) 3 A. I. R. 1916 Cal. 324; ('15) 2 A. I. R. 1915 Cal. 207; ('26) 13 A.I.R. 1926 Cal. 1 and ('15) 2 A.I.R. 1915 Cal. 341, *Approved*. [P 405 C 1]

Hiralal Chakravarty and Rabindra Nath Bhattacharjee — for Appellant.

A. C. Chatterjee, Narendra Nath Mitter and Anil K. Das Gupta— for Respondents.

MOHAMAD AKRAM J.—This appeal by the plaintiff arises out of a suit for partition and separate allotment of his eight annas share in the suit lands. The plaintiff's case was that the lands belonged to his great grand-father Nemai Churn Banerjee, that on his death it was inherited by his two sons Pitambar and Kalikumar in equal shares: that Kalikumar's interest devolved upon his son Becharam and on Becharam's death his two sons, the plaintiff and Tarak came to be the owners: that by amicable partition with the son of Tarak the plaintiff became entitled to the entire eight annas share of the suit lands: that the remaining eight annas share of Pitambar ultimately came to defendants 1 to 11 in the course of succession and by transfers: that in spite of repeated demands the defendants had failed to partition the property amicably. Defendants 1, 2 and 9 to 11 appeared, and various objections relating to extent of share, misdescription of the property, want of title, limitation etc. were taken but their main defence which is material for the purpose of the present appeal was that Becharam by a registered Will (Ex. F, certified copy) had dedicated all his immovable properties to the family idol and had thus deprived the plaintiff from obtaining any interest in the suit lands by inheritance: that in the absence of the shebaits of the idol the suit was not maintainable on account of the defect of parties. Regarding this main defence the issues framed in the trial Court were :

Issue No. 4. Is the suit bad for non-joinder and mis-joinder of parties and Issue 6. Has the plaintiff inherited by share in the disputed property and has he got any locus standi to maintain the suit ?

Upon the issues aforesaid, the trial Court expressed its views in the following terms :

"There cannot be any doubt about the genuineness of the will of which Ex. F is a certified copy. The shebaits of the deities apparently took possession of the properties dedicated to the deities by virtue of the will after Becharam's death, although no probate of the will was obtained. It is urged by plaintiff's pleader that as the probate of the will is not taken out the will is inadmissible in evidence. Notwithstanding S. 187, Succession Act, which is incorporated in the Hindu Wills Act, a will not proved in the probate Court may be used in evidence for a purpose other than the establishment of a right as executor or legatee. Section 187, Succession Act, does not stand in the way of defendants 9 to 11 putting forward the existence of the will of Becharam Banerjee (though unprobated) in answer to the plaintiff's claim to a share in his property. . . . .

The above deities represented by their shebaits . . . . . are necessary parties in this suit although no probate of the will has been taken. Their non-joinder seems to be fatal to the suit."

Taking the above view the trial Court was of opinion that the plaintiff could not claim any share in the immovable properties left by Becharam on the basis of inheritance and could succeed only by proving adverse possession against the deities and the defendants. On the merits, it recorded the findings that the plaintiff had proved his 8 annas share ; that adverse possession was established only in respect of C. S. Plots 1508 and 1509 ; that title was barred by limitation in respect of C. S. Plots 1510 and 1511: that plot No. 2 of the plaint was not shown to be included in C. S. Plots 868 and 870 as alleged, nor was it shown that it was in the possession of the plaintiff. It however dismissed the whole suit on a consideration of issue 4 as it held that there was defect of party which was fatal to the maintainability of the suit. Against this decision

the plaintiff appealed and the learned Additional District Judge who heard the appeal took the view that having regard to S. 213, Succession Act, the unprobated will could not be made the basis for establishing title under it only by the executor or the legatee and as such the suit could not be dismissed for not making the shebaits party to the suit; he accordingly decreed the suit in respect of C. S. Plots 1508 and 1509 but he upheld the decision of the trial Court in respect of C. S. Plots 1510 and 1511 observing in the course of his judgment as follows :

"The position is, however, different when we come to consider the title of the plaintiff. The plaintiff must of course prove his title before he can get any relief in this suit. But when he seeks to prove his title on the basis of his and his brother's heirship of their father, the will stands in the way. While no one can be allowed to establish a title on the strength of this unprobated will, S. 213, Succession Act, does not bar its use as evidence that Becharam disinherited his sons. The unprobated will proved by D. W. 3 Hari Lal (*vide* Ex. F certified copy of the will) does, in my view, prove the disinheritance of the plaintiff and his brother by their father. In the circumstances the plaintiff cannot claim any title to the land in suit, either as an heir of his father or through his brother."

He accordingly passed a decree modifying the decree of the trial Court. From this decision the plaintiff preferred the present appeal. It was contended by the learned advocate appearing on behalf of the appellant :

(i) that the Court of appeal below was in error in its view that S. 213, Succession Act, did not bar the use of the unprobated will (Ex. F) as evidence for the purpose of proving that Becharam by a testamentary disposition of all his immovable properties had precluded the plaintiff from claiming any share therein by inheritance and the decisions in 50 Mad. 927,[1] 59 I. A. 331,[2] A. I. R. 1937 Cal. 252[3] and 11 C. W. N. lxxvi[4] were relied upon in support : (ii) that as regards C. S. Plots Nos. 1510 and 1511 of the Plot No. 1 of the plaint the Court of appeal was in error in holding that the plaintiff could not be allowed to claim title on the basis of inheritance and could succeed only by proving title acquired by adverse possession. (iii) that as regards the entire plot No. 2 of the plaint the Court of appeal below had erroneously omitted altogether to consider the case of the plaintiff.

In answer to the above arguments, it was urged by the learned advocate appearing for the respondents (i) that S. 213, Succession Act, prevented the use of unprobated will only by the executor and the legatee for the purpose of establishing title under it and not by third parties for the limited purpose of merely showing that there was no intestacy as there was a will in existence. The decision in 87 I.C. 621 =A.I.R. 1925 Mad. 861[5] was cited as an authority in support and it was suggested that the observation in A.I.R. 1937 Cal. 252[3] to the effect that the case of A.I.R. 1925 Mad. 861[5] had been overruled by the Full Bench in 50 Mad. 927[1] was misconceived and incorrect. Reference was made to the cases in 42 Cal. 953,[6] 18 C. W. N. 1136,[7] 42 C. L. J. 280[8] at p. 407 for the proposition that an unprobated will was not inadmissible in evidence for any purpose other than the purpose of establishment of title as executor or legatee. As regards (ii) it was urged that as the existence of the will was proved the claim for inheritance based upon intestacy failed and the Court of appeal below was right in holding that the plaintiff could succeed only by proving adverse possession against the defendants. As regards (iii) however it was conceded that there was an omission to consider the case of the plaintiff in respect of plot No. 2 of the plaint.

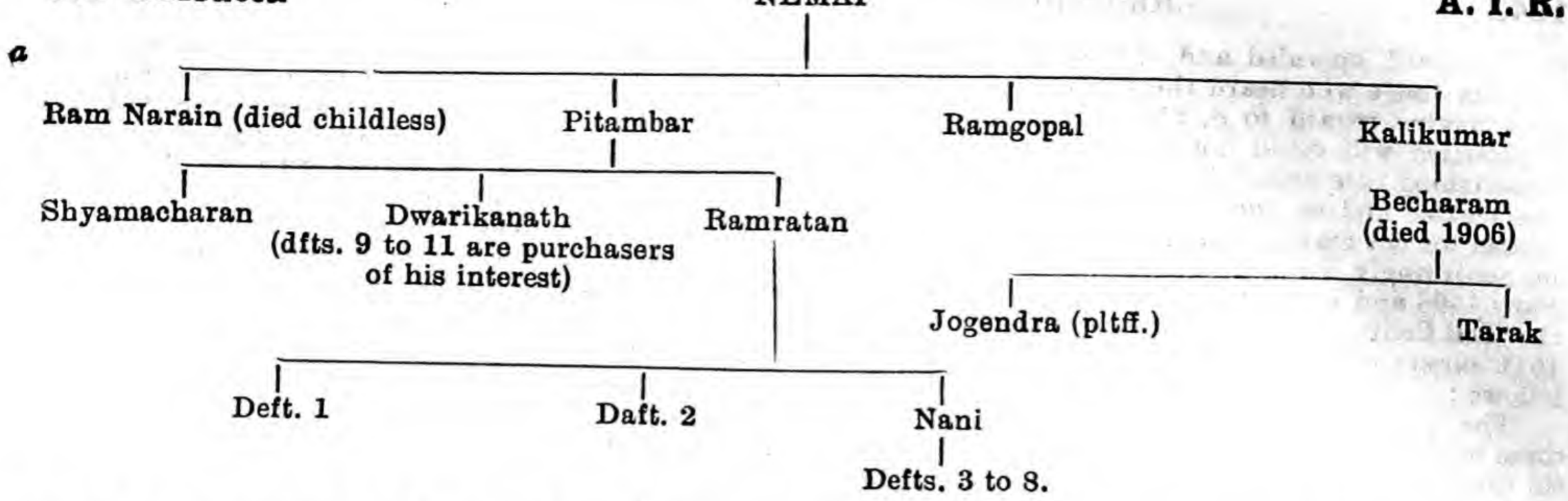
In our opinion the contentions put forward by the learned advocate on behalf of the appellant are well founded and should be given effect to. The decision in 87 I. C. 621[5] seems to us to have been substantially overruled by the decision in 50 Mad. 927[1] at least by implication if not by express terms. In this country intestacy is the general rule and unless a valid disposition of the property in suit is proved the plaintiff is entitled to succeed by inheritance; the defendant therefore should prove the will in order to defeat the plaintiff's claim, this he cannot do under the terms of S. 213, Succession Act, without taking probate, it is true that an unprobated will may be looked into for a collateral purpose or for the construction of it as was done in 42 Cal. 953,[6] 18 C. W. N. 1136,[7] 42 C. L. J. 280[8] at p. 407 and 20 C. W. N. 122[9] but that is a different matter. In the above mentioned cases, the unprobated will was not admitted for defeating the plaintiff's claim or title to any property by inheritance. The Court below therefore seems to us to have approached the case from an erroneous point of view. We accordingly send it back to the lower appellate Court for a rehearing in respect of C. S. Plots Nos. 1510 and 1511 and the Plot No. 2 of the plaint and for disposing of the appeal in accordance with law, in the light of the observations made herein. The findings in respect of C. S. Plots Nos. 1508 and 1509 will stand. The appeal is allowed as stated above. Costs will abide the result.

PAL J. — I agree that this appeal should be allowed. The appeal is by the plaintiff and it arises out of a suit for partition. The following genealogy will be helpful to understand the relationship between the parties :

(See Table on next page)

The property originally belonged admittedly to Nemai. He left four sons and of these Ram Narain and Ram Gopal died childless. It is not disputed that thus Pitambar got 8 annas share and the other 8 annas came to Kali Kumar. The defendants are the successors-in-interest of Pitambar and the plaintiff is claiming through Kali Kumar. Kali Kumar's 8 annas interest descended to his son Becharam and the plaintiff's case is that Becha-

1. ('27) 14 A.I.R. 1927 Mad. 1054 : 106 I. C. 150 : 50 Mad. 927 : 53 M.L.J. 709 (F.B.), Ganshamdas Narayandas v. Gulab Bi Bai.
2. ('32) 19 A.I.R. 1932 P.C. 216 : 138 I.C. 861 : 59 I.A. 331 : 59 Cal. 1399 (P.C.), Shiba Prosad Singh v. Prayag Kumari.
3. ('37) 24 A. I. R. 1937 Cal. 252 : 171 I. C. 17, Ranjit Kumar v. Subodh Chandra.
4. ('07) 11 C. W. N. lxxvi, Rup Chandra Sarma v. Ram Chandra Deb.
5. ('25) 12 A. I. R. 1925 Mad. 861 : 87 I. C. 621, Ganshamdoss v. Saraswati Bai.
6. ('16) 3 A. I. R. 1916 Cal. 324 : 28 I. C. 972 : 42 Cal. 953 : 19 C.W.N. 513, Sarala Sundari Debi v. Hazari Dasi Debi.
7. ('15) 2 A, I. R. 1915 Cal. 207 : 26 I. C. 21 : 18 C.W.N. 1136, Basunta Kumar v. Gopal Chunder.
8. ('26) 13 A. I. R. 1926 Cal. 1 : 93 I. C. 385 : 42 C. L. J. 280, Rani Prayag Kumari Debi v. Siva Prosad Singh.
9. ('15) 2 A. I. R. 1915 Cal. 341 : 27 I. C. 739 ; 21 C.L.J. 96 : 20 C. W. N. 122, Acyutananda Das v. Jagannath Das.



ram's interest descended to the plaintiff himself and his brother Tarak in equal shares. Subsequently, by a private partition between the plaintiff and Tarak's sons, the lands of the present suit fell to the share of the plaintiff. He thus alone became entitled to 8 annas share in these lands and his present suit is for a partition in respect of this 8 annas share.

The defence of the defendants is that Becharam died in 1906 leaving a registered will, whereby he dedicated this property to certain family deities. Under the provisions of that will nothing devolved upon the plaintiff and his brother Tarak and consequently, the plaintiff has got no title to this property. They further pleaded that in the absence of the deities, who thus became the real owners of the 8 annas share of Becharam, the present suit was not maintainable for defect of parties. The properties are given in two schedules in the plaint. Schedule Ka contains C. S. dags Nos. 1508, 1509, 1510 and 1511 and sch. Kha gives the property partly covered by C. S. dag No. 870 and partly by C. S. dag No. 868. Admittedly, the alleged will of Becharam has not been probated. The plaintiff impeached this will on various grounds and asserted that as no probate has been granted of the will, it cannot be given in evidence to establish the right of the deities.

The Court of first instance held : (1) that notwithstanding S. 187, Succession Act, the will, though not proved in the Probate Court, might be used in evidence for the purpose of establishing that Becharam Banerjee had left a will and that consequently plaintiff had not the claimed interest in the property; (2) that the plaintiff acquired title by adverse possession to plots Nos. 1508 and 1509 of sch. Ka but that as the deities were not made parties to the suit, the suit was bad for defect of parties and (3) that as regards the lands in schedule 'Kha' there was no reliable evidence on the record in support of the plaintiff's case that it was partly included in C. S. plot No. 870 and partly in C. S. plot No. 868; that defendants 9 to 11 had satisfactorily proved their uninterrupted and peaceful possession of a portion of the plot as a road for over 20 years as of right, and that the plaintiff's claim for partition of this plot is obviously barred by limitation, waiver, estoppel and acquiescence. He, therefore, dismissed the suit.

On appeal by the plaintiff, the learned Additional District Judge held that as probate has not been taken of the will, it could not be used to establish the title of the deities. That being so, there was no defect of parties; but that though the will could not be used for establishing the title of the deities, it could be looked into to demolish the title claimed by the plaintiff. He further found that by reason of this will, the plaintiff and his brother did not inherit anything from their father Becharam. He however maintained the finding arrived at by the Court of first instance, that the plaintiff succeeded in establishing his title by adverse possession to plots Nos. 1508 and 1509. As regards the other two plots of sch. Ka, namely, plots Nos. 1510 and 1511, the learned lower appellate Court came to the conclusion that the plaintiff failed to establish his title by adverse possession. On these findings and without saying a word about the properties given in sch. Kha, the learned Additional District Judge allowed the appeal in part decreeing the plaintiff's suit in respect of C. S. plots Nos. 1508 and 1509 only and dismissing the rest of his claim.

Mr. Chakravarty, appearing in support of this appeal, contends that the will was not admissible in evidence even for the purpose of demolishing the plaintiff's title by inheritance, and that, at any rate, the Court of appeal below was wrong in dismissing the plaintiff's claim to the property in schedule Kha without at all adverting to the evidence regarding that property. As regards the first point Mr. Chakravarty contends that in order to defeat the plaintiff's title by inheritance, it would not suffice to prove that there was a will left by his father. Unless and until it is established that under that will the property was successfully disposed of, plaintiff's title by inheritance will not be defeated. In order therefore to exclude the plaintiff's title, it becomes necessary to establish the right of the deities under the will and this is exactly what is prohibited by S. 187, Succession Act, 1865 (present S. 213) in the absence of a grant of probate of that will. Mr. Chatterjee appearing for the respondent contends (1) that the plaintiff having based his claim on intestacy of his father Becharam Banerjee, his claim will fail as soon as it is established that Becharam Banerjee did not die intestate in respect of the property in question and this will be established as soon as it is shown that he left a valid will in respect of the property; (2) that the will, though not clothed with the grant of probate, can be looked into for this purpose and Sec. 213, Succession Act, does not contain any prohibition in this respect. Section 187, Succession Act 1865 (Act 10 of 1865) ran as follows:

"No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under S. 180."

The provisions of this Act were not originally applicable to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist : (*vide* S. 331 of that Act). Some of the sec-

tions of this Act, including Sec. 187 were made applicable to the Hindus to a limited extent by the Hindu Wills Act, 1870 (Act 21 of 1870). Section 213 (1), Succession Act, 1925, is only a reproduction of the old Sec. 187 of the Act of 1865. It may be noticed here that Sec. 187, Succession Act of 1865 was not incorporated in the Probate Act of 1881 (Act 5 of 1881), though it continued embodied in the Hindu Wills Act. Consequently, the rule of prohibition in the section affected only those wills to which the Succession Act or the Hindu Wills Act applied. Section 213 of the present Succession Act (Act 39 of 1925) like S. 187, Succession Act of 1865 lays down that "no right as executor or legatee can be established . . . . unless a Court . . . has granted probate of the will under which the right is claimed . . . ." The section does not say that "no claim as executor or legatee can be established" and consequently the prohibition contained in it is not limited only to case where the claimant is himself an executor or a legatee under the will. If, in a case, it be necessary to establish the right as executor or legatee under a will, no matter whether or not the person setting up the right claims under that right, the prohibition shall apply. The section is not limited in its operation only to cases where the plaintiff brings a suit as executor or legatee or even to cases where the defendant claims as executor or legatee. It extends to all cases where it becomes necessary in the suit to decide that under the will the right as an executor or legatee accrued. It equally debars a person who is required to establish the legatee's right merely as a jus tertii for the purpose of his defence.

The prohibition, however, does not extend beyond the question of establishment of the right as executor or legatee. The will can be looked into for all other purposes. Thus, if, in the present case, it becomes necessary to come to a decision whether the deity took the property under the will, the will must be excluded from consideration and the right set up in the deity cannot be established unless and until the will is clothed with the grant of a probate. If, on the other hand, it be sufficient to show only that there was a will left by Becharam and that the will purported to dispose of this property, then the prohibition contained in S. 213 shall not exclude the will from consideration. The question involved in the present appeal therefore boils down to this : whether the title claimed by the plaintiff will be excluded simply by showing that his father left a will and that by that will purported to dispose of the disputed property in favour of the deity. If this be the position, the will shall not come within the prohibition of S. 213, Succession Act. If, however, it be necessary to establish not only that the will purported to dispose of this property in favour of the deity but that it succeeded in disposing it of in its favour, before plaintiff's claim on intestacy can be defeated, then, the prohibition of the section shall apply. As was pointed out by the Judicial Committee in the case of *Tagore* v. *Tagore*[10] : "whilst rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character. . . . The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down (or in the case of custom, recognized) by the State, not merely for the benefit of individuals but for reasons of public policy. . ."

The right of a Hindu heir to take by inheritance will not be defeated simply by a provision in the will prohibiting that heir from taking. Unless and until the property is effectively disposed of by the will to others, the heir will take by inheritance. This being the law, in order to defeat the title of the plaintiff in the present case, it would not suffice for the defendants simply to say that by the will the plaintiff was disinherited and the property was sought to be given to the deities. The defendants shall have to establish that the disposal in favour of the deities by the will was successful. This will be seeking to establish the right of the deity as a legatee under the will and as the claim of the plaintiff will not be defeated till this is established the prohibitory rule contained in S. 213, Succession Act, shall stand in the way of the defendant. The legal heir of a Hindu cannot be disinherited even by an express declaration of the testator's intention to disinherit him. Unless and until the property itself is taken away from him and successfully given over to another, he will take the property by inheritance. Whatever be the reason why an attempted disposition fails, if it fails and the property remains otherwise undisposed of, it comes to the heir. In our opinion, therefore, in order to defeat the claim of the present plaintiff it would not suffice in the present case simply to establish that his father left a valid will and that intended dispositions of that will covered this property. The defendant must proceed further and must establish that the disposition in favour of the deity was a successful one. This would really be establishing the right of the deity as a legatee under the will. And this is exactly what is prohibited by S. 213, Succession Act, so long as the will remains unclothed with a probate.

Mr. Chakrabuarty in support of his contention relied on the Full Bench decision of the Madras High Court in 50 Mad. 927[1] and on the decision of this Court in A. I. R. 1937 Cal. 252.[3] He also relied on the decisions in 18 C.W.N. 1136,[7] 59 Cal. 911,[11] 42 C. L. J. 280.[8] The cases which say that S. 213, Succession Act, does not debar an unprobated will from being given in evidence for a purpose other than the establishment of a right as executor or legatee will not be of any avail to the defendants in this case, because as has been pointed out above in the present case nothing short of establishing the right of the deities under the will as legatee will defeat the title of the plaintiff. In 50 Mad. 927[1] the question that was referred to the Full Bench in the case was, "Can a defendant resisting a claim made by the plaintiff as heir at law rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the will is not probated and no letters of administration with the will annexed have been granted?"

The question arose when the Succession Act (10 of 1865) was in force. Section 187 of the Act was the relevant provision. Philips Offg. C. J. observed:

"There is nothing in S. 187 which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants and this view has been taken in several cases."

Anantakrishna Ayyar J. observed: "Where the plaintiff's prima facie title to the property is estab-

10. ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47: 18 W. R. 359 : 3 Sar. 82 (P. C.), Jatindra Mohan Tagore v. Ganendra Mohan Tagore.

11. ('33) 20 A. I. R. 1933 Cal. 234 : 142 I. C. 747 : 59 Cal. 911, Gopal Lal v. Amulya Kumar.

lished, the defendant in order to non-suit the plaintiff should establish the title of the legatee. The general law would be seen to be that the defendant's plea of jus tertii cannot be entertained when he does not state in whom the right resides. The defendant must trace title to a third party other than the plaintiff . . . . . A prima facie title made out by the plaintiff to the property in suit is, I think, a good title against all the world except against the person who can show a better title . . . . . He must succeed unless the defendant is able to displace the plaintiff's prima facie title and prove a better title in some person other than the plaintiff. If such person's rights should happen to be as legatee under will, since the defendant has to prove such person's right as legatee, he comes within the scope of S. 213, Succession Act, 1925 (S. 187 of the old Act 10 of 1865)."

In A. I. R. 1937 Cal. 252,[3] (D. N. Mitter and S. K. Ghose JJ.) the plaintiff claimed a one-fourth share in a certain property as heir of one Krishnadas Basu Mullick and his suit was for partition of the same by distinct demarcation. The relevant defence was that Krishnadas left a will whereby some of the disputed properties were made debuttar. The will was at first probated but subsequently the probate was revoked. The contention of the plaintiff was that as after revocation of the original grant of probate, the will was left unprobated the debuttar character of the property could not be established under S. 213, Succession Act. This contention was upheld by this Court and for this purpose reliance was placed on the Full Bench decision of the Madras High Court referred to above. Mr. Chatterjee appearing for the respondents contended that both in the Calcutta case and in the Madras Full Bench case, the decision was on the footing as if it were necessary to establish the right as legatee under the will. He contends that in those cases the question was not at all agitated as to whether such right need be established to defeat the plaintiff's claim. According to him, therefore, these are no authorities against the proposition of law contended for by him, and that the direct authority in support of his contention is to be found in A. I. R. 1925 Mad. 861.[5] In the case relied on by Mr. Chatterjee, the plaintiff claimed as heir of one Kaberi Bai. The defence was that Kaberi Bai left a will under which the defendant took the property as legatee. Kumaraswami Sastri J. observed as follows :

" In the present case the plaintiff comes to Court saying that Kaberi Bai died intestate, and that he is the heir under the Hindu law claiming by intestate succession. There is no authority which says that where a plaintiff comes to Court claiming as on intestate succession, his claim can only be disputed by one who has obtained probate of the will. Where it is shown that the person did not die intestate but left a will, the plaintiff who claims adversely to the will is out of Court irrespective of any proof of claim or title by the defendant. In cases where the plaintiff necessarily fails, merely on the ground that there is a will left by a person and that, by reason of the will, his claim to succeed to the estate of the deceased on the ground of intestacy under the ordinary law is not sustainable, there is nothing to prevent the defendant from pleading and proving the existence of the will. It is unnecessary in such cases for the defendant to prove any independent title of his own. Just as he could plead jus tertii, he could also plead facts that would bar the plaintiff's title."

It seems that Kumaraswami Sastri J. took the view that when the plaintiff came to Court pleading that there was no will left by his predecessor and based his claim on this alleged fact of non-existence of any will, his claim will be liable to be defeated by the mere proof that as a matter of fact the predecessor left a will. The learned Judge does not seem to decide further than this, and we are not inclined to take such strict view of pleadings. If the learned Judge really meant to say that in Hindu law as soon as testacy is established in the sense that the predecessor left a will, there can be no claim on intestacy, we respectfully differ from this view, and we have already given our reason for holding otherwise. It should also be remembered that mere existence of a will does not necessarily mean testacy in respect of certain property. Under the Succession Act a man can die partly testate and partly intestate. And, in our opinion, a Hindu will die intestate even in respect of properties which he might have made an unsuccessful attempt to dispose of by will.

The second contention of Mr. Chakravarty must also prevail. Nowhere in his judgment the learned Additional District Judge adverted to the property in schedule Kha. Therefore his decree dismissing the plaintiff's claim to that property cannot be maintained. It appears that the defendants pleaded bar of limitation to the plaintiff's claim. So far as C. S. Plots Nos. 1510 and 1511 of Schedule Ka and that property of Schedule Kha are concerned, as the claim of the plaintiff was dismissed on other grounds, it was not necessary for the Court below to enter into this question of limitation. But on the view that we are taking of the plaintiff's title, it will be necessary now to consider this defence. So far as plots Nos. 1508 and 1509 are concerned, the plaintiff succeeded in getting a decree in respect thereof and there has been no cross-objection filed by the defendants on any ground. The decree in respect of these properties therefore must be left undisturbed.

G.N./R.K. *Order accordingly.*

A. I. R. (29) 1942 Calcutta 406

HENDERSON J.

Sazawar Khan and another —

Appellants

v.

Satyendra Lal Chowdhury and others—

Respondents.

Appeal No. 1227 of 1939, Decided on 16th January 1942, from appellate decree of District Judge, Chittagong, D/- 31st March 1939.

Transfer of Property Act (1882), S. 106 — Applicability — No lease — No notice can be served.

Where the relationship of landlord and tenant between the parties has been created not by a lease but by a decision of Court, no question of serving a notice to quit under S. 106 arises. [P 407 C 1]

Narendra Kumar Das and Durgesh Prosad Das — for Appellants.

Amritalal Mukherjee and Rohinibinod Rakshit — for Respondents.

JUDGMENT.—This appeal is by the defendants and is directed against a decree for ejectment. The position is as follows: The plaintiffs instituted Title Suit No. 804/92 of 1935 to eject the defendants from the disputed land on the ground that they were

trespassers. The defence was amongst other things that the defendants had extinguished the title of the plaintiffs by adverse possession. In the course of the trial this defence was abandoned. The defendants, however, contended that they had obtained a limited right to hold the lands as tenants by adverse possession. The Munsif accepted this defence. He accordingly gave the plaintiffs a declaration of their title and right to get rent from the defendants but dismissed the claim for khas possession. The plaintiffs appealed to the District Court without success and the matter terminated there. The plaintiffs then instituted a suit for the assessment of fair rent. They obtained a decree and it is not disputed by the defendants that they are liable to pay rent as decreed. The plaintiffs then instituted the present suit for ejectment on the allegation that they had terminated the tenancy by a valid notice to quit under S. 106, T. P. Act.

In my judgment, this suit was entirely misconceived. Section 106, T. P. Act, implies the existence of a lease. In the present case, there never was a lease. If there was a lease, it would be quite meaningless for the Court to assess fair rent. As there was no lease, no question of serving a notice to quit could arise. Then again, it would be impossible to serve a valid notice because it could not be ascertained on what date the annual or monthly tenancy, whatever it may be, terminated. In the present case, the relationship of landlord and tenant between the parties has been created not by a lease but by a decision of the Court. On behalf of the respondents, it was contended that the decision of the Court has not given the defendants a permanent right and that there are other methods by which the defendants may be ejected. It is not for me now to express any opinion on that argument. The only question is whether the tenancy of the defendants has been legally terminated by the notice to quit which was served upon them. The appeal is accordingly allowed. The decrees of the Courts below are set aside and the suit is dismissed with costs in all Courts. Leave to appeal under S. 15, Letters Patent, is asked for and is refused.

R.K. *Appeal allowed.*

T. P. Act —

('36) Mulla, Page 585 N. "Notice to quit in periodic tenancies."

('34) Mitra, Page 573 N. 554.

A. I. R. (29) 1942 Calcutta 407

PAL J.

Sher Ali Mridha — Plaintiff — Appellant

v.

Torap Ali and others — Respondents.

Appeal No. 1108 of 1939, Decided on 6th February 1942, from appellate decree of Sub-Judge, First Court, Bakarganj, D/- 28th February 1939.

(a) Civil P. C. (1908), O. 2, R. 2 — Words "cause of action" — Meaning of.

The expression "cause of action" really means the fact or combination of facts which gives rise to a right of action, the right of suing before a Judge for realisation of the relief arising out of the infringement of the right. The expression is sometimes used to include the facts which constitute the right and its infringement. Sometimes it is used only to mean the circumstances forming the infringement of the right or the immediate occasion for the action. In the Code of Civil Procedure itself the expression is not used everywhere in the same sense : 22 Cal. 833, *Rel. on* ; *Case law discussed.* [P 409 C 2]

The expression "cause of action" for purposes of O. 2, R. 2 means all the essential facts constituting the right and its infringement. [P 410 C 2]

(b) Civil P. C. (1908), O. 2, R. 2—Conditions requisite for applicability of O. 2, R. 2 stated — Allegations in plaints in two suits are to be looked into only to find out to what extent they disclose cause of action.

In order to apply the provisions of O. 2, R. 2 to bar a suit it must be found out (1) what was the cause of action in respect of which the claim was made in the previous suit ; (2) what is the claim made in the subsequent suit ; (3) whether the claim made in subsequent suit could have been made either wholly or in part in respect of the cause of action of the previous suit. If so, the claim in the subsequent suit shall fail to the extent to which it could have been but was not made in the prior suit. [P 409 C 2 ; P 410 C 2]

In order to arrive at these findings, the two plaints must be compared. But this does not mean that in order to apply O. 2, R. 2 all the allegations in the two plaints shall have to be taken and the bar imposed shall apply only when these are identical. The allegations are to be looked into only to find out to what extent they disclosed any cause of action. The cause of action for this purpose would mean all the essential facts constituting the right and its infringement. If the plaintiff obtained a judgment in his favour on a particular cause of action in the previous suit his claim in that suit must be taken to have been based on that cause of action, and that judgment ought to be conclusive as to the cause of action in respect of which that claim was made. In order to see what is the cause of action in respect of which the claim in the subsequent suit is made and what is the claim made in it the plaint in the subsequent suit must be looked into. If certain allegation in the plaint discloses the selfsame cause of action which could have supported the claim made in the plaint, then, simply because other additional allegations have also been made in it the plaintiff would not thereby escape the bar imposed by O. 2, R. 2. If without the additional allegations in the second plaint, the cause of action for the claim made in it be complete, then in that case the additional allegations will not constitute the cause of action at all, and the Court after finding that will have to dismiss the claim under O. 2, R. 2. If the additional allegations go to constitute a fresh cause of action for the claim made then the cause of action as alleged in the second plaint is different from the cause of action of the first plaint. If the plaintiff fails to establish the additional allegations, he may fail for want of cause of action but his suit will not be hit by the provisions of O. 2, R. 2: *Case law discussed.* [P 410 C 2]

(c) Civil P. C. (1908), O. 2, R. 2 — Plaintiff purchasing ka and kha lands at Court auction sale and given symbolical possession—Failing to obtain actual possession plaintiff suing for possession of kha lands only though he could have sued for possession of ka lands also — Decision under S. 145, Criminal P. C., in respect of ka lands adverse to plaintiff—Suit by plaintiff for possession of ka lands alleging adverse decision as cause of action — Adverse decision held did not give fresh cause of action — Circumstances under which plaintiff could have acquired fresh cause of action stated — Cause of action held not different simply because properties were different.

The plaintiff purchased ka and kha lands in a Court auction sale. He was given symbolical possession of those lands but failed to obtain actual possession. He therefore instituted a suit for possession of the kha lands only though he had a cause of action in respect of the ka lands also at that time. Subsequently, there was a decision under S. 145, Criminal P. C., in respect of the ka lands adverse to the plaintiff. The plaintiff therefore brought a suit for possession of the ka lands alleging the adverse decision under S. 145, Criminal P. C., as the cause of action :

Held that since before the adverse decision under S. 145, Criminal P. C., there had already been a completed cause of action available to the plaintiff in respect of the ka lands, the additional fact of an adverse decision under S. 145, Criminal P. C., could not give him a fresh cause of action without something more. [P 411 C 1]

The plaintiff being the rightful owner would, for example, have a fresh cause of action if he succeeded in taking even forcible possession of the lands though he might have subsequently been made to give up such possession by the due process of law : 9 C. W. N. 1061 ; 33 Cal. 821 and 6 C. L. J. 472, *Rel. on.* [P 411 C 1]

Held further that since the same facts were to be relied on as constituting the right and its infraction in respect of all the properties the cause of action would not be different simply because the properties were different. [P 411 C 2]

Panchanan Ghose and Binayak Nath Banerjee — for Appellant.

Atul Chandra Gupta and Radhika Ranjan Guha — for Respondents.

JUDGMENT. — This appeal is by the plaintiff and it arises out of a suit for recovery of possession on declaration of the plaintiff's title to the suit land. The land in suit appertains to a raiyati holding belonging to one Meru Shaikh. Meru Shaikh died leaving his widow Moyna alias Nowabjan and two sons Abdul Ali and Akub Ali. In 1916 the two sons of Meru Shaikh mortgaged their 14 annas share in the holding to one Benode Behari Shaha. In 1920, Akub Ali's son Turab Ali who is defendant 1 in the present suit, created a usufructuary mortgage in favour of the present plaintiff in respect of the land of this holding. In 1921, the widow of Meru Shaikh, Moyna alias Nowabjan, who is defendant 6 in the present suit sold her 2 annas share in the holding to Maniruddin and Kalimuddin who on their part sold this interest to the present plaintiff on 31st May 1923. In 1922, the mortgagee of the 14 annas interest instituted a suit for enforcement of the mortgage, obtained a decree in that suit and in execution of that decree purchased the holding himself in 1923. The present plaintiff as a usufructuary mortgagee thereupon deposited the decretal amount and got the said sale set aside. Thereafter on 5th May 1925, the plaintiff instituted a suit for recovery of the money deposited by him in satisfaction of the mortgage dues and obtained a decree against the sons of Meru Shaikh and ultimately in execution of that decree put their 14 annas interest in the holding to sale and purchased the same himself on 14th June 1928. The plaintiff then took delivery of possession through Court of this 14 annas share on 20th December 1928.

Thereafter in 1930, the present plaintiff instituted a suit for recovery of possession of one kani of land of the holding basing his title on his purchase dated 31st May 1923 and auction purchase dated 14th June 1928, alleging that after thus acquiring title, he came in actual possession of the entire holding but was subsequently dispossessed from the one kani of land by the defendants on 20th March 1929. This was Suit No. 130 of 1930, of which the plaint is Ex. 2 (b) and the judgment is Ex. F in the present case. In this suit, it was found that the story of plaintiff's getting into actual possession of the land and of subsequent dispossession on 20th March 1929, was a myth. His claim however was decreed on 16th March 1931, on the strength of his title as aforesaid and he succeeded in obtaining possession of that one kani of land in execution of this decree on 13th April 1932. After this there appear to have been disputes between the present plaintiff and defendant 1 regarding the possession of the land of the holding and ultimately defendant 1 instituted a proceeding under S. 145, Criminal P. C., in July 1936 and this proceeding was decided in his favour on 6th November 1936.

The present suit was instituted by the plaintiff on 8th July 1937, on the strength of his title by amicable purchase of 1923 and auction purchase of 1928 and symbolic delivery of possession of 20th December 1928, again alleging that after the delivery of the symbolic possession he came in actual possession of the land of the holding, was dispossessed from only one kani of land of which the possession was recovered by him by his title suit No. 130 of 1930, thereafter continued in peaceful possession of the entire holding for some time after which disturbance was caused by the defendants and the order in the proceeding under S. 145, Criminal P. C., threw cloud on his title and compelled him to come to the civil Court. The lands of the previous suit are given in Schedule 'Kha' of the present plaint and the remaining lands are given in Schedule 'Ka.' Both the Courts have found title with the plaintiff and that question is not in dispute in the present appeal. The main question raised by the defendants in the case is that the present suit in respect of the lands given in Schedule 'Ka' of the plaint is barred by the provisions of O. 2, R. 2, Civil P. C., inasmuch as the plaintiff was out of possession of the entire holding before his suit of 1930 and the cause of action in respect of which the present suit has been instituted is the same as the one in respect of which the previous suit was instituted by him.

The Court of first instance found that the plaintiff was in possession of the other lands when the title suit No. 130 of 1930 was brought and that he was dispossessed from this land subsequent to the decision of that suit. Consequently, it held that the present suit was not barred by principles of O. 2, R. 2, Civil P. C. The learned Munsiff therefore decreed the plaintiff's suit. On appeal by the defendants, the Court of appeal below came to the finding that on the date of the previous suit the plaintiff was not in possession of the other lands; that as a matter of fact he has never been in actual possession of the holding as was found also in the suit of 1930; that the cause of action in respect of which the present suit has been instituted is the same as the one in respect of which the Suit No. 130 of 1930 was instituted. On these findings it held that the present suit was barred under O. 2, R. 2, Civil P. C. and consequently, dismissed the plaintiff's claim in respect of lands of schedule 'Ka' of the plaint.

Mr. Ghose, appearing in support of the present appeal, contends as follows : (i) that in order to bring a case within the mischief of O. 2, R. 2, Civil P. C., cause of action as alleged in the plaint in the previous suit must be shown to be identical with

the cause of action as alleged in the plaint in the subsequent suit and the question whether or not the claims in the two suits are in respect of the same cause of action for the purpose of attracting the bar of O. 2, R. 2, Civil P. C., reference is permissible only to the allegations made in the plaint; (ii) that in any case when the claim in the previous suit was in respect of a property different from the one to which claim is made in the present suit the causes of action in the two suits must be different and consequently O. 2, R. 2 does not stand in the way of the maintainability of the present claim; (iii) that the findings arrived at by the Court of appeal below that "the plaintiff had no possession of any of the lands when he brought the 1930 suit" and "that there was no evidence that he did get into possession any time afterwards" are vitiated by the fact that in coming to this decision the Court of appeal below omitted to take into consideration the material evidence and the circumstances relied on by the Court of first instance. In support of his first point Mr. Ghose mainly relies on the case in 15 I. A. 156[1] at p. 157, where their Lordships of the Judicial Committee observed as follows :

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or, in other words, to the media upon which the plaintiff asked the Court to arrive at a conclusion in his favour."

Mr. Ghose contends that this is an authority for saying that whether or not the two suits are in respect of the same cause of action the allegations in the plaint alone would be decisive. He therefore contends that in the previous suit the basis of his claim was his title by amicable purchase and auction purchase, and the symbolic possession dated 20th December 1928; as also the actual possession alleged by him in that plaint. The cause for coming to Court was the subsequent dispossession of 20th March 1929, as alleged by him in that plaint. In the present suit also, no doubt the claim is based on the same title, the same delivery of symbolic possession and the actual possession as before but the cause for coming to Court is now the adverse decision in the proceedings under S. 145, Criminal P. C., as alleged by him in the present plaint. Thus, the present claim is in respect of a different cause of action. Mr. Ghose further relies on 8 Cal. 819.[2] Mr. Gupta appearing for the respondents contends that the words 'cause of action' as used in O. 2, R. 2, Civil P. C., mean and refer to the actual cause of action on which the claim is found by the Court to be really based. He contends that for the purpose of O. 2, R. 2 what shall have to be determined is what was the cause of action that the plaintiff possessed, and not merely alleged, in respect of which the previous suit was instituted and what is the cause of action which the plaintiff again possesses and not merely alleges, when the present suit is instituted. He relies on the cases in 49 I. A. 9[3] at p. 13 and 20 C. W. N. 163.[4] The relevant portion of O. 2, R. 2, Civil P. C. runs as follows :

"(i) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; . . . . . (ii) where a plaintiff omits to sue in respect of . . . . . any portion of the claim, he shall not afterwards sue in respect of the portion so omitted. . . . . ."

In order to apply the bar imposed by O. 2, R. 2 (ii) to a suit, it is, therefore, necessary to find: (1) what was the cause of action in respect of which the claim was made in the previous suit, (2) whether that cause of action entitled the plaintiff to make also the claim either wholly or in part now made in the present suit. If so, the claim in the present suit shall fail to the extent to which it could have been but was not made in the prior suit.

The expression 'cause of action' really means the fact or combination of facts which gives rise to a right of action, the right of suing before a Judge for the realisation of the relief arising out of the infringement of the right. The expression is sometimes used to include the facts which constitute the right and its infringement. Sometimes it is used only to mean the circumstances forming the infringement of the right or the immediate occasion for the action. In the Code of Civil Procedure itself the expression is not used everywhere in the same sense : *see* 22 Cal. 833.[5] In (1889) 22 Q.B.D. 128,[6] which is often cited as giving an authoritative definition of the expression and in which the Master of the Rolls cited with approval the definition in an earlier case, defined the expression thus: "The cause of action is every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court."

According to this definition everything which if not proved will give the defendant a right to an immediate judgment must be part of the cause of action. According to Tyebji J., in 29 Bom. 368[7] at p. 372 the expression means a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case." It is "the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour": 15 I.A. 156.[1] It has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. In 13 Beng. L.R. 461[8] at p. 473 Markby J. while trying to find out the meaning of the expression 'cause of action' as used in S. 5, Civil P. C., (1859) observed :

"The words 'cause of action' have received a variety of interpretations. Most of these interpretations were, however given upon the English County Courts Act; some were given upon the rules of English Procedure as to changing the venue; some upon the English Common Law Procedure Act of 1852. . . . . ."

In proceeding to explain why he considered it useless to make reference to the English authorities in which the meaning of the words 'cause of action' had been so freely discussed, the learned Judge gave his reasons thus :

"The learned persons who have participated in that discussion have not arrived at any definition of

1. ('88) 16 Cal. 98 : 15 I. A. 156 : 5 Sar. 243 : 177 P. R. 1888 (P. C.), Mt. Chand Kour v. Partab Singh.
2. ('82) 8 Cal. 819 : 10 C. L. R. 537, Jibunti Nath Khan v. Shib Nath.
3. ('22) 9 A. I. R. 1922 P. C. 23 : 65 I. C. 79 : 44 All. 121 : 49 I. A. 9 (P. C.), Md. Hafiz v. Mirja Muhammad Zakariya.
4. ('16) 3 A.I.R. 1916 Cal. 161 : 33 I. C. 139 : 20 C. W. N. 163, Kali Kumar v. Aslam.
5. ('95) 22 Cal. 833, Haramony Dasi v. Hari Charan.
6. (1889) 22 Q. B. D. 128 : 58 L. J. Q. B. 120 : 60 L.T. 250 : 37 W.R. 131, Reed v. Brown.
7. ('05) 29 Bom. 368 : 7 Bom. L.R. 20, Musa Yakub Mudi v. Mani Lal.
8. ('74) 13 Beng. L. R. 461 : 22 W. R. 79, Gopi Kishna Goswami v. Nil Komul Banerjee.

the words 'cause of action' which they can agree upon as applicable to all provisions of the law in which that expression occurs. And, in my opinion, it is hopeless to attempt to do so. The widest and the narrowest construction that can be put upon these words only differ in this that of all the events which precede an action, some persons insist on contemplating more and some less, as the cause of that final event. The selection is an arbitrary one and the purposes for which the selection has to be made are too various to admit of an agreement upon this point . . . ."

In 15 I.A. 156[1] the Judicial Committee considered the meaning of the expression 'the cause of action' in connexion with the question of application of S. 103 of the then Civil Procedure Code (Act 10 of 1877) (now O. 9, R. 9 of the present Code). Their Lordships observed 'the cause of action' refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to "the media upon which the plaintiff asked the Court to arrive at a conclusion in his favour."

In 12 I. A. 116[9] at p. 119 their Lordships of the Judicial Committee observed that the cause of action in S. 7 of Act 8 of 1859 (now O. 2, R. 2, Civil P. C.) meant the cause of action for which the suit was brought. In 49 I.A. 9[3] their Lordships of the Judicial Committee while explaining the meaning of the expression as used in O. 2, R. 2, Civil P. C., observed :

"'The cause of action' is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits the claim, he cannot afterwards seek to recover the balance by independent proceedings."

The appeal before the Judicial Committee in the last named case arose out of a mortgage suit. The mortgage deed by its cl. 2 provided that the interest should be paid on the bond as each month went by and that if the interest was not paid for six months, the creditor should be competent to realise only the unpaid amount of interest due to him, or the amount of principal and the interest both by bringing a suit in Court without waiting for the expiration of the time fixed. The time was fixed by cl. 7 of the deed and it was that if the amount secured by the bond, with interest, should not be paid after the expiration of three years, the creditor should be entitled to realise by bringing a suit for the whole of the amount of the principal and interest. Three years elapsed after the deed had been executed and no interest was paid, with the result that in the year 1914 the mortgagee had the power, so far the terms of the deed were concerned, either to bring an action for the purpose of realising the security in order to obtain repayment of the full principal money and the interest, or simply of the interest alone. He selected the course and on 16th April 1914 he instituted a suit which set out the provision of the bond and the fact that he had elected to prefer the remedies that the bond gave him in respect only of the interest that was then due. This suit was decreed. The mortgagee having died thereafter the representatives of the mortgagee instituted in 1915 the mortgage suit for realisation of the entire mortgage money less the amount which had been provided by the proceedings formerly taken. To this suit objection was taken that it was barred by O. 2, R. 2, Civil P. C. This objection was given effect to by the Judicial Committee. Their Lordships observed :

"What was the cause of action that the plaintiffs possessed when the proceedings were first instituted ? It was the cause of action due either to the fact that the interest had been unpaid for more than six months or that three years had elapsed and the principal was also unpaid, and in either case, they could have sued for realisation to provide for the whole amount secured by the deed. The plaintiffs purported to proceed under cl. 2 of the deed, but even in that case the non-payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought for or the larger relief which they abstained from seeking. It is also important to point out that the only relief that could be sought in both cases was the realisation of the mortgage security, for the mortgage was the simple mortgage containing no express covenant for the payment of the principal and the interest. Their Lordships think therefore that the rules cover the present dispute."

From the above authorities it seems clear that in order to apply the provisions of O. 2, R. 2, Civil P. C., to bar a suit it shall have to be found out, (1) what was the cause of action in respect of which the claim was made in the previous suit ; (2) what is the claim made in the present suit ; (3) whether the claim made in the present suit could have been made either wholly or in part in respect of the cause of action of the previous suit. In order to arrive at these findings, the two plaints must be compared.

But in my judgment this does not mean that in order to apply O. 2, R. 2 all the allegations made in the two plaints shall have to be taken and the bar imposed shall apply only when these are identical. The allegations are to be looked into only to find out to what extent they disclosed any cause of action. In my opinion, cause of action for this purpose could mean all the essential facts constituting the right and its infringement. If the plaintiff obtained a judgment in his favour on a particular cause of action in the previous suit his claim in that suit must be taken to have been based on that cause of action, and that judgment ought to be conclusive as to the cause of action in respect of which that claim was made. In order then to see what is the cause of action in respect of which the claim in the subsequent suit is made and what is the claim made in it we are to look to the plaint in the subsequent suit.

If certain allegation in the plaint discloses the selfsame cause of action which could have supported the claim made in the plaint, then, simply because other additional allegations have also been made in it the plaintiff would not thereby escape the bar imposed by O. 2, R. 2. If without the additional allegations in the second plaint, the cause of action for the claim made in it be complete, then in that case the additional allegations will not constitute the cause of action at all, and the Court after finding that will have to dismiss the claim under O. 2, R. 2. If the additional allegations go to constitute a fresh cause of action for the claim made then certainly the cause of action as alleged in the second plaint is different from the cause of action of the first plaint. If the plaintiff fails to establish the additional allegations, he may fail for want of cause of action but his suit will not be hit by the provisions of O. 2, R. 2. In Title Suit No. 130 of 1930, in the first eight paragraphs of the plaint the plaintiff stated facts in support of his title to the lands of which the then suit lands formed a

9. ('85) 8 Mad. 520 : 12 I.A. 116 : 4 Sar. 638 (P.C.), Pittapur Raja v. Suria Rau.

part. Those facts are now concisely stated in para. 1 of the present plaint. In para. 9 of the previous plaint the plaintiff stated how he took possession of his auction purchased land or how he came in actual occupation of the same by removing the defendants therefrom. These details are not given in the present plaint. In para. 10 of the previous plaint the plaintiff stated how he was dispossessed from some of the plots on 6th Chaitra 1335. His previous suit was in respect of those plots only. In that suit the plaintiff's title to the extent of sixteen annas share was found. It was found that as the auction purchaser of fourteen annas share the plaintiff obtained delivery of possession in December 1928, corresponding to Pous 1335 B. S. and that the remaining two annas share was also acquired by him by private purchase. The plaintiff's plea of actual possession and dispossession, however, was not accepted by the Court in that case. The learned Munsif observed :

"I must find that the story of actual possession between Pous and Chaitra 1335, was a myth . . . . . The defendant had been in an undisturbed possession all along."

The lands for which the previous suit was instituted are given in schedule "kha" in the present plaint. The other lands are given in its schedule "ka." The cause of action in respect of the "ka" schedule lands is given in para. 3 of the present plaint as the adverse decision dated 6th November 1936 under S. 145, Criminal P. C. The Court of appeal below has decreed the plaintiff's claim regarding the lands of schedule "kha." There has been no appeal or cross-objection by the defendants in respect of these lands. The only property which is the subject-matter of the present appeal is that given in schedule "ka" of the present plaint. According to the decision in the previous suit the plaintiff did not succeed in getting actual possession even of the "ka" schedule lands after the delivery of symbolic possession to him in December 1928. He was therefore possessed of a cause of action in respect of these "ka" schedule lands also at the time when the previous suit was instituted in respect of the "kha" schedule lands only. As regards the "kha" schedule lands the plaintiff then came to the Court with the allegation of some subsequent disturbance of possession. It was found that that "cause" did not exist. The plaintiff, however, was allowed to succeed in that suit on a different cause which was also covered by his pleadings, namely inability to get actual possession after delivery of symbolic possession and acquisition of sixteen annas title to the lands. According to the findings in the previous suit, the selfsame "cause of action" was present at that time in respect of all these lands including the present "ka" schedule lands. It was, however, not necessary to decide this point for the purposes of that suit and in my opinion that finding would not determine the fate of the present suit.

In the present suit the allegations in the plaint ascribe the cause of action for the "ka" schedule lands to the adverse decision of the criminal Court dated 6th November 1936. No doubt there is that adverse decision. But if before that adverse decision there had already been a completed cause of action available to the plaintiff in respect of these lands, this additional fact shall not give him a fresh cause of action without something more. The plaintiff being the rightful owner would, for example, have a fresh cause of action, if he succeeded in taking even forcible possession of the lands though he might have subsequently been made to give up such possession by the due process of law: *see* 9 C. W. N. 1061,[10] 2 C.L.J. 1,[11] 33 Cal. 821[12] and 6 C.L.J. 472.[13] The Court of appeal below finds that the plaintiff did not succeed in getting actual occupation of the land after the delivery of symbolic possession. If this finding be allowed to stand then the plaintiff must be said to have been in possession of the cause of action for the relief claimed in the present suit in respect of the 'ka' schedule lands even on the date when he instituted the previous suit and that suit was based on the self-same cause of action though the relief claimed there was only in respect of the 'kha' schedule lands. In my opinion the plaintiff's present suit in that case would be barred by the provision of O. 2, R. 2, Civil P. C. There is no substance in the second point faintly urged by Mr. Ghosh. If the same facts are to be relied on as constituting the right and its infraction in respect of all these properties then the cause of action will not be different simply because the properties are different. This brings us to the third point urged by Mr. Ghose. The Court of first instance dealt with the matter thus :

"It is admitted that there was a case under S. 145, Criminal P. C. Defendant 1 deposed in that case. He deposed in that case that he possessed the share of defendant 7 by virtue of a kabuliyat: *vide* Ex. 15. This witness also deposed on another occasion that he took Burga Settlement of the entire jama from Afajaddin's wife : *vide* Ex. 15. Golam Ali deposed that Torap Ali and others, possessed the entire lands : *vide* Ex. 15b. It is thus clear that Hashem Ali did not possess the land before. There is also no allegation in the written statement that defendant 7 possessed her share of the land through Burgadars. It is not the case of defendant 1 in this suit that he possessed the entire land before 1338. Hashem Ali did not possess the land. Defendant 8 (D. W. 7) is a rich and an influential person. He has got account books to show the amount paid as rent and also the amount which he got as a profit from the disputed land. The account book has not been produced. There is thus no evidence to show that defendant 7 possessed any portion of the land. Hashem Ali deposed in 1936 that he claimed 8 annas share of the land last year and also put in a petition before K. M. O. for getting possession of the same. It is not the defendant's case that Hashem Ali possessed any land from 1338. It appears from bond (Ex. H-2) that defendant 1's mother gave usufructuary mortgage of one kani of land to the plaintiff for six years in 1937. Torap Ali admitted in the previous case that the bond was executed after the execution of the kobala in favour of defendant 7 and that the plaintiff got the southern plot in question. The plaintiff possessed one kani of land to the south of the homestead as mortgagee up to Chaitra 1333. The defendant's case is that defendant 7 possessed the land to the south of the homestead from 1330, is evidently false. Defendants 1 and 8 jointly filed written statement in S. 145 case. They clearly alleged that Torap Ali and others, possessed the entire lands : *vide* Ex, 7. It appears that no land to the south of the homestead was included in the previous suit. Defendant 1 admitted in a petition that the plaintiff possessed the portion of the land to the south of the homestead also (*vide* Ex. 6). It is thus clear that the plaintiff

10. ('05) 9 C. W. N. 1061, Protap v. Durga.
11. ('05) 2 C. L. J. 1, Mamtazuddin v. Barkatulla.
12. ('06) 33 Cal. 821 : 10 C. W. N. 1081, Jonab v. Surja Kanta.
13. ('07) 6 C. L. J. 472, Mir Waziruddin v. Lala Deoki Nandan.

a was not out of possession of the entire lands when the title suit was brought. The plaintiff took delivery of possession of the lands through Court. There was difficulty in removing the huts from the homestead as the sale was held in respect of 14 annas share of the property. The plaintiff had no reason to allow the defendants to possess the Nal land after the delivery of possession. It appears from the copy of the order-sheet (Ex. 14C that defendant 1 applied for an injunction against the plaintiff and two others on 1st December 1931, for forbidding them not to go upon the land. The order was vacated on 16th December 1931, as the plaintiff had taken delivery of possession through Court. It appears from the copy of the judgment (Ex. 13a) that in 1936 an injunction was issued by the S. D. O. of Patuakhali for restraining the defendants and Saroda De Nath or Badsha Mia from b entering the plot. On the next day when the plaintiff's men were reaping the paddy, from the land some peadas of Badsha objected and the accused struck the peadas with lejas. The accused were convicted as they had exceeded the right of private defence. The plaintiff has also filed several receipts (Exs. 4 to 5f) to show that he has been paying rent of the lands all along since his purchase. Not a scrap of paper has been produced from the defendant's side to show the payment of rent. It cannot be believed that the plaintiff paid rent for so many years without getting possession of the Nal lands. The defendants have produced a copy of a judgment (Ex. F) a S. 103 case to show that the plaintiff was not in possession of the land. The case was brought by Baser Mridha and others. The copy of the petition has not been filed. There is nothing in the c judgment to show that the plaintiff was a party to the case. The case was disposed of before the plaintiff took delivery of possession through Court. The plaintiff did not get his name mutated in respect of 2 annas share of Moyna Bibi and hence his name was not recorded in the Khatian. The judgment in the S. 103 case does not help the defendants."

The learned Subordinate Judge while reversing this finding did not at all advert to Ex. 6, Ex. 14c, Ex. 13a and Exts. 4 to 5f and did not consider the circumstances which so much weighed with the learned Munsif and which certainly were weighty considerations. In my opinion, the judgment of the Court of appeal below in this respect is not at all satisfactory. It is difficult to see what the learned Subordinate Judge means by saying : "It is impossible to believe that although Amurunnessa and Akub Ali were in occupation of the lands and resisd ted and won the dispute the plaintiffs could be given and had actual possession."

They might have resisted before the execution sale. But from that it does not at all follow that they would conduct in the same way even after their title is gone. In the result this appeal is allowed ; the judgment and decree of the Court of appeal below are set aside and the case is sent back to that Court for re-hearing of the appeal according to law. Costs of this appeal will abide the result.

G.N./R.K. *Appeal allowed.*

C. P. C.—

(a) ('40) Chitaley, S. 20, N. 14 Pts. 4 to 7 and O. 2 R. 2, N. 7.
('41) Mulla, Page 118 Pts. (o), (p) and (r) and P. 525 Note "Cause of action."

(b) ('40) Chitaley, O. 2 R. 2, N. 7.
('41) Mulla, P. 525 Note "Cause of action."

(c) ('40) Chitaley, O. 2 R. 2, N. 10 Sub-heading "Suits relating to different properties."
('41) Mulla, P. 525 et seq N. "Splitting of claims."

* A. I. R. (29) 1942 Calcutta 412

DERBYSHIRE C. J. AND EDGLEY J.

Western India Life Insurance Co. Ltd. — *Appellant*

v.

Sm. Asima Sirkar and others — *Respondents.*

Appeal No. 17 of 1941, Decided on 16th July 1941, from judgment of Panckridge J., D/- 19th November 1940.

(a) Contract—Insurance — Answers given by insured wilfully untrue and in nature of fraud—Policy is void.

Where answers given by the insured are wilfully untrue and he was proposing to obtain through them a policy of insurance on his life, they are in the nature of fraud and therefore the basis of the contract of insurance is gone, and the insured and his representatives have no rights under it. [P 414 C 1]

(b) Waiver—What is explained—Insurance Company having means of knowing certain fact invalidating policy, still accepting premiums held no waiver—Actual knowledge of such fact and condoning of it are necessary.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment; and there can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. The burden of proof of such knowledge is on the person who relies on the waiver. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. Possession of the means of knowledge will not be sufficient to constitute waiver but actual knowledge of the material fact must be proved. [P 414 C 2; P 415 C 1]

Therefore where a person seeks to get rights under a policy of insurance on the ground that the insurance company has waived their rights to challenge the validity of the policy by accepting premiums, strict proof of waiver is required and the burden of proof lies upon the person who alleges it. It is not sufficient merely to prove that the insurance Company had the means of knowing that a previous proposal for insurance had been rejected by another company; but it is also essential to show that they actually had this knowledge at all material times h and that they knowingly condoned the conduct of the assured in furnishing them with incorrect information. It must be shown that the premiums were taken intentionally with knowledge of the untrue statements in the proposal : *Case law referred.* [P 415 C 1; P 417 C 2]

(c) Appellate Court — Finding of trial Court based on testimony of witness is not to be lightly set aside.

The opinion and finding of a Judge who sees the witnesses and hears their testimony are not lightly to be set aside by an appellate Court which only considers the record of the evidence. [P 415 C 2]

(d) Evidence Act (1872), S. 114 — Course of business must be proved or admitted.

Under S. 114, the Court may presume that the ordinary course of business is followed. This presumption, however, cannot arise unless the course of business has been proved or admitted. [P 417 C 1]

(e) Contract Act (1872), S. 19 — Defeasance clause in contract itself—Section does not apply.

Section 19 cannot apply where the contract itself contains a defeasance clause. And if the conditions of such clause are fulfilled, the party who is given right to annul the contract under it is entitled to do so unless the other party proves that the former has waived his rights. [P 417 C 2]

S. C. Bose and S. N. Banerjee (Jr.) — for Appellant.

Dr. S. C. Roy and S. Chatterjee — for Respondents.

DERBYSHIRE C. J.—This is an appeal from a judgment of Panckridge J., and the decree consequent thereon whereby he adjudged that the plaintiffs were entitled to recover a sum of rupees five thousand and profits from the defendants in respect of Life Insurance Policy No. 28484 issued by the defendants on 11th June 1935. The policy was taken out by Jadunath Sarkar who was a Government Official in the Province of Bengal. The plaintiffs are the widow and children of Jadunath Sarkar. The policy itself was the result of a proposal and declaration made by Jadunath on 14th May 1935, the proposal being accepted the defendant company after a medical examination of Jadunath by their doctor. Jadunath was a Hindu governed by the Dayabhag School of Hindu law, who died intestate on 4th April 1938, the due premiums having been in the meantime paid. The defendants declined to pay the sum payable under the policy on the ground (a) that Jadunath untruly stated in his proposal that no proposal on his life had ever been declined by any Insurance Company whereas in fact a proposal in writing and dated 30th September 1932, was made to the Sun Life Assurance Company of Canada for an assurance on his life, but that the said Assurance Company declined to accept the same and (b) that in Jadunath's personal statement he concealed the fact that this proposal was rejected, and that he also concealed and/or made an untrue statement as to the results of his medical examination with a view to insure his life with the Sun Life Assurance Company of Canada. When the case came up for trial, the plaintiffs' solicitor by a letter dated 22nd May 1940, to the defendants' solicitors raised the plea of waiver as follows :

"In continuation of my letter to you dated 26th April last I have to furnish you with the following particulars regarding the question of waiver to be taken up by the plaintiffs at the hearing of this suit viz. —Assuming but not admitting that the life of Jadunath Sarkar had been rejected on 5th October 1932 by the Sun Life Assurance Company of Canada as alleged in para. 4 (a) of the written statement the fact of such rejection was communicated to the defendant company by a rejection card duly issued and sent to the defendant company on the 17th day of October 1932 by the Indian Life Assurance Offices Association."

There were two other pleas of waiver raised in that letter arising out of matters alleged to have occurred after the death of the deceased. Those second and third pleas were not sustained at the trial and they have not been raised herein. The policy itself contains this clause :

"Provided always (1) that the proposal and declaration made by the assured and the personal statement before the medical examiner with declaration made by the life assured dated as specified in the schedule shall be the basis of this contract, it being nevertheless hereby expressly declared that after the expiry of three years from this date, neither error in, nor omission from, such proposal, personal statement or declaration, not wilful and in the nature of fraud, shall render this policy void."

The proposal referred to contained the following questions and the answers thereto :

Questions.	Answers.
"4A. In what companies have you insured your life ?	Sun Life, Rs. 4000 Policy No. 386723 in 1919 for 20 years Endowment. North British, 4000 Policy No. 56723 in 1919 for 20 years. Bombay Mutual, Rs. 5000 Policy No. 18001 in 1933 for 15 years. Metropolitan, Rupees 3000 Policy No. 3611 in 1933 for 18 years Endowment. Hindustan, Rs. 5000 Policy No. 75151 in 1933 for 15 years. Great Eastern, Rs. 4000 Policy No. 7881 in 1935 for 14 years.
B. What are the policy Nos. and their amounts ?	
5A. Has any proposal or application to insure your life ever been made to any company upon which a policy has not been issued on the plan and for the amount for which you applied ?	No.
B. Was any medical man consulted as to insurability of your life ?	No.
C. If so, who and with what results ?	Does not arise.

The declaration contained the following :

"I on behalf of myself and of any person who shall have any interest in my policy issued under this policy do hereby solemnly declare that the statements and representations made in this proposal are correct and true to the best of my knowledge and belief, whether written by my hand or not and shall, along with the declaration and statement made before the medical examiner be the basis of the contract between me and the above Life Insurance Co."

That was signed by Jadunath in the presence of the medical examiner. In the personal statement in answer to a question if he ever suffered from diabetes he said "No". There was a further declaration as follows :

"I the undersigned applicant for insurance (Jadunath Sarkar) do solemnly declare that according to the best of my knowledge and belief, I am now in good health, that my age does not exceed that mentioned above and that I have fully and faithfully answered all such questions as have been put to me by the Medical Examiner and I hereby covenant and agree that this declaration shall be the basis of the contract between myself and the Company and if any untrue averment is contained herein or if any of the facts required to be set forth in the proposal and in the personal statement be not truly stated all moneys which shall have been paid up on account of the assurance made in consequence hereof shall be forfeited and the Assurance itself be absolutely null and void."

Put shortly, the contention of the defendants appellants is that the answers to questions Nos. 5-A, B and C given in the proposal were untrue and untrue to the knowledge of Jadunath. It is not disputed that on 30th September 1932, Jadunath applied to the Sun Life Assurance Company of Canada for a life Insurance Policy and it is not denied that no such policy was ever issued upon that application. That in itself is sufficient to show that the answer to question No. 5A, was untrue. But it is said that the answers were not "wilful and in the nature of fraud" to use the words of the policy itself. Evidence has been given by Dr. Kumode Nath Ghose of Calcutta to the effect that on 30th September 1932, at the instance of the Sun Life Assurance Company he examined Jadunath for the purpose of ascertaining whether the Sun Life Assurance Company would accept Jadunath's proposal. Dr. Ghose's evidence is that he found slight trace of sugar in Jadunath's urine, that in order to further assure himself he took another sample of urine from Jadunath, and that he again found sugar. He made his report accordingly to the Sun Life Assurance Company. A little time after that Jadunath came to the house of Dr. Ghose—to use his own words: "He came to me two or three times to my house and he tried his best to convince me that he was not passing sugar. He was very anxious to have a policy from the Sun Life. But I convinced him later on by taking two or three samples of his urine and examining it in his presence, that he was passing sugar. Then he dropped his proposal." He also says: "He (i. e. Jadunath) came and informed me that his life had not been accepted because he was informed by the company that he was passing sugar in his urine."

Now, the learned Judge has made no adverse comments upon Dr. Ghose's evidence and I see no reason to disbelieve it. It is clear from that evidence that Jadunath's answer to question No. 5B "Was any medical man consulted as to insurability of your life?—No" was not correct as also the answer to question No. 5C "If so, who and with what results—Does not arise". The rejection of a proposal to effect a life insurance is not a thing that a man is likely to forget, and when he goes to the length of trying to persuade the doctor who examined him for the Insurance Company, that he was not suffering from any untoward symptoms in the way that Jadunath did, it is impossible to think that when Jadunath gave his answers to questions Nos. 5A, B and C he did not know that what he said was untrue. Those answers were untrue and they were untrue to the knowledge of Jadunath. Jadunath is dead and cannot speak for himself; we have to do the best we can under the circumstances and however unfortunate the result may be for Jadunath's family, the conclusion must be arrived at that Jadunath's answers were wilfully untrue and as he was proposing to obtain through them a policy of insurance on his life, that they were in the nature of fraud. That being so, the basis of the contract of insurance had according to the terms of the policy gone, and the insured and his representatives had no rights under it.

But it is said that the company—the Western India Life Insurance Co. Ltd.—knew about 17th October 1932, that is to say, a short time after the proposal, that those answers were untrue, but that they continued to accept the premiums payable under the policy down to the death of the deceased and that they thereby waived their right to insist that the basis of the policy had gone. The learned Judge has upheld that plea of waiver. The plea is based, as the letter of 22nd May 1940 sets out, on a statement that a rejection card was sent on 17th October 1932, by the Indian Life Assurance Offices Association to the defendant company. It is necessary to explain what a "rejection card" is and how it comes into existence. There is an institution in Calcutta called the Calcutta Claims Bureau. This institution is run by a number of European Insurance Companies who are, if I may use the word, the constituents of the Bureau. In addition to these European Companies, there is another member which is called the Indian Life Assurance Offices Association. The Indian Life Assurance Offices Association has as its constituents a number of Indian Insurance Companies. The Indian Life Assurance Offices Association has its head quarters in Bombay, but has a branch in Calcutta.

The Calcutta Claims Bureau operates in this way: whenever one of its constituent members has occasion to reject a proposal of life insurance, it sends particulars of the rejection to the Claims Bureau which makes a note of it and then issues to each of its constituents a card on which are certain particulars relating to the rejected proposal. The card itself is pink in colour and ruled out into certain rectangles. Each card is given a serial number which is put on the left-hand top corner. In the next rectangle at the top are words indicating the name of the person whose proposal has been rejected. The full name was not put down in this rectangle in 1932; for instance in the case of this particular rejected proposal with the Sun Life Assurance Company (which was a constituent member of the Claims Bureau) was this word "Sir" which is a short for "Sirkar" and underneath "Jadunath". In the next rectangle at the top right-hand corner is the date of the rejection and immediately below the name of the person rejected is the date of his birth. In the adjoining rectangle under the date of the rejection is an Index number which indicates the name of the company to whom the proposal had been made and by whom it has been rejected. It is obvious that this rejection card is intended to give information of the rejection to the constituent members but not to disclose too much to any person who has no right to it. The constituent member knows from a key which is provided which is the Insurance Company that is indicated in the last rectangle in the middle row and each member can, if so minded, get into touch with the rejecting company and ascertain the circumstances of the rejection.

It is said by the plaintiffs here that a rejection card was received by the Western India Life Insurance Company on 17th October 1932, that the defendant company, namely, the Western India Life Insurance Company, knew or had the means of knowing about that time of his rejection, and that by taking the premiums thereafter they waived their rights under the policy. It is necessary at this stage to realise what is meant by waiver and what are the conditions necessary for its operation. There is a passage in the Treatise on the Law of Evidence by the late Woodroffe J. and the late Mr. Syed Ameer Ali, Edn. 9, by the late Woodroffe J. at page 760 as follows :

"A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment; and there can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. The burden of proof of such knowledge is on the person who relies

on the waiver. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known."

That passage is founded upon judgment of Ashutosh Mookherjee J. in 11 C.W.N. 848.[1] The passage in the judgment of Ashutosh Mukerjee J. is founded on a number of English cases and in particular, that in (1867) 2 H.L. 43.[2] In that particular case there was an agreement between two parties giving power to a third to make, within a certain time, an award on a matter in difference between them. One of the parties not knowing that the award had been made beyond the specified time, took up the award and paid for it. It was held that his doing that did not amount to a waiver of the condition as to the time for making the award which was contained in the agreement. At p. 57 Lord Chelmsford, the Lord Chancellor, said this :

"Assuming that the solicitors knew at that time that Clutton had not made his award till then, and that when they heard in June from Oakley that 'the award as to crossings etc., had been waiting to be taken up for some months' they also knew that it had not been in existence until after the time fixed by the agreement; yet I cannot think that their act in receiving it and paying Clutton's charges can have the effect of waiving all objection in point of time. A waiver must be an intentional act with knowledge."

If the plea of waiver which is specifically pleaded is to succeed in this case, it must be shown that the premiums were taken intentionally with knowledge of the untrue statements in the proposal. In my view means of knowledge here would not be enough in order to satisfy the plea of waiver. In that connexion I refer to the case in (1843) 11 M.& W. 116.[3] There the owner of a ship sailing from St. John's Newfoundland, asked for an insurance upon that vessel sometime towards the end of January 1842. The vessel had already sailed. The statement of the shipowner was that the vessel was to sail at the end of the month of December 1841. The broker who procured the insurance from the defendant, the underwriter, showed the underwriter a letter setting out the passage that the vessel, the Elizabeth, was to sail at the end of the month (i. e. December) and also put before him a copy of Lloyd's sailing list from Newfoundland which was described as being a duplicate, the original being on the vessel to be insured, the Elizabeth. The vessel had actually sailed on the 27th, four days before the end of the month; if the underwriter had looked on the back of the Lloyd's sailing list which was put before him he would have seen that the vessel had sailed on the 27th. But he did not examine the back of the list and accepted the risk. The risk of course was greater the earlier the vessel had sailed. It was held that the underwriter was not bound by the insurance and in giving judgment Alderson B. at page 127 said :

"I think, the moment it appeared that the party was communicating a letter, which clearly stated that the vessel was to sail subsequently to 27th December, before the Jury could consider the defendant to have been bound by the list at Lloy'ds they ought to have had affirmative evidence that he actually did see it, and not merely that he might. There is no evidence to shew that."

The waiver then must be intentional with knowledge. What was the knowledge of the defendant company with regard to the untrue statements of Jadunath relating to the rejection of his proposal by the Sun Life Assurance Company ? The card relating to Jadunath's rejection was undoubtedly issued to the constituent members of the Claims Bureau in October 1932. That is the evidence of Mr. Archer. One can presume that each of those cards in the ordinary way would reach each constituent member, although there is always the possibility that through some mischance or slackness on the part of someone concerned with sending out cards, it may be overlooked. But the evidence of Mr. Archer is that the cards with regard to Jadunath's rejection went out in October 1932. In the ordinary way one of those cards would reach not the Western India Life Insurance Company, but the Indian Life Assurance Offices Association. No witness was called from the Indian Life Assurance Offices Association to state that a rejection card relating to Jadunath was sent to the Western India Life Insurance Company, but the Western India Life Insurance Company being a constituent of the Indian Life Assurance Offices Association would in the ordinary way, if all went well, get not one of the cards issued by the Calcutta Claims Bureau, but a similar one issued by the Indian Life Assurance Offices Association. But again there is always the possibility of one not reaching some constituent of the Indian Life Assurance Offices Association including the Western India Life Insurance Co. But in the ordinary course of things, one would, if all went well, reach the defendant company somewhere about October 1932. Now the defendant company say that they had no card relating to Jadunath's rejection. It is a contest whether a thing usually done was in the ordinary course of business done or whether, as the defendants say, they did not get a card. Panckridge J., heard the evidence of Mr. Joshi, who was the office manager of the defendant company. Mr. Joshi impressed him unfavourably, so that he came to the conclusion that in spite of what Mr. Joshi said about the card not being in possession of the defendant company, the defendant company had it. Now, the opinion and finding of a Judge who sees the witnesses and hears their testimony are not lightly to be set aside by an appellate Court which only considers the record of the evidence. Two things, however, have impressed me with regard to the question of the defendant company's possession of the pink card. The first is that on receipt of the present proposal at their head office in June 1935, the defendant company wrote a letter to the Sun Life Co., on 27th May 1935. It was headed "Your Pol. No. 386723." It will be remembered that in the proposal form, Jadunath had stated that he had insured with the Sun Life Assurance Co. for rupees 4000 being Policy No. 386723 of 1919. The defendant company wrote on 27th May 1935 to the Sun Life Assurance Co.'s office in Bombay with regard to that Policy as follows :

"We are considering a proposal from the above gentleman (Jadunath Sarkar) who, we understand, is insured with you under your Pol. No. 386723. The party has been medically examined for us, and we have the medical report before us. We shall, therefore be much obliged if you will kindly let us have an extract from your medical report and personal statement on the life mentioned, stating therein the decision of your Board.

1. ('07) 11 C.W.N. 848 : 6 C.L.J. 62, Dhanukdhari Singh v. Nathima Sahu.
2. (1867) 2 H.L. 43: 36 L.J.Ch. 404: 16 L.T. 217: 15 W. R. 817, Earl of Darnley v. Proprietors &c of the London, Chatham, and Dover Railway.
3. (1843) 11 M. & W. 116 : 12 L. J. Ex. 337 : 63 R.R. 531, Mackintosh v. Marshall.

If, however, the proposal has been completed at other than normal rates or under a Scheme of Assurance other than proposed, a true copy of the report of the medical examination and of the personal statement of the proposer may kindly be supplied."

In answer to that the Sun Life Assurance Co., wrote back a letter on 5th June 1935, stating among other things :

"I would like to state that the copies of proposal and the medical report are not available at this office. The proposal was for a policy of Rs. 4000 on endowment 20 plan and was submitted in November 1919. It was accepted by our head office at ordinary rates and without a lien."

It was evident, therefore, that the defendant company were concerned with the previous proposal of Jadunath with the Sun Life Assurance Co. which Jadhunath had disclosed to them and the results of it. It is difficult to think that if they went to that trouble to enquire from the Sun Life Assurance Co. about the 1919 policy, they would have neglected to enquire about the proposal rejected by the same company in 1932, if they had known of that proposal; that is one matter that struck me, which the learned Judge did not refer to in his judgment and apparently did not consider. There is another matter to which the learned Judge did not refer and apparently did not consider which seems to me to bear on the question whether the defendant company got a pink card relating to Jadunath's rejection. The Hindusthan Co-operative Insurance Co., which carries on business and has its head office in Calcutta was, like the Western India Life Insurance Co., a member of the Indian Life Assurance Offices Association in Bombay. It was a constituent of that Association in the same way that the defendant company was. Jadunath had, as he stated in his answer to question No. 4 of the proposal form in the present case, insured with the Hindusthan Co-operative Insurance Co. 1933 for a sum of Rs. 5000. Apparently, that proposal was accepted by the Hindusthan Co-operative Insurance Co. Now, the Hindusthan Company was due to receive a pink card relating to Jadunath's rejection from the Indian Life Assurance Offices Association in 1932 in just the same way that the defendant company were. It is noteworthy, and there is no question as to this, that they insured the deceased Jadunath's life and what is more they paid upon the policy on Jadunath's death. A representative from the Hindusthan Company, Sachidananda Das Gupta was called. His evidence was as follows :

"Q. Was Jadunath Sarkar insured with your company ?

A. Yes.

Q. Is Hindusthan Insurance Co. a member of the Indian Life Offices Association, Bombay ?

A. Yes.

Q. Have you paid the claim of Jadunath Sarkar?

A. Yes.

Q. Did you receive any card from the Indian Life Offices Association ?

A. I can answer the question after consulting the file. (Referring to the file) our record does not show that we received a rejection card before we took the risk of the policy ?

Later he said in answer to a question :

Q. If you had received the rejection card then you would not have written to the Association complaining ?

A. Certainly not.

Now, it is said that the usual course of business indicates that the defendants received that card. The defendants say that they never got it. In the same way the Hindusthan Co-operative Insurance Company who were due to get the card never got it. That suggests to my mind that there is doubt as to whether cards relating to Jadunath were sent out by the Indian Life Assurance Offiecs Association as assumed.

Panckridge J. in his judgment in criticising the evidence of Mr. Joshi said that he had not produced the file. The file was the sum total of the cards which the defendant company received from the Indian Life Assurance Offices Association, presumably kept in some sort of a file. Mr. Joshi was not bound to produce the whole of that file. He was bound to produce the card relating to Jadunath but not the others. If it had been desired that he should produce the whole of the cards, an order could have been made to that effect. None was made. Panckridge J. criticised Mr. Joshi's evidence because Mr. Joshi did not appear to be very willing to produce the other cards, although he did offer to do so. In my opinion that criticism is not well-founded. He was bound to produce Jadunath's card, if he had it, but he was not bound to produce the others. Panckridge J. criticised Mr. Joshi because he had not examined the serial numbers on the cards. I do not see that it was necessary to examine the serial numbers. If he examined the cards and found that there was none relating to Jadunath, it seems to me that that was enough. It may be that there was something in Mr. Joshi's mind which he was troubled about which produced an unfavourable impression upon Panckridge J. But after reading the evidence of Mr. Joshi, it does not appear to me that he either did anything that was unreasonable or refused to do anything that was reasonable. There is no evidence that the Indian Life Assurance Offices Association sent out cards relating to the rejection of Jadunath; having regard to the fact that the Hindusthan Co-operative Insurance Company did not receive such card and the fact that the defendant company deny having one and subsequently wrote to the Sun Life Assurance Company about the previous policy and not about the rejection, I come to the conclusion notwithstanding Panckridge J.'s strictures upon Mr. Joshi and the adverse inference that he drew as to his credibility from his behaviour on the whole that the evidence of Mr. Joshi is correct.

I am of the opinion therefore and so find, that at all material times the defendant company was not in possession of the rejection card relating to Jadunath. That being so, the defendant company not having the means of knowledge still less what is essential to the plaintiffs' case of waiver, the actual knowledge of Jadunath's rejection by the Sun Life Assurance Company in 1932 after medical examination, it cannot be said that they waived their rights to insist that the basis of the policy had gone by reason of the untrue statements made by Jadunath. For that reason I am of the opinion that this appeal must be allowed. The appellants will get the costs of the appeal but there will be no costs in the Court below.

EDGLEY J.—I agree that this appeal must be allowed. In this case, the initial onus lay upon the defendant company to show that they were legally entitled to avoid the contract. In my view, they were able to discharge this onus by showing that in 1935 Jadunath Sarkar had omitted to state certain material facts when he made his proposal for insuring his life. The defendant company were also able to show that they were not affected by the proviso to the policy that "after the expiry of three

years from this date, neither error in nor omission from such proposal, personal statement or declaration, not wilful or in the nature of fraud shall render this policy void." In other words, they proved that certain material information had been wilfully withheld from them by Jadunath and that his conduct in this respect was in the nature of fraud. This being the case, the onus was then thrown upon the plaintiffs to show that the defendant company had waived their right to annul the policy.

With regard to this point, Mr. Banerjee on behalf of the plaintiffs argues that it is sufficient for his purpose to show that a rejection card said to have been issued by the Indian Life Assurance Offices Association reached the defendant company. In order to do this, Mr. Banerjee attempts to show that this rejection card must have reached the Western India Life Insurance Co., Ltd., in the ordinary course of business. Now the ordinary course of business is a relevant fact under S. 16, Evidence Act, and under S. 114 of that Act the Court may presume that the ordinary course of business is followed. This presumption, however, cannot arise unless the course of business has been proved or admitted. In my view, the evidence which was given in this case was quite insufficient for the purpose of showing that a rejection card must have reached the Western India Life Insurance Co., Ltd. in the ordinary course of business. It is true that Mr. Archer gave evidence to the effect that these rejection cards are distributed to the constituents of the office in which he is employed. There was, however, no satisfactory evidence as to the manner in which these cards are re-distributed by the Indian Life Assurance Offices Association, which was one of the constituents of the Calcutta organization. Further, it was not shown what happened to these cards after they had been received in the various offices to which they were finally distributed, whether the system which was followed was such that the absence of a card, which a constituent office was entitled to receive, would be immediately detected and whether a requisition would be made for it as a matter of course. With regard to this matter, Panckridge J. states in his judgment :

"In my opinion having regard to the relations which must exist between the Association and those who are its members if it is a fact that the cards were not sent out, it was for the defendants to call evidence to that effect from the Association."

In my view, the learned Judge has wrongly placed the onus upon the defendants with regard to this particular point. Having regard to the circumstances of the case the onus to prove the course of business lay with the plaintiffs and not with the defendants. Mr. Joshi's answers certainly show that his office was entitled to receive rejection cards but I am not prepared to hold that his evidence indicates that the rejection card relating to the proposal to the Sun Life Co. in 1932 was actually received by the defendants. It is certainly significant that, when the Western India Life Insurance Co. Ltd., wrote to the Sun Life Assurance Co. of Canada on 27th May 1935, they made no reference to the rejection of Jadunath's application by the latter company in 1932; and the letter addressed by the Hindusthan Co-operative Insurance Society Ltd. to the Indian Life Assurance Offices Association on 7th November 1938 also indicates that the particular company had not received the rejection card which is supposed to have been issued by the Indian Life Assurances Association on 17th October 1932. Having regard to this evidence and the circumstances to which I have referred, I am of opinion that the plaintiffs have not succeeded in discharging the onus which lay upon them to show that the rejection card had actually been received by the defendant company.

Even if it be assumed, however, that the card had been received by the Western India Life Insurance Co., Ltd., I am of opinion that this fact would not be sufficient for the purpose of establishing the plaintiffs' case. It would merely show that the defendant company had a document in their office which if it had been consulted might have indicated to them that an application for the insurance of Jadunath's life had been rejected by the Sun Life Assurance Co. in 1932. The question which requires consideration in connexion with this matter is whether this knowledge was actually present in the minds of those responsible for the affairs of the defendant company in 1935. Mr. Banerjee states that if the card had actually been received, his clients would be entitled to succeed having regard to the provisions of S. 19, Contract Act, the relevant portion of which is in the following terms :

"When consent to an agreement is caused by coersion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

* * * * *

Exception. — If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of S. 17 the contract nevertheless is voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence."

On this point, Mr. Banerjee's argument is that, if the card had been received, the Insurance Company had the means of ascertaining with ordinary diligence that a previous proposal had been rejected by the Sun Life Assurance Company of Canada. In my view, however, this section cannot apply in the present case where the Insurance Company are relying on the terms of a defeasance clause within the contract itself. The conditions demanded by this defeasance clause have been fulfilled and the defendant company are, therefore, entitled to annul the policy unless the plaintiffs are able to prove that the company had waived their rights. With regard to the question of waiver, I entirely agree that strict proof is required and that the burden of proof lies upon the person who alleges it. It is not sufficient merely to prove that the Insurance Company had the means of knowing that a previous proposal for insurance had been rejected by another company ; but it is also essential to show that they actually had this knowledge at all material times and that they knowingly condoned the conduct of the assured in furnishing them with incorrect information. In my opinion, this matter is covered by the principle laid down by Cockburn C. J. in (1867) 2 Q. B. 595.[4] In that case the learned Chief Justice observed at page 604 :

"No proposition of insurance law can be better established than this, viz., that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured."

His Lordship then went on to say :

"I do not mean to say that, if the insurer choose to neglect the information which he receives, he

4. (1867) 2 Q. B. 595 : 36 L. J. Q. B. 282 : 15 W. R. 1172, Bates v. Hewitt.

can take advantage of his wilful blindness or negligence, if he shuts his eyes to the light, it is his own fault, provided sufficient information as far as the assured is concerned, has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance."

The principle which appears to have been adopted in this case is that possession of the means of knowledge will not be sufficient to constitute waiver by the insurer but that actual knowledge of the material fact must be proved. This principle was also followed by the Court of appeal in (1921) 1 K. B. 104.[5] It follows, therefore, that the onus lay upon the plaintiffs not only to show that the rejection card had been received by the defendant company but that these cards were consulted by that company in the ordinary course of business at the time when proposals for insurance were received. The letter written by the Hindusthan Co-operative Insurance Society Ltd., to the Indian Life Assurance Offices Association on 7th November 1938, to which reference has already been made, seems to show that in that office at any rate these cards could not have been consulted as a matter of general routine when applications for insurance were received. Further, Mr. Joshi's evidence seems to indicate that until 1338, even if these cards were received in the office of the Western India Life Insurance Co. Ltd., it is unlikely that any regular and systematic use was made of them. In fact, it was not until 1938 that a register was introduced for the purpose of facilitating reference to these rejection cards. It follows, therefore, that in any view of the case the plaintiffs have failed to discharge the onus which lay upon them and the defendants are entitled to succeed in this appeal.

K.S./R.K. *Appeal allowed.*

5. (1921) 1 K. B. 104 : 89 L. J. K. B. 1245 : 26 Com. Cas. 52 : 15 Asp. M. C. 94 : 36 T. L. R. 887 : 124 L. T. 67, London General Insurance Company v. General Marine Underwriters' Association.

C. P. C. —
(c) ('40) Chitaley, O. 41, R. 1 N. 13 Pt. 3.
('41) Mulla, Page 1156 Pts. (y) and (z).

A. I. R. (29) 1942 Calcutta 418

NASIM ALI AND PAL JJ.

Province of Bengal — Plaintiff — Appellant

v.

Corporation of Calcutta — Defendant — Respondent.

Appeals Nos. 166, 167 and 168 of 1940, Decided on 17th February 1942, from original orders of Judge, Third Bench, Small Causes Court, Calcutta, D/- 21st February 1940.

Calcutta Municipal Act (3 of 1923), S. 127 (b) —Words "value of land valued with building as part of same premises" in S. 127 (b)—Meaning of—Word "value" means selling price—No method for determining value of land can be laid down—Court must decide each case on opinion of experts—Methods starting with annual rent or dealing with determination of hypothetical annual rent are of no use for purposes of S. 127 (b).

The words "the estimated present value of the land valued with the building as part of the same premises" in S. 127 (b) mean and refer to the value of the land only and the land is to be valued with the building as part of the same premises. The word "value" in S. 127 (b) means the selling price. It must be the selling price of the land between a willing seller and a willing purchaser of the property in question, subject to the advantages or disadvantages involved in its present condition. The property must be valued as it exists at the time when the rate is made, with all the then existing circumstances. No definite method of estimating the present value of the land required to be estimated by S. 127 (b) can be laid down. The Legislature itself has not done that. There may be different methods of estimating under S. 127 (b) "the present value of land valued with the building as part of the same premises." It will be for the expert valuers to make the estimate in each particular case. Objections can be taken to that expert valuation and ultimately the matter is allowed by the statute to be taken before a Court and the Judge may thus be called upon to decide whether or not the valuation in the particular case is correct. The Judge shall have to come to a decision on the expert opinion before him. [P 419 C 2 ; [P 420 C 1 & 2 ; P 422 C 2]

Inasmuch as S. 127 (b) requires the determination of the value of the land and not the annual rent and was designed to meet also the cases where the determination of the annual rent by any direct method is impossible, any method which starts with annual rent can be of no use in determining the value of the land under S. 127 (b). For the same reason, the various methods to be found in the English system of rating which lead to the determination of the hypothetical annual rent can be of no help in determining the "value" of the land under S. 127 (b): ('40) 27 A. I. R. 1940 Cal. 47, *Rel. on*; ('37) 24 A. I. R. 1937 Cal. 14, *Approved*; (1926) A. C. 331 and (1916) 1 A. C. 337, *Ref.* [P 422 C 1]

P. B. Mukerjee, Satyendra Nath Banerjee and Amiya Lal Chatterjee — for Appellant.

Ramaprasad Mookerjee and Pasupati Ghose — for Respondent.

PAL J.—These three appeals are under S. 142, Calcutta Municipal Act. The Appeal No. 166 of 1940 relates to the valuation of the premises No. 6/1 Wellesley Place constituting the stables attached to the Government House. It consists of 1 bigha 10 cottas and 9 chataks and 33 Sq. Ft. of land and of buildings comprising 54 horse stables 14 syces quarters and 2 quarters used by Police Sergeants. In 1931, the Corporation of Calcutta valued the premises as follows :

Lands at Rs. 10,000 per cotta ...	Rs.	306,083
Building	Rs.	113,198
	Rs.	419,281
Annual value	Rs.	20,964

This valuation was based on the appellant's own return under S. 136, Municipal Act, (Exs. D, E, 1a). In this return the Executive Engineer, First Calcutta Division, gave the value of the land as Rs. 306,083 calculating the same at Rs. 10,000 per cotta and returned Rs. 109,802 as the estimated

present cost of erecting the building. The present valuation was made in 1937 as follows:

Land at Rs. 10,000 per cotta	...	Rs. 306,083
Building	...	Rs. 106,507
Electric installation ...	...	Rs. 5000
		Rs. 417,519

In this appeal, the contention of the appellant is that the valuation of the land should be reduced to Rs. 3000 per cotta. The Appeal No. 167 of 1940 related to the rating of 3 Churnock place consisting of 2 bighas 11 cottas 5 chataks of land and of an office building with 46,870 Sq. Ft. of office space. In 1931 the Executive Engineer, First Calcutta Division, submitted a return in respect of the premises under S. 136, Calcutta Municipal Act, giving the value of the land as Rs. 949,281 at Rs. 18,500 per cotta and returning Rs. 274,449 as the estimated present cost of erecting the building. On this return, the Corporation of Calcutta made the valuation in 1931 as follows :

Land at Rs. 18,500 per cotta	...	Rs. 949,281
Building	...	Rs. 282,937
		Rs. 1,232,218

Annual value, Rs. 61,670.

The present valuation is of the year 1937. The Corporation valued the land at Rs. 20,000 per cotta. The appellant claims that the land must be valued at Rs. 16,000 per cotta. The Appeal No. 168 of 1940 relates to the assessment of 27, Chowringhee, known as the Indian Museum. The area of the land in the premises is 10 bighas 16 cottas 10 chataks of which 3 bighas 18 cottas 10 chataks are farm lands and the rest is a tank. In 1931 it was assessed on an annual value of Rs. 1,17,408. For the present valuation of 1937 a return was submitted by the Executive Engineer, City Division on 26th September 1936. In it he gave the annual value of the land with the building as Rs. 16,700 and the annual value of the tank as Rs. 1000 and returned rupees 11,33,253 as the estimated present cost of erecting the building. The Corporation determined the annual value to be Rs. 1,18,800. For this purpose the tank and its surrounding lands were valued at Rs. 1200 per cotta. At this rate the value of the land came to Rs. 2,59,930. The contention of the appellant is that the value of the tank should be taken as nil. It is the case of either party that the valuation in all these cases shall have to be made under S. 127 (b), Calcutta Municipal Act, 1923, (Bengal Council Act 3 of 1923). The section runs as follows :

"For the purpose of assessing lands and buildings to the consolidated rates ..... (b) The annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be five per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation 'if any' to the estimated present value of the land valued with the building as part of the same premises."

There is no dispute in these appeals as to the estimated present cost of erecting the building or as to the deductions on account of depreciation. The only dispute is about "the estimated present value of the land valued with the building as part of the same premises." The only question involved in all these three appeals is what is the meaning of the words "the estimated present value of the land valued with the building as part of the same premises." The question is *juuris positivi* and depends entirely upon the construction of the above words. It is not disputed that the above words mean and refer to the value of the land only and that, whatever be the meaning of the word 'value', the land is to be valued with the building as part of the same premises. The real controversy is (1) about the meaning of the word 'value' as used here and (2) about the method to be followed in valuing "the land with the building as part of the same premises."

The Legislature does not lay down how "the present value of the land valued with the building as part of the same premises" is to be estimated and obviously leaves the task to the experts. Experts were called by both the parties in this case to support their respective valuations. On behalf of the Corporation, Mr. C. K. Sarkar (P. W. 2) was one such witness. He says that he is an architect and valuer and surveyor and has been in the profession for over 44 years. He valued the land and his valuation supports the Corporation valuation. He says :

"When I value the land I value the land saddled with the building on it. It may increase the value in certain cases, e. g., an over-developed building. It may also decrease the price ..... I have not valued the price of bare land ..... I have valued the land with the building."

Mr. Sawday is the expert witness on behalf of the Province of Bengal. He says :

"In valuing the land ..... I have tried to value the land as it stands in value to the owner. In my opinion the best way to do it is to find the value of the property as a whole and then deduct the figure taken by the Corporation for the building ..... Valuing the property "as it stands" mean what any other person would give for this property subject to this restriction that he would occupy in its present methods. Anybody thinking of buying the property as it stands must consider what he will pay for it rather than hire property somewhere else. The property has 47,000 Sq. ft. of office space. If he wants to rent that it will cost him Rs. 4700 at Rs. 10 per 100 sq. ft., i. e. Rs. 5,60,400 a year. Capitalising that at 5 per cent. I get Rs. 11,28,000 from which I have made a small deduction although High Court in some cases approved 40 per cent. deduction..... I take Rs. 10 per 100 sq. ft. as the result of my general experience."

In cross-examination he says :

"In coming to the rateable value at Rs. 16,000 per cotta I have not taken into consideration the sale value. I did not consider the rental value. In approaching the matter I was considering what would be the capital value of the property to Government. What I mean is this that if Government goes to rent a similar property for its present offices they would get in the locality at Rs. 10 per 100 sq. ft. In other words I ascertain the value from the rental level..... I have capitalised the annual value by multiplying it by 20 because that is the standard. It is generally taken as the standard."

This witness says that he is a rating expert and valuer and has been an expert in rating law since five or six years. At the hearing before the learned Small Causes Court Judge the method of valuation of the land that was suggested on behalf of the appellant was this : (1) Find out the annual rent that the building would fetch when let out regard being had to the prevailing rent in the locality for similar houses used for similar purposes. (2) Multiply this annual rent by 20 in order to arrive at the capital value. (3) Deduct the present cost of the

building from (2). According to the appellant the balance would represent "the estimated present value of the land valued with the building as part of the same premises," under S. 127 (b) of the Act. If the capital value in (2) does not exceed the present cost in (3) then the land value must be taken to be nil. It need only be pointed out here that the appellant himself contends that cl. (b) of S. 127 was introduced for those cases where determination of the annual rent was not otherwise possible. The result of accepting the method suggested above by the appellant can be visualised as follows :

The annual value of any building under Section 127 (b) = 5 % of { the estimated present cost of erecting the building ... a reasonable amount on account of depreciation } + 20 (the annual rent that the building would fetch) ... the present cost of the building.

According to the appellant the last item in this valuation (viz., the present cost of the building) is to be obtained from the first two items, (viz., by deducting the depreciation allowance from the estimated present cost of erecting the building). So in the result

the annual value of any building under S. 127 (b) = 5 % of 20 × the annual rent that the building would fetch

i.e. = the annual rent

thus ultimately the method suggested by the appellant may lead us to the same annual rent as is contemplated by cl. (a) of the section. The appellant himself contends from the history of the section that cl. (b) was introduced for those cases where determination of the annual rent by the direct method contemplated by cl. (a) was not possible. If that is so, then how it will be possible to start with the same annual rent in valuing the land, and why should all the troubles involved in the process laid down in cl. (b) be undertaken if the result be to arrive at the same starting figure as the final result?

In these appeals a somewhat different method has been suggested by the appellant. It has been contended before us that "the present value of the land valued with the building, etc.," means the value of its present occupation by the owner in its present condition. The method that is suggested for estimating this value is : (1) to find out the character and extent of the present occupation of the premises, (2) to see how much any one will pay for this land who requires it for the purpose of occupying it in its present condition in the same manner and to the same extent as the owner is doing ; or (3) to find out at what rent the present occupier can have similar benefit of occupation of the premises in the locality and then to capitalise this rental value. This according to the appellant will give the present value of the entire premises. In order to allocate a portion of this estimated value to the land the method suggested is to deduct therefrom the present market value of the building.

We are thus asked by the appellant to lay down a definite method of estimating the present value of the land required to be estimated by S. 127 (b). But the Legislature itself did not do that. The method suggested has been sought to be supported by reference to authorities on the English law of rating and we have been referred to the principles of beneficial occupation, of contractor's basis, of effective capital value and similar other principles discussed by those authorities. But in my opinion the question before us is one *juris positivi* and we cannot travel beyond the provisions of the statute itself.

As has been pointed out above, the section speaks of estimating "the present value of land valued with the building as part of the same premises." There may be different methods of making this estimate and it will be for the expert valuers to make the estimate in each particular case. Objections can be taken to this expert valuation and ultimately the matter is allowed by the statute to be taken before a Court and the Judge may thus be called upon to decide whether or not the valuation is correct. Seldom do we see what happens when our judicial system is forced to deal with problems almost unfamiliar to the Judges. The problem before the Judges sometimes becomes like a mathematical problem in which there are too many unknowns. The Judges no doubt enjoy the traditional confidence that they can handle any dispute without assistance. Partisan experts called by the parties are the most familiar present source of technical information imparted indirectly to the Courts. Without condemning this long established practice in toto it may safely be said that it frequently operates to confuse the Judge than to inform. Before a Judge can act intelligently in such a matter he must have an amount of the special knowledge required for the matter and I do not think that such knowledge can be acquired the moment he takes his first lesson from the partisan experts, or, so-called experts, produced by the parties at the trial. He must have a broader, clearer and surer grasp of the subject than he can get from any such unreliable lessons. Whatever that be, as the present judicial machinery stands, the Judge shall have to come to a decision and must decide on the expert opinion before him.

Mr. Mukherjee appearing for the appellant contends that S. 127 (b) of the Act should not be so construed as to yield a result different from what would be arrived at if S. 127 (a) stood alone and for this purpose he takes us to the history of the section. He starts with the Bengal Council Act 4 of 1876 (The Calcutta Municipal Consolidation Act, 1876). Chapter 5, Ss. 104 to 120 of this Act provided for the assessment of houses and lands. The relevant portion of S. 104 of that Act ran as follows:

"The estimated gross annual rent at which any house or land liable to rate under this Act might reasonably be expected to let from year to year shall, for the purposes of any rate to be imposed under this Act, be held and be deemed to be the annual value of such house or land."

That Act made no distinction between buildings erected for letting purposes or ordinarily let and buildings not so erected for letting purposes and not so ordinarily let. For all characters of premises "annual value" was to be based on the estimated gross "annual rent" at which such house might reasonably be expected to let from year to year. This was the position in the English system also. This state of things continued up to 1884. Even in the Bengal Council Act 3 of 1884 (the Bengal Municipal Act, 1884) the same principle was adopted : *vide* its S. 101. In 1885 the case of *Nundo Lal Bose* v. *Corporation of Calcutta*[1] was decided by this High Court. That case arose out of an assessment made on a certain house and premises which was a family dwelling house and not likely to be let on rent. The

1. ('85) 11 Cal. 275.

Corporation estimated the gross annual rent on the basis of the costs of the buildings and premises. The Corporation estimated the total expenditure of the building and land at Rs. 180,000 and found the gross annual rent at which the said house and premises might reasonably be expected to let from year to year at 2½ per cent. of the said sum. In setting aside this assessment Garth C. J. observed :

"In this it seems to me they acted beyond their powers. They had no right whatever to make the assessment upon any other basis than that which the Act prescribed. The principle upon which they ascertained the annual value of the premises appears to me to have been obviously fallacious; but whether it was so or not it was an arbitrary test and one which the law does not sanction."

In course of the judgment the learned Chief Justice observed that some difficulties might certainly arise in assessing joint family property of this nature. But he pointed out that "the principle of rating upon which the Commissioners were directed to proceed under Act 4 of 1876 was the same which was adopted in England; and similar difficulties would arise there in the case of gentlemen's parks and mansions which were laid out for residential purposes, and not for sale or letting. But such properties were nevertheless constantly rated upon the basis of their annual letting value."

Mr. Mukherjee contends that what the Corporation did in the *case of Nundolal Bose*[1] was really to base the estimate on what was known in England the contractor's basis, and, if in England such properties were being constantly rated upon the basis of their annual letting value, this contractors basis was the method generally used there for such purposes. But, as the High Court disapproved of the application of that method of arriving at the letting value here, the Legislature amended the section in 1888 (Bengal Council Act 2 of 1888, S. 122) by adopting that method as the method of finding out the annual value of such building. Section 122, Calcutta Municipal Consolidation Act, 1888, ran as follows :

"For the purpose of assessment under this Act, the annual value of land and the annual value of any house built for letting purposes or ordinarily let shall be the gross annual rent at which such land or house might reasonably be expected to let from year to year less, in the case of a house, an allowance of 10 per cent., for the cost of repairs and for all other expenses necessary to maintain the house in a state to command such gross rent. The annual value of any house not built for letting purposes and not ordinarily let shall be 5 per cent. on the sum obtained by adding the estimated present cost of building the house, less a reasonable amount to be deducted on account of depreciation, if any, to the estimated value of the land valued with the house as part of the same premises."

This is substantially the present S. 127 divided into cls. (a) and (b). No doubt this history helps us to understand the growth of the law in this respect. We know what it was and how it became what it is now. But in interpreting the statute we shall only have to find out 'what it is" though for this purpose it may be helpful to know what it was and how it became so. But beyond this the history will not be of much help to us. Further, if the Legislature wanted to retain the basis of the letting value for all classes of buildings as before, but only intended to clear up the position that a particular method could be adopted for the purposes for ascertaining this letting value of a certain class of buildings, then nothing would have been easier for it than simply to add an explanation to the then existing law to the effect that in determining the letting value of this specified class of buildings that specified method will be legitimate.

Assuming that the legislature even after introducing cl. (b) intended to retain and retained the hypothetical annual rent to be the 'annual value' as before even then it cannot be denied that the legislature enacted only one legitimate method for determining this annual value for buildings not erected for letting purpose and not ordinarily let. In introducing cl. (b) the legislature at least recognized the difficulty in determining the annual rent by the direct method contemplated by clause (a) and, therefore laid down a definite method for the determination of the annual value. The process laid down may or may not yield the annual rent ; but this is the only way in which the valuation must be made, whether it yields 'the annual rent' or merely its approximate equivalent, or anything else. Then again in applying this process we shall have to estimate "the present value of the land valued with the building as part of the same premises." Remembering that the process itself has been given by the Legislature to meet also the cases where determination of the "annual rent' by any direct method is impossible, it will be absurd to suggest that in valuing the land the self-same impossible item was intended by the Legislature to supply the starting point. To ascribe this intention to the Legislature would indeed be a very violent supposition.

Mr. Mookerjee next contends that what is given in S. 127 (b) is really the contractor's basis of rating prevailing in the English system. If that is so, it is so. But even then that would not entitle us to give up the positive expressions of the section and haunt for what is the 'contractor's basis' as understood in the English system and then to apply that basis instead of applying the provisions of the section as expressed by the Legislature. In the English system since the Poor Rate Exemption Act, 1840, (3 & 4 Vict., C. 89) the only persons rateable besides parsons and Vicars, are those in occupation of lands etc. This occupation means 'beneficial occupation' or occupation of some value. The more complete way of expressing the fact, usually and compendiously expressed by saying that there is no beneficial occupation, is to say that there is occupation, but it has no value. In that system the legal definitions of value for the purpose of rating are contained in the Rating and Valuation Act, 1925 (15 & 16 Geo. V, C. 90) S. 68 (1), the Valuation (Metropolis) Act, 1869, (32 & 33 Vict. C. 67), as amended by the Rating and Valuation Act, 1928 (18 & 19 Geo. V, C. 8) and by S. 7, Rating and Valuation (Apportionment) Act 1928 (18 & 19 Geo. V, C. 44). There is (1) a gross value, (2) a rateable value, and (3) an intermediate value known as the net annual value. These expressions are defined in the statutes referred to above and the rating proceeds upon the basis of these statutory definitions. The gross value is defined to mean the rent which a tenant might reasonably be expected to pay for a hereditament from year to year under certain circumstances : *see* S. 68 (1), Rating and Valuation Act, 1925 and S. 4, Valuation (Metropolis) Act, 1869. The question in the English system, therefore, always reduces to finding out the rent which a tenant might reasonably be expected to pay for a hereditament from year to year. Various methods are suggested according to the character and use of the hereditament to find out this hypothetical annual rent and the so-called Contractors' basis is only one such method.

a There are also the profits basis and the competitive basis.

Where an owner is also the occupier, and especially where it is difficult or impossible to imagine any person other than the owner in occupation, the task of discovering what a hypothetical tenant would pay becomes very difficult. It was owing to these circumstances that it was found necessary for rating experts and Courts to have recourse to what Viscount Cave L. C. described as hypotheses of a more or less violent character in 1926 A. C. 331[2] at p. 338. One such hypothesis is the assumption that the rent which would commend itself to a tenant would be based upon an estimate of the profits resulting from the occupation of the hereditament. Another is the contractor's basis, namely, an estimate of the rent by reference to the interest which a contractor would expect for the money which he had expended b in buying the land and erecting the buildings of which the hereditament consists. (*Vide* Faraday on Rating, Edn. 4th, Vol. I, Chap. IV p. 76). The contractor's principle has been explained by Lord Parker thus:

"When the owner is also the occupier, then inasmuch as he is by reason of his occupation out of pocket to the extent, at least, of interest on his capital expenditure in acquiring and building on the land he occupies, the amount of such interest is good evidence of what the owner would be willing to pay by the year for the privilege of continuing in occupation:" (1916) 1 A. C. 337[3] at p. 360.

The capital expenditure to be taken into consideration again is not that which was incurred in the past, but that which would be incurred at the date of assessment. According to the English authoc rities the true method of applying this basis would be to ask: (1) what would be the lowest present cost of a structure suitable for the purposes for which this hereditament is now occupied? and (2) how much more would such new structure be worth for its purpose than the existing one because of more efficient and economical working? But all this is only a method of estimating the rent. In the English system we have also the expression "effective capital value." This means "the selling price between a willing seller and a willing purchaser of the property in question, subject to the restriction that it can only be occupied substantially in its present condition." In considering whether the profits basis or the contractor's basis is to be adopted it has, even in the English system, been found impossible to lay down any definite principle determining the circumstances in which one or other d of these methods of assessment shall be applied: (Faraday p. 80).

As has been pointed out above, these are all methods not of determining the value of the land, but of ascertaining the hypothetical annual rent. They may be quite useful for the system where such rent falls to be determined. But our statute requires the determination of the value of the land and not the annual rent. Even if we assume that cl. (b) gives only what is known as the 'contractor's basis' in the English system, that does not in the least solve the difficulty. 'Contractor's basis' only gives a process for determining an approximate equivalent of annual rent where its determination e by the direct method is difficult or impossible. It does not give us any method for estimating the present value of the land valued with the building as part of the same premises. This value shall have to be estimated in course of the process laid down by cl. (b). Consequently, whatever name the process be given the difficulty, if any, in estimating the present value of the land still remains and the 'contractor's basis' does not authorise this estimate to be started on the basis of 'annual rent' as suggested by the appellant.

The question as to how to determine the value of the land as required by S. 127 (b) came up for consideration in this Court between these identical parties on another occasion: *see* 44 C. W. N. 165.[4] A Division Bench of this Court declined to lay down any definite method of valuing the land under S. 127 (b) and refused to accept the method f suggested by the present appellant to be the only one legitimate method. The possible difficulty in making such valuation was also pointed out by my learned brother Nasim Ali J. in I.L.R. (1937) 1 Cal. 576.[5] The word 'value' ordinarily means "the amount of money for which the thing can be exchanged in open market"—means 'the selling price'; and this meaning was accepted for the word as used in this part of the section by this Court in 44 C.W.N. 165.[4] We do not see any reason why we should differ from the view taken in that case. The value must be the selling price as was pointed out by our learned brother Mitter J. in 44 C. W. N. 165,[4] and it must be the selling price of the land between a willing seller and a willing purchaser of the property in question, subject to the advantages or disadvantages involved in its present condition. It is no doubt a fundag mental principle of rating that the property must be valued as it exists at the time when the rate is made, with all the then existing circumstances. This is also what is required by S. 127 (b), Calcutta Municipal Act. There always remains the difficulty in estimating this price. But this difficulty is to be solved by an expert valuer.

As has been pointed out above, the value of the land estimated by the Corporation has been stated by its expert witnesses to have been the present value of the land valued with the building as part of the same premises. These experts have given the details of the method adopted in coming to this estimate, and nothing has transpired either from their cross-examination, or from the expert evidence given on the side of the present appellant which would entitle us to say that the method adopted by the Corporation in making this estimate was wrong. h In the result therefore these appeals are dismissed with costs.

NASIM ALI J. — I agree that these appeals should be dismissed with costs. The point raised in these appeals was decided by a Division Bench of this Court in 44 C.W.N. 165.[4] I see no reason to differ from the decision in that case. The hearing-fee in these appeals is assessed at ten gold mohurs.

G.N./R.K. *Appeals dismissed.*

2. (1926) 1926 A.C. 331 : 95 L.J.K.B. 605 : 134 L.T. 483 : 90 J.P. 69 : 42 T.L.R. 275, Kingston Union v. Metropolitan Water Board.
3. (1916) 1 A.C. 337 : 85 L.J.K.B. 296 : 114 L.T. 380 : 80 J.P. 137 : 32 T.L.R. 168 : 14 L.G.R. 217 : 60 S.J. 208, Metropolitan Water Board v. Chertsey Union Assessment Committee.
4. ('40) 27 A. I. R. 1940 Cal. 47 : 189 I. C. 717 : I.L.R. (1940) 1 Cal. 168 : 44 C.W.N. 165, Corporation of Calcutta v. Province of Bengal.
5. ('37) 24 A. I. R. 1937 Cal. 14 : 169 I. C. 811 : I.L.R. (1937) 1 Cal. 576 : 41 C. W. N. 200, Corporation of Calcutta v. Jardine Skinner & Co.

a **A. I. R. (29) 1942 Calcutta 423**

B. K. MUKHERJEA AND BLANK JJ.

Nripendra Chand Saha Chowdhury and others — Plaintiffs — Appellants

v.

Jowadali Mondal — Defendant — Respondent.

Appeal No. 894 of 1939, Decided on 20th February 1942, from appellate decree of Sub-Judge, Mymensingh, 2nd Court, D/- 17th February 1939.

(a) Bengal Tenancy Act (8 of 1885, as amended in 1928), S. 26B—Section is not retrospective.

Section 26B is not retrospective and consequently
b a transfer of a portion of a holding effected prior to 1928 is not in any way validated by this amendment. The transferee still remains a trespasser.
[P 424 C 1]

(b) Bengal Tenancy Act (8 of 1885 as amended in 1928), Ss. 26B, 87, 26F — Sale of part of occupancy holding before 1928—Sale of residue after 1928 amendment — Rights of landlord to evict first transferee on such sale explained — Landlord purchasing lands sold to second transferee under S. 26F is entitled to recover possession of land from first transferee.

Where a part of occupancy holding is sold before 1928 and the residue sold after 1928 and the second transferee is in possession of the lands purchased by him and is liable for payment of the entire rent and the lands have neither been pre-empted by the land-
c lord under S. 26F, Ben. Ten. Act, nor separated from the rest of the holding by a division of the tenancy under S. 88 of the Act, it cannot be said that the landlord would still have the right to enter upon the land in possession of the first transferee. The second transferee must be deemed to be a tenant under the landlord in the same way as the original raiyat was, he was still answerable for the entire rent and to allow the landlord a right of re-entry with regard to the lands previously sold, in such circumstances, would be to hold that there could be an abandonment in respect of the portion of the holding. Therefore, the mere transfer of the last portion of the holding to a purchaser if it is after 1928, would not by itself constitute abandonment. The landlord, however, may have the right to recover possession of the first sold portion if, in addition to the transfer of the residue of the holding,
d other circumstances are present. If the second transferee gets the tenancy sub-divided and the rent apportioned under S. 88, Ben. Ten. Act, there would be obviously a splitting up of the original holding. The portion already sold would in that case be severed from the remaining portion and as there is no arrangement made for payment of rent in respect of the same either by the original tenant or his successor, it might be deemed to have been abandoned, even though the other portion was actually in possession of a tenant. The landlord would also have the right to recover khas possession of the portion sold to the first purchaser, if he has exercised his right of pre-emption with regard to the remaining portion and taken possession of the same. In such a case, there is no tenant in possession of any portion of the land constituting the holding and there is no arrangement for payment of rent in respect of the same. As the first transferee who is alone in possession is admittedly a trespasser he can certainly be evicted and the landlord can take khas possession of the lands occupied by him : *Case law discussed.* [P 424 C 2]

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Atul Ch. Gupta and Hiran Kr. Roy. — for Appellants.

Nirmal Chandra Nandi — for Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiffs and it arises out of a suit commenced by them to recover possession of the lands in suit, on establishment of their title to the same. The material facts lie within a small compass and may be narrated as follows: By certain collectorate partitions the plaintiffs have come to own the entirety of tauzi No. 14198 of the Mymensingh Collectorate. Under this touzi there was a non-transferable occupancy holding in possession of one Indramoni Dasya, consisting of four plots of land, to wit, C. S. Dags Nos. 686, 688, 801 and ·13 acres of Dag 687. In 1927, Indramoni sold all the lands of the holding with the exception of ·34 acres of land of holding No. 686 to the present defendant. In 1928, the Bengal Tenancy Act was amended, making all occupancy holdings transferable in law, and in 1936 Indramoni transferred the residue of the holding amounting to ·34 acres of land possessed by her to one Kali Prasanna. The plaintiffs as landlords, thereupon exercised their right of repurchase under S. 26F, Ben. Ten. Act, as it stood prior to the amendment of 1938 in respect to the portion of land purchased by Kali Prasanna, and they have now instituted the present suit to recover possession of the lands sold to the defendant in 1927, on the allegation that the holding was entirely abandoned after the second transfer, and the defendant as a mere trespasser had no right to retain possession of the same against the plaintiffs landlords.

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Both the Courts below have dismissed the plaintiff's suit. They have held concurrently, that as the sale to Kali Prasanna was after 1928, when occupancy rights became transferable in law, the plaintiffs were bound to recognize Kali Prasanna as tenant, and the holding could not be said to have been abandoned. It was further held, that the plaintiffs by exercising their right of pre-emption simply stepped into the shoes of Kali Prasanna, and could not treat their own purchase as constituting an abandonment of the holding. It is the propriety of this view that has been challenged before us in this second appeal. It may be pointed out at the outset that the identical point came up for consideration before Edgley J. sitting singly in 44 C.W.N. 118,[1] and it was held by the learned Judge that as soon as the last portion of the holding was transferred, there was an abandonment of the holding within
h the meaning of S. 87, Ben. Ten. Act, and the landlords were entitled to enter on the land occupied by the first purchaser. In that case, as in the present, the landlords had got the lands of the second purchaser by exercise of their rights of repurchase under S. 26 (F), Ben. Ten. Act, as it stood before 1938, but it was held, that even without relying on their pre-emption of a portion of the holding, the landlords were entitled to treat the holding as abandoned. The decision undoubtedly supports the contention of the appellant. Mr. Gupta who appears on behalf of the appellant has placed reliance upon the decision itself but he has attempted to support it on grounds other than those assigned by the learned Judge.

The learned advocate appearing for the respondent, has on the other hand contended that the

1. ('40) 27 A.I.R. 1940 Cal. 6: 186 I.C. 555: I.L.R. (1939) 2 Cal. 471 : 70 C.L.J. 501 : 44 C.W.N. 118, Annada Prosad v. Ramjan Sarkar.

decision of Edgley J. is wrong, as it goes against several decided authorities of this Court. In these circumstances it is necessary for us to examine the matter with some care. Under the law as it stood prior to 1928, occupancy holdings were not transferable except with the consent of the landlord or by custom, and an unauthorised transfer of the entire holding by way of sale, ordinarily entitled the landlord to enter upon the lands of the holding: *vide* 42 Cal. 172.[2] The reason why the zemindar was entitled to recover possession of the lands of a holding which was sold in its entirety by the raiyat was explained in one of the earliest Full Bench decisions of this Court which is to be found in 22 W. R. 22.[3] The reason was that the sale and transfer of possession to the purchaser conveyed no title to him, and as the raiyat had left the land he must be deemed to have abandoned it. As the land remained a part of the zemindary of the landlord, to which the person in possession had no title, and which was abandoned by the owner, there was nothing in law which prevented the proprietor from taking possession of it. If the raiyat transferred only a portion of the holding and remained in possession of the rest, the landlord had no right to recover possession of the transferred portion as the holding was not then abandoned, and the original tenant occupying a portion of the lands, constituted a barrier between the landlord and his own transferee. It was also well settled that the entire holding need not be transferred all at once. If the entire holding was sold out in parts at different times, it would amount to abandonment as soon as the last transfer was made.

In 1928 the law was changed, and under S. 26 (B), Ben. Ten. Act, as it stands after amendment, the holding of an occupancy raiyat, or a share or portion of it can be transferred like any other species of immovable property, subject to the other provisions of the Act. It is undisputed that the section is not retrospective and consequently a transfer of a portion of a holding effected prior to 1928 is not in any way validated by this amendment. The transferee still remains a trespasser. The question now is what would be the legal consequence if the residue of the holding in possession of the raiyat is sold to another person after 1928. The second transferee of course cannot be evicted, but Edgley J. is of opinion that the first transferee can be turned out as a trespasser, as there is an abandonment of the holding as soon as the second sale is made, even though it is made after 1928, and the first transferee would lose the protection, which he hitherto enjoyed by reason of the original tenant being in possession of a portion of the holding. Edgley J. lays stress on the wording of S. 26 (B), Ben. Ten. Act, which makes the holding of an occupancy raiyat transferable subject to the other provisions of the Act. In his opinion, S. 26 (B) must be read subject to the provision of S. 87 of the Act. It is pointed out by the learned Judge that so long as the original tenant was in possession of some portion of the holding the landlord might have some security for the rent of the entire tenancy, including the portion already transferred. But the second transferee, who acquired the statutory right of a tenant with regard to a portion might get the holding divided under S. 88, Ben. Ten. Act, and the landlord also might exercise his right of pre-emption under S. 26 (F) of the Act. In either case, the landlord would have no means of realizing rent in respect of the portion of the holding previously transferred, and as with regard to that portion at least the original tenant can be said to have made no arrangements for payment of rent, there is abandonment within the meaning of S. 87, Ben. Ten. Act.

In our opinion, Edgley J., has enunciated the proposition of law a little too broadly. If the second transferee is in possession of the lands purchased by him and is liable for payment of the entire rent and the lands have neither been pre-empted by the landlord under S. 26 F, Ben. Ten. Act, nor separated from the rest of the holding by a division of the tenancy under S. 88 of the Act, it is difficult to say that the landlord would still have the right to enter upon the land in possession of the first transferee. The second transferee must be deemed to be a tenant under the landlord in the same way as the original raiyat was, he was still answerable for the entire rent and to allow the landlord a right of re-entry with regard to the lands previously sold, in such circumstances, would be to hold that there could be an abandonment in respect of a portion of the holding. We think, therefore, that mere transfer of the last portion of the holding to a purchaser if it is after 1928, would not by itself constitute abandonment. The landlord, however, may have the right to recover possession of the first sold portion if, in addition to the transfer of the residue of the holding, other circumstances are present, to which reference was made by the learned Judge himself in his judgment. If the second transferee gets the tenancy sub-divided and the rent apportioned under S. 88, Ben. Ten. Act, there would be obviously a splitting up of the original holding. The portion already sold would in that case be severed from the remaining portion and as there is no arrangement made for payment of rent in respect of the same either by the original tenant or his successor, it might be deemed to have been abandoned, even though the other portion was actually in possession of a tenant.

We think that the landlord would also have the right to recover khas possession of the portion sold to the first purchaser, if he has exercised his right of pre-emption with regard to the remaining portion and taken possession of the same. In such a case, there is no tenant in possession of any portion of the land constituting the holding and there is no arrangement for payment of rent in respect of the same. As the first transferee who is alone in possession is admittedly a trespasser he can certainly be evicted and the landlord can take khas possession of the lands occupied by him. In the case decided by Edgley J., the plaintiffs landlords had also pre-empted the portion of the holding sold to the last transferee, and we think, therefore, that the decision of our learned brother was perfectly right though, for ourselves, we would like to base the landlord's right of entering on the land, on the ground of his having pre-empted and taken possession of the rest of the holding. It appears that Edgley J., did not attach much importance to the fact of the landlord's taking possession of the last portion of the holding by re-purchase under S. 26F, Ben. Ten. Act, inasmuch as he felt embarrassed by certain decisions of this Court, which held, that the landlord if he himself purchases a portion of the holding by private sale, or in execution of a money decree, which gives him only the right, title and interest of the judgment-debtor, is precluded from setting up his own purchase as constituting an abandonment of the holding.

2. ('15) 2 A.I.R. 1915 Cal. 242: 27 I.C. 61: 42 Cal. 172: 20 C. L. J. 52: 18 C.W.N. 971 (F.B.), Dayamoyi v. Ananda Mohan Roy.
3. ('74) 22 W. R. 22: 13 Beng. L. R. 274 (F.B.), Narendra Narayan v. Ishan Chandra.

a The decided cases to which reference was made by the learned Judge are 40 C. W. N. 269[4] and 35 C. W. N. 648.[5] In both these cases, which were decided under the old law, the occupancy raiyat had himself transferred a portion of the holding and the remaining portion was purchased by the landlord, in execution of a defective rent decree which had the effect of a money decree. It was held by the learned Judges that on the principle enunciated by the Full Bench of this Court in 25 C.W.N. 29,[6] the landlord who merely stepped into the shoes of the tenant by such sale, could not take advantage of his own purchase in treating the holding as abandoned and evicting the first transferee. In our opinion the cases mentioned above cannot have any application to the facts of the present case. In 25 C. W. N. 29[6] it was held that an occupancy raiyat who had transferred a part of his non-transferable holding b was not competent to surrender to the landlord either the whole holding or the portion so transferred and thereby entitle the landlord to enter on the lands; as that would be to allow him to derogate from his own grant which the law does not permit. In other words, having himself transferred a portion of the holding to another for a consideration, the transferor was disentitled to exercise to the detriment of the purchaser, the power of surrender, which he undoubtedly had. We entertain doubts as to whether this principle could be extended to a case where the raiyat sold a portion of his tenancy to a purchaser, and the remaining portion was purchased by the landlord in execution of a decree against the tenant.

According to the Full Bench decision, the disability was upon the raiyat, who on the principle c that the grantor cannot be permitted to derogate from his grant, was prevented from doing anything which might prejudice the interests of his vendee. But in the cases mentioned above, it was the landlord who put up to sale the remaining portion of the tenancy, the tenant really did nothing except that he could not or did not pay the rent and thereby gave the landlord an opportunity to put up his lands to sale. But even if these decisions are right, there is no act or omission nor even a default on the part of the tenant in the present case. Kali Prasanna did neither voluntarily sell his share to the plaintiffs, nor did he do or abstain from doing anything which enabled the landlord to acquire his share by purchase. The landlords merely exercised their statutory right of repurchase, which was not founded on any act except the act of purchase by the tenant. It is also doubtful, whether not being the grantor d himself, the principle that one cannot derogate from his grant could at all be invoked against Kali Prasanna.

It may be said further, that even if before 1928, a landlord in purchasing a portion of the tenancy could be deemed to have impliedly held out and represented that the entire holding was transferable, there could be no such representation, when the lands were sold after 1928. We have therefore no hesitation in holding that the fact of the plaintiffs having pre-empted a portion of the holding does not disentitle them in any way to treat the holding as abandoned. On the other hand, having got possession in exercise of their statutory right of the lands e that were in lawful occupation of their tenant, they could evict the first transferee who was nothing but a trespasser with regard to the lands possessed by him. The fact that under S. 26 (F) (6), Ben. Ten. Act, the pre-empting landlord gets only the right, title and interest of the purchaser is immaterial for, as we have said above, no rule of estoppel could be invoked against the purchaser also. Our conclusion therefore is that the plaintiffs are entitled to recover possession of the lands in possession of the defendant. The appeal is thus allowed. The judgments and decrees of both the Courts below are set aside, and the plaintiffs' suit decreed with costs in all the courts.

K.S./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 425 f

B. K. MUKHERJEA AND BLANK JJ.

Nagendra Nath Sarkar—Defendant — Judgment-debtor—Appellant

v.

Krishnapada Sarkar and another — Plaintiffs — Decree-holders — Respondents.

Appeal No. 122 of 1941, Decided on 4th March 1942, from original order of Sub-Judge, Burdwan, D/- 25th January 1941.

Civil P. C. (1908), S. 60 (1) (c)—"Agriculturist" — Occupancy raiyat letting out lands and living on such income and having no other income held agriculturist. g

The judgment-debtor had about 20 or 25 bighas of culturable land with regard to which he had been recorded as an occupancy raiyat. He was not actually cultivating all these lands with his own hands but was getting them cultivated under bhag system, by letting them out to bhag chasis. The other income which he derived from his zemindary properties was only Rs. 25 :

Held that he was an agriculturist and therefore his residential house was exempt from attachment.

[P 425 C 2]

Baidya Nath Banerji and Chandra Narayan Laik — for Appellant.

B. K. MUKHERJEA J.—This is an appeal on behalf of the judgment-debtor and is directed against an order of the Subordinate Judge, Burdwan, dated h 25th January 1941, dismissing the appellant's objection to attachment and sale of his residential house on the ground that it was exempted from attachment under S. 60 (1), cl. (c), Civil P. C.

The only point in dispute is as to whether or not the judgment-debtor was an agriculturist within the meaning of that clause. It appears to us from the evidence that the appellant has got about 20 or 25 bighas of culturable land with regard to which he has been recorded as an occupancy raiyat. He admits in his deposition that he does not actually cultivate all these lands with his own hands, and gets them cultivated under the bhag system, by letting them out to bhag chasis. The other income which he derives from his zemindary properties is only Rs. 25. From the facts, appearing on evidence, it seems to us that the appellant is an agriculturist. There is no opposition on behalf of the respondents in this appeal. In these circumstances, we allow the appeal and set aside the order of the Subordinate

4. ('36) 23 A.I.R. 1936 Cal. 536 : 165 I.C. 190 : 62 Cal. 1110 : 40 C. W. N. 269, Sorojini Roy v. Ramesh Chandra.
5. ('32) 19 A.I.R. 1932 Cal. 405 : 137 I.C. 668 : 35 C.W.N. 648, Runini Kumar v. Amiruddin Kabiraj.
6. ('21) 8 A. I. R. 1921 Cal. 444 : 61 I. C. 443 : 48 Cal. 605 : 32 C.L.J. 286 : 25 C. W. N. 29 (F.B.), Mohesenuddin v. Bhagaban Chandra.

Judge, and direct that the house of the petitioner be released from attachment. We make no order as to costs in this appeal.

BLANK J. — I agree.

K.S./R.K. *Appeal allowed.*

C. P. C. —
('40) Chitaley, S. 60, N. 10 Pt. 1.
('41) Mulla, Page 243 Note "Clause (c) : Houses occupied etc."

A. I. R. (29) 1942 Calcutta 426 (1)

HENDERSON J.

Ruhini Kumar Bhattacharyya
Accused — Petitioner

v.

Emperor.

Criminal Revn. Petn. No. 1090 of 1941, Decided on 19th February 1942.

(a) Motor Vehicles Act (1939), S. 123 — Accused returning fares to passengers may be regarded as conductor.

From the fact that the accused returned fares to passengers, it can be inferred that the accused was the conductor. [P 426 C 1]

(b) Motor Vehicles Act (1939), S. 123— Statement by co-accused that accused was conductor is no evidence against accused — Prosecution should ask for separate trial and examine co-accused as witness if they wish to rely upon statement.

In a prosecution under S. 123, a statement by the co-accused (driver) that the accused was the conductor of the bus is no evidence against the accused. If the prosecution wish to rely upon that statement they should ask for separate trial and examine the co-accused (driver) as a witness. [P 426 C 1]

S. S. Mukherjee and Sachindra K. Bhattacharjee — for Petitioner.

ORDER.—The petitioner has been convicted of an offence punishable under S. 123, Motor Vehicles Act. The gist of the prosecution case is that a certain vehicle which was licensed as a lorry was being improperly used as a bus. The accused were the driver and owner and the petitioner who is alleged to have been the conductor. The prosecution only examined two witnesses, namely the police officers who detected the offence. None of the passengers were examined to prove that the petitioner was acting as the conductor. There was only circumstantial evidence to the effect that the petitioner returned the fares to the passengers. The learned Magistrate would certainly have been entitled to find on this evidence that the petitioner was the conductor. But unfortunately he has also placed reliance upon a statement made by a co-accused, i. e., Wazid Ali—the driver. If the prosecution wished to rely upon this, they should have asked for a separate trial and examined Wazid Ali as a witness. As the present conviction has been based upon what is not evidence, it cannot be supported. The rule is accordingly made absolute, the conviction and sentence are set aside and I direct that the petitioner be retried by some other Magistrate. The prosecution will be at liberty to examine as witnesses the driver and any of the passengers.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 426 (2)

ROXBURGH AND MOHAMAD AKRAM JJ.

Emperor

v.

Keamatali Sheikh and others — Accused.

Criminal Ref. No. 29 of 1941 and Appeals Nos. 710 and 714 of 1941, Decided on 29th January 1942.

Penal Code (1860), Ss. 302, 326, 324 and 109— *A's* cattle damaging *D's* crops — While *D* was taking cattle to pound *A*, *B* and *C* coming to rescue cattle—During scuffle between *B* and *C* on one side and *D* on other *A* suddenly taking out pocket knife which he happened to carry in his waist and stabbing *D* as result of which *D* died — Whole incident of stabbing sudden and spontaneous — *A* held guilty under S. 326 and not S. 302 — *B* and *C* held guilty under S. 323 and not Ss. 324 and 109.

The cattle of the accused had damaged *D*'s crops. While *D* was taking the cattle to the pound, the accused *A*, *B* and *C* came to rescue the cattle. Accused *B* pushed *D* down and *C* held him down when *A* took out a pocket knife which he happened to carry in his waist and stabbed *D* into the stomach as a result of which *D* died. The whole incident of stabbing took place very suddenly. It arose spontaneously because *A* happened to remember when the quarrel was developed that he had a knife in his waist. There was no previous premeditation about the matter and the accused party did not go to attack armed in any way. The attack itself on *D* apart from the scuffle between *B* and *C* on the one hand and the deceased on the other amounted to one sudden blow inflicted by *A* :

Held that accused *B* and *C* were guilty of an offence under S. 323. Since there was nothing to show that at any stage before the incident happened they were aware that there was any likelihood of *D* receiving any stab wound their conviction under Ss. 324 and 109 could not be sustained. [P 427 C 2 ; P 428 C 1]

Held further that in view of the sudden and special nature of the incident of stabbing it could not be said beyond reasonable doubt that any of the intentions or requisite knowledge necessary to support a charge of murder under S. 302 were made out against *A*. He was guilty under S. 326 while there was room for doubt as regards the charge under S. 302. [P 428 C 1]

Sudhansu Sekhar Mukherji — for the Crown.

Suresh Chandra Talukdar and Nikhil Chandra Talukdar — for Accused.

ROXBURGH J. — In this case the accused Keamatali Sheikh has been convicted on the unanimous verdict of the jury under S. 302, Penal Code, and has been sentenced to death by the Additional Sessions Judge of Mymensingh who has referred his case for confirmation to this Court under S. 374, Criminal P. C. The accused has also appealed. Three other accused, Isof Ali, Sabed Ali and Samar Ali were tried along with Keamatali Sheikh on a charge under S. 302/109, Penal Code, and have been convicted on the unanimous verdict of the jury under S. 324/109 of the Code and have been sentenced to three years' rigorous imprisonment each. These have also appealed. Keamatali Sheikh was also charged and tried under S. 324, Penal Code, but no verdict was taken from the jury on this charge. The prosecution case was that on 24th August 1941 two cattle of the accused Keamatali

Sheikh damaged the crops of one Keamat Akanda who was taking them to the pound when the four accused together with another named Hasen Ali came to rescue the cattle. The accused Isof Ali pushed Keamat Akanda down into a field by the side of the road and Sabed Ali and Samar Ali held him down when Keamatali Sheikh took out a pocket knife from his waist, opened the blade with his teeth and stabbed Keamat Akanda with it into the stomach just above the navel. The medical evidence is that death would be the natural consequence of the injury caused. Ahed Ali Akanda, P. W. 1, attacked Keamatali Sheikh with a stick and was in turn caught hold of by the accused Samar Ali. Keamat Ali Sheikh then struck Ahed Ali with a knife causing a cut wound. P. W. 9 Shahed Ali Akanda then came up and hit Keamat Ali Sheikh with a wooden club knocking the knife out of his hand.

The occurrence had taken place just before noon. The witnesses carried Keamat Akanda home and later took him to the Dhalla Charitable Dispensary. From there they set out to take him by train to Mymensingh but missed the train and so brought him back to the dispensary. At about 4 O'clock witness Habibulla Akanda, P. W. 10, left the place for the Thana which he reached at 8-35 P.M. and there he lodged the first information. In the mean time as the condition of Keamat Akanda became precarious, the doctor Paramesh Chandra Majumdar, P. W. 8, recorded his dying declaration. The deceased died at 8-30 P.M. that night. In his dying declaration he stated :

" My name is Keamat Ali Akanda. My father's name is Akbar Akanda deceased. My home is at Bharbhara. Keamat Sheikh son of Doli Sheikh of Bharbhara gave me thrust with a knife on my abdomen. His brothers Isof, Samar and Sabed Ali held me."

The first information does not mention the names of the three accused Isof, Sabed Ali and Samar Ali who, as stated in the dying declaration are brothers of Keamat Sheikh. The version there given is that Keamat Sheikh's cow came to damage the paddy of the deceased Keamat Akanda who drove the cow away. At that time Keamat Sheikh came and abused Keamat Akanda and there was an altercation between the two in course of which Keamat Sheikh caused a serious injury with a knife on the left side of the abdomen about the navel of Keamat Akanda. The first information also mentions that the informant Habibulla, P. W. 10, and others had taken the deceased to Dhalla for treatment. Keamat Sheikh was charged under S. 302, Penal Code for causing death of Keamat Akanda and under S. 324 in respect of the injury inflicted on Ahedali. The other accused were charged with abetting the offence of murder committed by Keamat Sheikh.

The evidence of the eye-witnesses in the case supports the version as given in the dying declaration and as stated above, which makes out that the accused party were the aggressors as the deceased was taking the cattle along the road. Ahed Ali Akanda, P. W. 1, is a nephew of the deceased who says that he went to his uncle when the cattle were being taken to the pound and supports the case that he himself was injured when he attacked Keamat Sheikh. Medical evidence is given to show that he himself had an injury, an incised wound, which was slight, on the right side of his body. This was seen by the doctor, P. W. 8, on the same afternoon when the deceased had been brought to the dispensary at about 4 P.M. No mention of this injury is, however, made in the first information, nor of the fact that this witness had any part in the occurrence. [After referring to the evidence of the witnesses for the prosecution his Lordship proceeded.] The four accused in their statements all merely pleaded not guilty, but Keamat Sheikh submitted in the trial Court a written statement. His story is that Keamat Akanda came with a scythe, the witness Ahed Ali with a stout lathi, and the witness Sahed Ali with a club, to the accused's field and abused him because one of his cattle had damaged the paddy. He denied it whereupon Keamat Akanda said that he himself had driven the cattle away and then while there was an altercation going on between the accused and Keamat Akanda, Ahed Ali suddenly struck the accused on the head with a lathi and Keamat Akanda struck the accused on the back with his scythe. Then he turned towards Keamat Akanda who dealt him another blow with the scythe and warding off another blow he received a cut on his right thumb. Sahed Ali then hit him on the knee with the club.

" Thereupon I being not in my sense brought out a pen knife which I had in the folds of my cloth and began to use it against the assailants in self-defence and for fear of life. I cannot say who has been injured and where and what the nature of the injuries is. Thereafter I ran away with my knife."

He denies however that the knife exhibited in the case was his and further that the articles exhibited as the implements used by Ahed Ali and Sahed Ali were the real implements used by them. Thus the first information version is that Keamat Akanda drove away the accused's cow from his own paddy field when the accused came and abused him, the evidence given by the witnesses is that Keamat Akanda was taking the cattle along the road when he was attacked by the accused while the accused Keamat Sheikh's version is that the deceased Keamat Akanda with Ahed Ali and Sahed Ali came to the accused's field and attacked him.

The difference between the first information story and that now given is not, as appears to us, very great. The main difference is the absence of mention of the names of the three accused Isof, Sabedali and Samarali and there is also the absence of mention of an attack and an injury caused to Ahed Ali. [After discussing the evidence his Lordship proceeded.] We therefore are of opinion that the prosecution version of the occurrence is substantially correct and it therefore remains only to discuss what offences have been established by that evidence. A point that has been brought out in the cross-examination of more than one witness is that the whole incident of the stabbing took place very suddenly. It would appear that it arose spontaneously because Keamat Sheikh happened to remember when this quarrel was developed that he had a knife in his waist which he pulled out, opened with his teeth and used to make a sudden attack on Keamat Akanda. It is obvious that there was no previous premeditation about the matter and that the party did not go to the attack armed in any way, the attack itself on Keamat Akanda apart from the scuffle between Isofali, Sabedali and Samarali on the one hand and the deceased on the other amounted to one sudden blow inflicted by Keamat Sheikh. In the circumstances we do not think that the facts establish as against the accused other than Keamat Sheikh more than an offence under S. 323, Penal Code. It does not appear that at any stage before the incident happened that they were aware that there was any likelihood of Keamat Akanda receiving any stab wound. We do not think therefore that the conviction under

S. 324/109, Penal Code, in respect of these three accused can be sustained, but we find that the evidence establishes a charge under S. 323 of the Code against these three accused.

As regards the accused Keamat Sheikh for similar reasons arising out of the sudden and special nature of the incident of stabbing we find it a little difficult to be satisfied beyond reasonable doubt that any of the intentions or requisite knowledge necessary to support a charge of murder under S. 302 of the Code have been made out. It is clear that grievous hurt endangering life was caused to the deceased and there can be no doubt that the accused voluntarily caused hurt to him and intended or knew himself likely to cause hurt endangering life. It can therefore be safely said in the circumstances that he was clearly guilty of an offence under S. 326, Penal Code, while there is room for doubt as regards the charge under S. 302 of the Code. The appeal and the reference of the Additional Sessions Judge of Mymensingh are therefore disposed of as follows. The convictions of accused Isofali, Sabedali and Samarli under S. 324/109, Penal Code, are set aside and they are convicted under S. 323 of the Code and sentenced each to undergo rigorous imprisonment for the period already undergone with the consequence that they will be directed to be set at liberty forthwith. The conviction of the accused Keamat Sheikh under S. 302 of the Code and the sentence of death are set aside and he is convicted under S. 326, Penal Code, and sentenced to undergo rigorous imprisonment for seven years.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Order accordingly.*

Penal Code —
('36) Ratanlal, Page 744 Note "Punishment where doubt exists" and Pages 752-753 Notes "Premeditation" and "Benefit of doubt."
('36) Gour, Page 1031, N. 3431 and Page 1033, N. 3435.

A. I. R. (29) 1942 Calcutta 428 (1)

HENDERSON J.

Mt. Shamsunnessa Khatun Choudhurani w/o Hossein Jan Choudhury — Decree-holder — Appellant

v.

Romjan Sheikh and another — Judgment-debtors — Respondents.

Appeal No. 115 of 1941, Decided on 5th March 1942, from appellate order of Sub-Judge, Pabna, First Court, D/- 30th January 1941.

Bengal Non-Agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 4 — Order holding judgment-debtor entitled to benefits of Act relates to execution of decree and is decree within S. 2, Civil P. C.—Appeal lies.

An order holding the judgment-debtor entitled to the benefits of the Act is a decree within the meaning of S. 2, Civil P. C., and falls within S. 47, Civil P. C., as it relates to execution of decrees. Therefore, an appeal lies from that order. The mere fact that the judgment-debtor's right to remain in possession might terminate within a certain period will not prevent the order from amounting to a decree.

[P 428 C 2]

Surajit Chandra Lahiri — for Appellant.

Amaresh Chandra Roy — for Respondents.

JUDGMENT. — The question raised in this appeal is whether the appeal in the District Court was competent. The Munsif made an order under S. 4, Bengal Non-Agricultural Tenancy Act. The decree-holder appealed and his appeal has been dismissed as incompetent. The learned Subordinate Judge rightly held that the competency of the appeal would depend upon whether the matter was one within S. 47, Civil P. C. He came to the conclusion that it was not. I do not propose to set out the terms of S. 4 in full. Suffice it to say that it gives relief to persons who have been ejected between 30th January 1940 and the dates of the commencement of the Act. The respondents were ejected by the appellant between those two dates in execution of a decree. There is no question that the present dispute is between the parties to the suit. By the decree the appellant is entitled to eject the respondents. The result of this application is that the decree remains unexecuted. I should have thought it was beyond controversy that this question relates to the execution of the decree. I have no doubt that if, when this Act comes to an end, the appellant attempted to recover possession by a suit, she would be met with the objection that the suit was barred by S. 47 of the Code.

The further question remains whether the order made by the Munsif amounts to a decree within the meaning of S. 2, Civil P. C. On this point the judgment of my learned brother Nasim Ali in 44 C.W.N. 364[1] is very much to the point. The learned Judge makes it quite clear that the mere fact that the respondents' right to remain in possession might terminate within a certain period will not prevent the decision from amounting to a decree. The point at issue between the parties is whether the respondents are entitled to the benefits of this Act at all. That question has been conclusively and finally determined by the order of the learned Munsif in this case. The appeal is accordingly allowed, the order of the lower Appellate Court is set aside and I direct that the appeal be reheard by some other Court to be appointed by the District Judge. Costs in this Court will be costs in the appeal—hearing fee, one Gold Mohur. The application is rejected.

G.N./R.K. *Appeal allowed.*

1. ('40) 27 A. I. R. 1940 Cal. 257 : 188 I. C. 483 : I.L.R. (1940) 1 Cal. 393 : 44 C. W. N. 364, Nafar Chandra Sarkar v. Kalipada Das.

C. P. C. —
('40) Chitaley, S. 2 (2), N. 14 Pt. 2.
('41) Mulla, Page 9 Pt. (m).

A. I. R. (29) 1942 Calcutta 428 (2)

LODGE AND ROXBURGH JJ.

Wahed Bux Waeshi — Complainant — Petitioner

v.

Fakharuddin Piracha — Accused — Opposite Party.

Criminal Revn. Petn. No. 516 of 1941, Decided on 17th February 1942.

Criminal P. C. (1898), S. 253 (2) — When accused may be discharged under S. 253 (2) stated—Magistrate having evidence before him not applying his mind to question whether charge was substantiated or not — Magistrate has no jurisdiction to discharge accused under S. 253 (2).

Section 253 (2) empowers a Magistrate to discharge an accused person only if for reasons to be

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recorded by such Magistrate he considers the charge to be groundless. Where far from recording any reasons to show that the Magistrate had considered the charge to be groundless it is apparent that the Magistrate had evidence before him but had not applied his mind to the question whether the charge had been substantiated or not, the Magistrate has no jurisdiction to pass an order discharging the accused under S. 253 (2). [P 429 C 1]

D. N. Bhattacharji and C. F. Ali — for Petitioner.

ORDER.—This rule was issued upon the District Magistrate of Dacca to show cause why an order of discharge passed under S. 253 (2), Criminal P. C., should not be set aside. The material facts briefly are as follows : The complainant one Wahed Baksh Waeshi filed a petition of complaint on 14th June 1938, before a Magistrate of Dacca alleging that the accused Fakharuddin Piracha had committed an offence punishable under S. 420, Penal Code. A warrant with bail under S. 420, Penal Code was issued on that same date against the accused. The accused surrendered in Court on 16th October 1939 after proclamations and attachments had been issued. Thereafter on a number of dates witnesses were examined for the prosecution and the case was adjourned to 4th December 1939 on which date the Magistrate proposed to hear arguments on the question whether or not a charge should be framed. On 4th December 1939, a joint application was filed by the complainant and the accused praying for time to compromise. Time was allowed and extended on various occasions up to 30th March 1940. On that date the accused did not appear and a warrant for his arrest was again issued. Since that date, the accused has failed to appear and no trace of his whereabouts has been found. The case was put up before the Magistrate on a number of dates and ultimately on 7th February 1941, the learned Magistrate passed an order discharging the accused under S. 253 (2), Criminal P. C., on the ground that it was useless to wait and drag on the case indefinitely any more. Section 253 (2) of the Code empowers a Magistrate to discharge an accused person only if for reasons to be recorded by such Magistrate he considers the charge to be groundless. Far from recording any reasons to show that the Magistrate had considered the charge to be groundless it is apparent that the Magistrate had evidence before him and had not as yet applied his mind to the question whether the charge had been substantiated or not. In the circumstances the Magistrate had no jurisdiction to pass an order discharging the accused under S. 253 (2), Criminal P. C. The rule is made absolute, the order of discharge is set aside and the case remanded to the learned Magistrate for disposal according to law.

G.N./R.K. *Rule made absolute.*

Cr. P. C.—

('41) Chitaley, S. 253 N. 7.

('41) Mitra, Page, 912 N. 828 Sub-heading "Recording reasons."

A. I. R. (29) 1942 Calcutta 429

NASIM ALI AND PAL JJ.

Satish Chandra Hui and others — *Appellants*

v.

Sudhir Krishna Ghosh and others — *Respondents.*

Appeal No. 52 of 1941, Decided on 27th February 1942, from original order of Sub-Judge, Midnapore, First Court, D/- 25th January 1941.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A — S. 168A does not affect Bengal Putni Regulation 1819.

No doubt S. 168A affects the putni-tenures but as there is nothing in the Bengal Putni Regulation relating to the execution of any decree for arrears of rent due in respect of the putni and as S. 168A, Bengal Tenancy Act, only gives certain special provisions relating to such execution, the provisions contained in the Bengal Putni Regulation are not affected by S. 168A, Bengal Tenancy Act. [P 431 C 2]

(b) Interpretation of statutes — Maxim "Ita scriptum est" cannot be accepted in its rigid form—But under guise of interpretation Court should not substitute "arbitrium judicis" for "lex scripta."

It is not open to the Court to strain the language of a statute so as to fit in with any supposed intention of the Legislature. No doubt doctrine of the strictest literal interpretation, i. e., the maxim '*ita scriptum est*' if followed in its unqualified and rigid meaning may often lead to absurdities and thus defeat the true purpose of the Legislature. But at the same time the Court must also avoid the opposite extreme of disregarding the letter of the law in order to seek elsewhere a rule that may appear to it more consonant with the supposed justice or the supposed intention of the Legislature. It is not the business of the Courts to be wiser than the laws and to mould them into conformity with their views of what is just and unjust or to substitute "*arbitrium judicis*" for "*lex scripta*" under the guise of interpretation. [P 432 C 1]

(c) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1) (a)—S. 168A (1) (a) prohibits in unqualified manner execution by attachment and sale of any moveable or immovable property other than tenure or holding—Prohibition in S. 168A (1) (a) applies, apart from proviso to that section, whether or not tenure or holding is still in existence or available for execution.

Section 168A (1) (a) cannot be made to mean "shall not be executed by the attachment and sale of any moveable or immovable property so long as the tenure or holding is still available for execution." Section 168A (1) (a) plainly and clearly prohibits in an unqualified manner execution by the attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree relates and apart from the qualification enacted by the proviso to S. 168A (1) (a) the prohibition in S. 168A (1) (a) applies, whether or not the tenure or holding is still in existence or is still available for execution. [P 432 C 1]

(d) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1) (a) Proviso — Scope — Proviso to S. 168A (1) (a) is not

limited to cases where defaulting tenancy is for fixed period but extends to all classes of tenures and holdings — Words "term of tenancy expires" in proviso — Meaning.

The proviso to S. 168A (1) (a) is an excepting or qualifying proviso, and, is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it. The proviso to S. 168A (1) (a) is not limited in its operation only to the cases where the defaulting tenancy is one for a fixed period, but extends to all classes of tenures or holdings; and the words "term of the tenancy expires" in that proviso mean and refer to the extinction or cessation of the tenancy itself and not merely, of the interests of the judgment-debtor in the tenancy. [P 432 C 1,2]

(e) Government of India Act (1935), Sch. 7, List II, Items 21 and 2 — Words "with respect to" in Item 2—Meaning—Power under item 21 to legislate with respect to land, land tenure, relation of landlord and tenant and collection of rents — Scope.

The words "with respect to" in Sch. 7, List II, Item 2 mean "on the subject of." What has to be determined in each case is the subject of the legislation, and not what things or operations it may indirectly affect. When the Legislature is given power to legislate "with respect to" certain subjects, it may exercise all necessary and incidental powers, including the power of passing ancillary provisions which may not be strictly and directly referable to the actual heading under which the power is granted. The power of legislation with respect to land, land tenure, the relation of landlord and tenant and the collection of rents, under Sch. 7, List II, Item 21 would mean and include the power of legislation with respect to the rights, privileges, obligations and liabilities relating to them, any relief or remedy in respect of any such right, liability, etc., and the mode of realization of such relief or remedy, or the procedure for obtaining that relief. [P 433 C 2]

(f) Government of India Act (1935), S. 107 (1) — Words "with respect to . . . . . concurrent Legislative list" in S. 107 (1) qualify words "existing Indian law"— S. 107 (1) paraphrased in light of S. 311.

The words "with respect to one of the matters enumerated in the concurrent Legislative List" in S. 107 (1) qualify only the words "an existing Indian law." In the light of the definitions of "Provincial law" and "existing Indian law" as given in S. 311 of the Act. Section 107 (1) may be paraphrased as follows: "If any provision of the law made by a Provincial Legislature established under this Act is repugnant . . . . . to any provision of the law . . . . passed or made before the commencement of Part III of this Act by any Legislature . . . with respect to one of the matters enumerated in the concurrent Legislative list, then . . . the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void." [P 434 C 1]

(g) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1)—Civil P. C. is existing Indian law within S. 107 (1), Government of India Act — Bengal Act 18 of 1940 is Provincial law within S. 107 (1), Government of India Act — Section 4, Civil P. C., withdraws from operation of its relevant provisions namely Ss. 51 and 60 field covered by S. 168A (1), Ben. Ten. Act—Section 168A is not repugnant to Ss. 51 and 60, Civil P. C.—Section 168A (1) is not rendered void by S. 107 (1), Government of India Act.

The Code of Civil Procedure is an existing Indian law within S. 107 (1), Government of India Act, and the whole Code is with respect to the Item 4 of the matters enumerated in the concurrent Legislative list (List III). Sections 51 and 60 of this law are also with respect to one of the matters enumerated in the concurrent Legislative list (namely Item 4 of List III), and are the relevant provisions for the purpose of considering whether S. 168A, Ben. Ten. Act, is repugnant to Civil P. C. The Bengal Council Act 18 of 1940 is a Provincial law—is a law made by the Provincial Legislature within S. 107 (1), Government of India Act. The Bengal Act 18 of 1940 in pith and substance is one with respect to "land-tenure" and consequently with respect to item 21 of the matters enumerated in the Provincial Legislative List. Assuming that it is with respect to one of the matters enumerated in the concurrent Legislative List it is nonetheless a provision in a Provincial law within the meaning of S. 107 (1), Government of India Act, 1935. That S. 51, Civil P. C., gives only the procedure in execution and enacts the powers of Court to enforce execution and does not purport to give anything else is obvious from its Cl. (b) read with S. 60, Civil P. C. Section 51, Civil P. C., gives the powers of the Court to enforce the decree in general and the new S. 168A, Ben. Ten. Act, only limits that power for the special cases contemplated by it. Therefore, S. 4, Civil P. C., withdraws the operation of the relevant provisions of the Code from the field covered by the new provision of S. 168A, Ben. Ten. Act, to the extent to which the latter covers that field, and thus saves the latter from being repugnant to the former. The one cannot thus be contrary to or inconsistent with the other. The provisions of the Civil P. C., thus avoid the clash and automatically make room for the new power or the new procedure under S. 168A, Ben. Ten. Act. Consequently, the provisions contained in S. 168A (1), Ben. Ten. Act, are not rendered void to any extent by S. 107 (1), Government of India Act, 1935. [P 434 C 1, 2]

(h) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1)—Bengal Putni Regulation of 1819 does not fulfil requirements of S. 107 (1), Government of India Act — Any repugnancy of S. 168A (1) to provisions of Regulation of 1819 does not vitiate provisions of Section 168A (1).

The provisions of Bengal Putni Regulation of 1819 do not fulfil the requirements of S. 107 (1), Government of India Act. A putni tenure is certainly a land-tenure and the regulation in "pith and substance" is one with respect to such land-tenures. This is not one of the matters enumerated in the Concurrent Legislative List and consequently any repugnancy to its provisions is not made by S. 107(1), Government of India Act, a vitiating cause affecting the provision of a Provincial law namely S. 168A (1), Ben. Ten. Act. [P 434 C 2]

Gunada Charan Sen and Surendra Nath Das Gupta — for Appellants.

Atul Chandra Gupta, Syama Charan Mitter, Paresh Lal Shome, Probodh Lal Shome and Bhaba Nath Datta — for Respondents.

JUDGMENT.—The questions involved in this appeal relate to the newly enacted S. 168A, Ben. Ten. Act, inserted by the Bengal Council Act 18 of 1940 (The Bengal Tenancy (Amendment) Act, 1940),

which came into force on 9th January 1941. The decree in question is for arrears of rent due in respect of a patni tenure held under tauzi No. 2409 of the Midnapur Collectorate. The entire patni was sold away by the defendant patnidars in 1938 (1344-45 B. S.) in fractional portions. The suit for the arrears of rent due for the period from 1342 B. S. to Falgoon 1345 B. S. was instituted by the decree-holders against the present defendants on 26th March 1939. In this suit the transferees of the patni were not made parties. The tauzi was sold away for arrears of revenue on 24th June 1939. In the rent suit the defendants inter alia took the plea, that as the patni has been sold away by them they were no longer liable for the arrears. This defence was overruled and the suit was decreed on 14th May 1940. The present application for execution of this decree was made on 21st June 1940. The relief that was prayed for in this application was the realization of the decretal amount by attachment and sale of certain immovable properties belonging to the judgment-debtors 6 to 9. These are properties other than the tenure in arrears. The attachment was effected by 21st December 1940. On 16th January 1941 the judgment-debtors 6 to 9 filed their present objections objecting to the attachment and sale of the properties in view of the new S. 168A, Ben. Ten. Act. The learned Subordinate Judge by his order dated 15th January 1941 overruled these objections. The present appeal is by defendants 6 to 9 and is directed against this order.

Before the learned Subordinate Judge, the decree-holders contended: (1) That the new S. 168A, Ben. Ten. Act, was ultra vires of the Bengal Legislature; (2) That the section was not applicable to putni tenures; (3) That the provisions of cl. (a) of S. 168A (1) were not applicable as the putni tenure was no longer available for the realisation of the decretal dues (a) it having been sold away by the putnidars; (b) it having been annulled under S. 37 of the Revenue Sale Law by the purchaser of the tauzi at the revenue sale. The learned Subordinate Judge overruled the first two contentions of the decree-holders, but upheld the third one and on this ground overruled the objection of the judgment-debtors. Mr. Sen appearing in support of the appeal contends: that on a proper construction of the new S. 168A, Ben. Ten. Act, execution of the decree by the attachment and sale of the disputed properties is prohibited by cl. (a) of its sub-s. (1) and that the present case is not covered by the excepting proviso to this clause. According to Mr. Sen, S. 168A (1) (a), Ben. Ten. Act, apart from the "proviso", contains a prohibition for the execution by attachment and sale proceeding against any moveable or immovable property other than the tenure or holding in default; that the proviso to cl. (a) is an excepting one and is limited in the operation only to tenancies for a term of fixed periods; that in any case the exception in the proviso applies only when the tenancy itself is extinguished in any manner other than by surrender; that in the particular case the sale of the tauzi having been under S. 13 of the Revenue Sale Law, the tenure did not become liable to annulment, and, consequently, as it still subsists, the prohibition contained in cl. (a) of S. 168A shall apply.

Mr. Gupta appearing for the respondent on the other hand contends: (i) that S. 168A (1), Ben. Ten. Act, standing by itself and apart from the qualifying proviso, prohibits execution by attachment and sale of any moveable or immovable property other than the defaulting tenure or holding only when the defaulting tenure or holding is still available for the execution of the decree; (ii) that in any case the proviso withdraws the prohibition enacted in cl. (a) as soon as the judgment-debtor's interest in the tenancy ceases to exist; (iii) that in any case the entire tauzi having been sold under the Revenue Sale Law the purchaser thereof became entitled to annul the tenure under S. 37 of the Revenue Sale Law and as a matter of fact did annul the same; consequently the tenure itself has expired. Mr. Gupta further seeks to support the final order of the Court below on the grounds: (1) that the new S. 168A, Ben. Ten. Act, is void under S. 107 (1), Government of India Act, being repugnant to the provisions of the existing Indian law, namely (a) S. 51, Civil P. C., (b) Sections 2 and 3 of the Putni Regulation (2) that at any rate the section is controlled by S. 195 (e), Ben. Ten. Act, and consequently cannot affect the putni tenures.

In our opinion the learned Subordinate Judge fell into an error as to the effect of the revenue sale of the tauzi held in this case. We have examined all the relevant documents relating to this sale and in our opinion it was a sale of the shares of the tauzi under S. 13 of the Revenue Sale Law and consequently by it under S. 54 of the Revenue Sale Law the purchaser failed to acquire any rights which were not possessed by the previous owners of the tauzi. Such a purchaser did not acquire any right to annul the tenure. In our opinion there is also no substance in the contention raised by Mr. Gupta that the operation of the section is withdrawn from the putni tenures by reason of S. 195 (e), Ben. Ten. Act. The relevant portion of S. 195, Ben. Ten. Act, runs as follows: "Nothing in this Act shall affect

* * * * *

(e) any enactment relating to patni-tenures in so far as it relates to those tenures . . . "

Section 168A (1) makes its provisions applicable: "Notwithstanding anything contained elsewhere in this Act, or in any other law, or in any contract." Two questions will arise as to the relative operation of these two sections, namely, (1) whether there is anything in S. 168A which can be said to affect any enactment relating to putni tenures (say, the Putni Regulation of 1819); (2) if so, which of the two sections will be the controlling one.

In our opinion there is nothing in S. 168A which can be said to affect the Putni Regulation itself. No doubt it affects the putni-tenures. But as there is nothing in the Putni Regulation relating to the execution of any decree for arrears of rent due in respect of the putni and as S. 168A only gives certain special provisions relating to such execution, the provisions contained in the Putni Regulation are not affected by S. 168A, Ben. Ten. Act. In this view the second question on the point, namely whether or not S. 168A will be controlled by S. 195 (e) does not fall to be examined at all in this case. The substantial questions to be decided in this case therefore are: (1) the meaning and scope of the new S. 168A, Ben. Ten. Act, and (2) whether it is void to any extent under S. 107 (1), Government of India Act, 1935. As to the scope and meaning of cl. (a) of S. 168A, apart from the qualifying proviso we are inclined to the view contended for by Mr. Sen. The relevant portion of the clause runs as follows: "a decree for arrears of rent due in respect of a tenure or holding . . . . shall not be executed by the attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree . . . . relates." As the clause stands, execution by the attachment and sale of 'any . . . . property' other than the defaulting tenure is prohibited. No other property moveable or

immovable, other than the defaulting tenure, can be taken in execution by the attachment and sale. The language in this part of the section seems to bear no other meaning and in our opinion it is not open to us to strain this language so as to fit in with any supposed intention of the Legislature. It is true that the doctrine of judicial interpretation of a statute will be pushed to an unreasonable extreme if we follow the doctrine of the strictest literal interpretation—if we accept the maxim,'*Ita Scriptum est*,' in its unqualified and rigid meaning. No language is so perfect, and perhaps no legislation is so skilful that this mode of interpretation may not often lead to absurdities and thus defeat the true purpose of the Legislature. At the same time, we must also avoid the opposite extreme of disregarding the letter of the law in order to seek elsewhere a rule that may appear to us more consonant with the supposed justice or the supposed intention of the Legislature.

If the words of the law can be given an unnatural meaning, if words can be read into a statute which are not expressed therein, or disregarded as inoperative although they appear therein, if the Courts are at liberty to adopt as law that which the Legislature is supposed to have meant rather than that which it has actually said, there are few statutes which would be proof against the dissolving influences of this form of interpretation and the Courts instead of being bound by fixed rules of law made for them would in effect be at liberty to legislate for themselves and to substitute, under the guise of interpretation, the '*arbitrium judicis*' for the '*lex scripta*.' It is not the business of the Courts to be wiser than the laws and to mould them into conformity with their views of what is just or unjust. As the section stands, it cannot be made to mean "shall not be executed by the attachment and sale of any moveable or immovable property so long as the tenure or holding is still available for execution." It plainly and clearly prohibits execution by the attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree relates. Execution by the attachment and sale of any moveable or immovable property other than the tenure or holding is prohibited in an unqualified manner, and apart from the qualification enacted by the proviso, the prohibition applies, whether or not the tenure or holding is still in existence or is still available for execution. It is the proviso to the section which brings in the question of qualification of the wide provision of cl. (a). The proviso runs as follows :

"Provided that the provisions of this clause shall not apply if, in any manner other than by surrender of the tenure or holding, the term of the tenancy expires before an application is made for the execution of such a decree or certificate."

This is an excepting or qualifying proviso, and, is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it. The expressions used in this proviso are not quite happy and the meaning of the proviso can not be said to be plain. Mr. Sen contends that the word 'term,' which means 'the fixed period for which a right is to be enjoyed,' confines the operation of this proviso only to the cases where the tenancy in question was for a certain term of period and that period has expired. But then, in that case the words, 'in any manner other than by surrender, etc.' will have no meaning. Here is a case where the 'litera legis' is defective—the language used is ambiguous. The word 'term' means 'boundary' 'limit' especially of time; the word 'expire' means 'die out,' 'become extinct' 'come to an end.' If the word 'term' used in the expression 'the term of the tenancy' be taken to mean and refer to the limit of time in respect of the tenancy and thus to mean only "the fixed period for which the tenancy right is to be enjoyed," then the word 'expire' can only apply when that period is over. The 'term' in this sense cannot 'expire' in any other manner. It does not 'expire' by 'surrender.' Of course a tenancy including a tenancy for a term, may come to an end by surrender and in many other manners. If, therefore, we take the words 'the term of the tenancy' to mean the tenancy in the tenure or holding, then none of the words appearing in the proviso will have to be disregarded. This meaning will not render the word 'term' also a surplusage. Its use will be pertinent to mean and refer to the tenancy itself as distinguished from any particular tenant's interest in it. Evidently the word 'expire' taken along with the words 'in any manner other than by surrender' was intended to bear the meaning of 'extinguishment.' Even in the case of a tenancy for a certain fixed period, though the term does not expire by surrender, the tenancy may come to an end by such surrender. Such a tenancy also may come to an end in some other manner. In our opinion, therefore, reading the entire proviso together, the words 'the term of the tenancy expires' do not limit the operation of the proviso only to tenancies for a certain period. These words apply to all the tenures and holdings contemplated by cl. (a), but, in our opinion, mean and refer to the extinction of the tenancy itself and not merely of the judgment-debtors' interest in the same. Reading cl. (b) and sub-s. (3) of S. 168A it seems amply clear that the Legislature intended that the execution should proceed primarily against the defaulting tenure or holding, and in our opinion the proviso to cl. (a) was enacted to withdraw the prohibition contained in clause (a) only when this primary source of realisation of the decretal amount was no longer in existence. It may be remembered that so long as the tenancy is not extinct, it can ordinarily be made available for the realisation of its arrears by the landlord. In our opinion, therefore, (i) the proviso is not limited in its operation only to the cases where the defaulting tenancy is one for a fixed period, but extends to all classes of tenures or holdings; (ii) the words 'term of the tenancy expires' mean and refer to the extinction or cessation of the tenancy itself and not merely, of the interest of the judgment-debtor in the tenancy. In the facts of the present case the term of the tenancy in question has not expired within the meaning of the proviso and consequently the prohibition enacted in cl. (a) of S. 168A (1), Ben. Ten. Act, shall apply to this case unless it is void under S. 107 (1), Government of India Act, as contended for by Mr. Gupta. The relevant portion of S. 107 (1), Government of India Act, 1935, runs as follows :

"If any provision of a Provincial law is repugnant . . . . . to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section . . . . . the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy be void."

Sub-section (2) of the section lays down how, with the assent of the Governor-General or of His Majesty, such repugnant Provincial law shall prevail in the Province. Section 168A, Ben. Ten. Act, has been inserted in the Act by S. 5, Ben. Ten. (Amendment) Act, 1940 (Bengal Council Act 18 of 1940). This Act was enacted by the Provincial

Legislature of Bengal and no assent of the Governor-General or of His Majesty was received as contemplated by S. 107 (2), Government of India Act. 'Provincial law' is defined in S. 311, Government of India Act, 1935, to mean "an Act passed or law made by a Provincial Legislature established under this Act." 'Existing Indian law' is defined by the same section to mean

"any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

Section 168A, Ben. Ten. Act is a 'Provincial law' within the meaning of the above definition, Mr. Gupta contends: (1) that its provisions are repugnant (a) to the provisions contained in S. 51, Civil P. C., as also (b) to the provisions contained in Ss. 2 and 3 of the Putni Regulation; (2) that the provisions contained in S. 51, Civil P. C., as also those contained in Ss. 2 and 3 of the Putni Regulations are provisions of existing Indian laws: (3) (a) that the provision in S. 51, Civil P. C., is with respect to one of the matters enumerated in the Concurrent Legislative List, namely its items 4 and 15; (b) that the provisions in Ss. 2 and 3 of the Putni Regulation are also with respect to one of the matters enumerated in the Concurrent Legislative List, namely its item 10.

Consequently according to Mr. Gupta, as the assent contemplated by sub-s. (2) of S. 107, Government of India Act, has not been obtained, S. 168A, Ben. Ten. Act is altogether void under S. 107 (1), Government of India Act, 1935. Mr. Sen on the other hand contends that the provisions in S. 168A, Bengal Tenancy Act, S. 51, Civil P. C., so far as it is applicable to decrees for arrears of rent of land tenures, and Ss. 2 and 3 of the Putni Regulations are all with respect to land tenures and consequently with respect to item 21 of the matters enumerated in the Provincial Legislative List, and not with respect to any of the matters enumerated in the Concurrent Legislative List at all. According to Mr. Sen therefore S. 168A, Bengal Tenancy Act, is not at all hit by S. 107 (1), Government of India Act, 1935. His further contentions are (1) that S. 51, Civil P. C., itself being subject to the saving provisions contained in S. 4 (1), Civil P. C., the provisions in a special or Local law could not be repugnant to its provisions; and (2) that the existing Indian law for the present purposes was not S. 51, Civil P. C., but S. 51, Civil P. C., as adapted by S. 143 (1), Bengal Tenancy Act. The relevant portion of item 4 of the matters enumerated in the Concurrent Legislative List is given thus:

"Civil Procedure, including the Law of Limitation and all matters included in the Civil Procedure Code at the date of the passing of this Act . . . ."

The description of the matter in this item is very general and the entire Civil Procedure Code as it stood in 1935 would be with respect to this matter. Item 15 of the matters enumerated in the Concurrent Legislative List is given in the following terms:

"Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list."

Item 10 of that List is given thus:

"Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land."

The relevant portion of item 21 of the matters enumerated in the Provincial Legislative List is described as follows:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents, transfer, alienation, and devolution of agricultural land."

Item 2 of the matters enumerated in the Provincial Legislative List is given thus:

"Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; Procedure in Rent and Revenue Courts."

The power of legislation with respect to land, land-tenure, the relation of landlord and tenant and the collection of rents, would mean and include the power of legislation with respect to the rights, privileges, obligations and liabilities relating to them, any relief or remedy in respect of any such right, liability, etc., and the mode of realization of such relief or remedy, or the procedure for obtaining that relief. The words "with respect to" mean "on the subject of." We have to determine in each case what is the subject of the legislation, and not what things or operations it may indirectly affect. Of course the Legislature cannot enlarge the scope of its powers beyond the limits expressed in the constitution by reference to the words "with respect to." The true position seems to be when the Legislature is given power to legislate "with respect to" certain subjects, it may exercise all necessary and incidental powers, including the power of passing ancillary provisions which may not be strictly and directly referable to the actual heading under which the power is granted.

The whole question really turns upon the construction of S. 107 (1), Government of India Act, 1935, and of S. 4 (1), Civil P. C. It cannot be disputed that the Bengal Council Act 18 of 1940 which enacted the new S. 168A, Bengal Tenancy Act, is a Provincial law as defined by S. 311, Government of India Act, 1935. Section 168A, Bengal Tenancy Act, therefore, is "a provision of Provincial law" within the meaning of S. 107 (1), Government of India Act, 1935. It cannot also be disputed (1) that the Civil Procedure Code is "an existing Indian law" as defined by the same S. 311, Government of India Act, and (2) that this existing Indian law, (namely the Civil Procedure Code of 1908) is with respect to one of the matters enumerated in the Concurrent Legislative List, (viz., item 4 of the List).

The question, therefore, is whether the provision in S. 168A, Ben. Ten. Act, is repugnant, either wholly or in part, to any provision of the Civil Procedure Code. If not, then there is no difficulty and the provision in S. 168A, Ben. Ten. Act, shall stand as valid law. If repugnant, then the provision in S. 168A, Ben. Ten. Act, shall be void to the extent of the repugnancy. In arriving at the above conclusion we have taken the words "with respect to one of the matters enumerated in the Concurrent Legislative List" in S. 107 (1), Government of India Act, 1935, as qualifying "existing Indian law." The position will not, in the least, be different in the present case whether we take these words as qualifying (1) "any provision" in "any provision of an existing Indian law" or (2) "an existing Indian law." It cannot be disputed that the provisions in Ss. 51 and 60, Civil P. C., are also with respect to one of the matters enumerated in the Concurrent Legislative List, (namely Item 4 of List III.) Sulaiman J., in 45 C. W. N. F. C. 1[1] at p. 18 took the view that

1. ('41)28 A.I.R.1941F.C.47:192 I.C.225:45 C.W.N. F.C.1: I.L.R. (1941) Kar.F.C.25: 1940 F.C.R.188, Subrahmanyan Chettiar v. Muthuswami Goundan.

the words "with respect to one of the matters enumerated in the Concurrent Legislative List" qualify only the words "an existing Indian law" in S. 107 (1), Government of India Act, 1935. Remembering the definitions of 'Provincial law' and 'existing Indian law' as given in S. 311 of the Act, S. 107 (1) may be paraphrased in the line indicated by Sulaiman J. thus:

"If any provision of the law made by a Provincial Legislature established under this Act is repugnant . . . . . to any provision of the law . . . . . passed or made before the commencement of Part III of this Act by any Legislature . . . . . with respect to one of the matters enumerated in the Concurrent Legislative List, then . . . . . the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void."

The Code of Civil Procedure is an existing Indian law and the whole Code is with respect to Item 4 of the matters enumerated in the concurrent Legislative List (List III). Sections 51 and 60 are the relevant provisions of this law and these are also with respect to one of the matters enumerated in the Concurrent Legislative List, (namely Item 4 of List III). The Bengal Council Act 18 of 1940 is a Provincial law—is a law made by a Provincial Legislature established under the Government of India Act, 1935. Section 5 of this Provincial law inserts the new S. 168A in the Bengal Tenancy Act, 1885. This enactment in pith and substance is one with respect to 'land-tenure' and consequently with respect to Item 21 of the matters enumerated in the Provincial Legislative List. Assuming that this enactment is with respect to one of the matters enumerated in the Concurrent Legislative List it is nonetheless a provision in a Provincial law within the meaning of S. 107 (1), Government of India Act, 1935 and the question is whether this enactment is repugnant to any provision of the Code of Civil Procedure. As has been pointed out above the relevant provisions of the Code of Civil Procedure are its Ss. 51 and 60. Section 1 (3) of the Code extends its operation to the whole of British India, except the Scheduled Districts. Mr. Sen contends that the provisions contained in the new S. 168A, Ben. Ten. Act, cannot be repugnant to any provision of the Code of Civil Procedure because of the saving provision of its S. 4 (1). Section 4 (1) runs as follows:

"In the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed, by or under any other law for the time being in force."

The section makes a clear distinction between "special or local law now in force" and "any other law for the time being in force." As regards the special or local law now in force the saving provision is that "nothing in this Code shall be deemed to limit or otherwise affect" them. The Bengal Council Act 18 of 1940 does not come within this class. It was not in force when the Code of Civil Procedure was enacted. It comes within the class "any other law for the time being in force." For this class the savings provision is "nothing in this Code shall be deemed to limit or otherwise affect (1) any special jurisdiction or power conferred or (2) any special form of procedure prescribed, by or under" such law. The question, therefore, reduces to this: whether the new S. 168A Ben. Ten. Act (1) confers only a special jurisdiction or power or (2) prescribes only a special form of procedure. If so, nothing in the Civil Procedure Code shall be deemed to limit or otherwise affect such provisions and consequently the new provision cannot possibly be repugnant to any provision of the Code of Civil Procedure.

In our opinion, S. 51, Civil P. C., gives only the procedure in execution and enacts the powers of Court to enforce execution. That it does not purport to give anything else, becomes obvious from its cl. (b) read with S. 60, Civil P. C. Clause (b) says that the Court may order execution of the decree by attachment and sale or by sale without attachment of any property. But certainly this does not mean that the decree-holder has right to have his decree realised from any property of the judgment-debtor. What property is and what is not liable to attachment are given in S. 60, Civil P. C. Even that section simply says which properties are liable to attachment and which not and does not make it obligatory on the part of the Court to attach and sell them. Section 51, Civil P. C., gives the powers of the Court to enforce the decree in general and the new S. 168A only limits that power for the special cases contemplated by it. In our opinion therefore S. 4, Civil P. C., withdraws the operation of the relevant provisions of the Code from the field covered by the new provision of the Bengal Tenancy Act to the extent to which the latter covers that field, and thus saves the latter from being repugnant to the former. The one cannot thus be contrary to or inconsistent with the other. The provisions of the Civil Procedure Code thus avoid the clash and automatically make room for the new power or the new procedure.

As regards the other existing Indian law, namely, the Putni Regulation of 1819, its provisions do not fulfil the requirements of S. 107 (1), Government of India Act, at all. A putni tenure is certainly a land tenure and the regulation in 'pith and substance' is one with respect to such land-tenures. This is not one of the matters enumerated in the Concurrent Legislative List at all and consequently any repugnancy to its provisions is not made by S. 107 (1) a vitiating cause affecting the provision of a Provincial law. In our opinion therefore the provisions contained in S. 168A (1) are not rendered void to any extent by S. 107 (1), Government of India Act 1935. In the result, this appeal is allowed with costs. The judgment and order of the Court below are set aside and the objection of the judgment-debtors to the execution of the decree by the sale and attachment of the properties attached is allowed. The execution petition is dismissed. The hearing fee in this appeal is assessed at three gold mohurs.

G.N./R.K. ***Appeal allowed.***

C.P.C.—
(b) ('40) Chitaley, Preamble, N. 7 Pt. 9.
('41) Mulla, Page 2 Pt. (c).
(g) ('40) Chitaley, S. 4, N. 2 Pt. 1.
('41) Mulla, Page 18 Pt. (d).

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DERBYSHIRE C. J. AND BARTLEY J.

Rajshahi Banking and Trading Corporation, Ltd. — Petitioners

v.

Surendra Nath Mitra—Opposite Party.

Civil Revn. Petn. No. 3 of 1941, Decided on 29th January 1942.

Criminal P. C. (1898), Ss. 195 (1) (a) and 476 — Judge giving to peon warrant for attaching judgment-debtor's property — While executing warrant peon assaulted by judgment-debtor — Judge ought to protect peon and make complaint—Both Judge and peon are public servants within S. 21, Penal Code — S. 476 has no application.

Where while executing the warrant given to him by a Judge for attachment of certain property belonging to the judgment-debtor the peon is assaulted by the judgment-debtor it is the duty of the Judge to protect the peon when he was carrying out the order of the Court. Both the Judge and the peon are public servants within the meaning of S. 21, Penal Code, and the peon is subordinate to the Judge whilst he is carrying out the Judge's order. [P 435 C 2]

Unless peons are protected they cannot carry out their duties and the administration of justice may become a farce. The Judge in such a case ought to make a complaint in respect of the occurrence so that the matter can be examined by the proper criminal Court to see whether an offence under section 186, Penal Code, had been committed or not. Section 476 has nothing to do with such a case. [P 435 C 1,2]

Anil Chandra Roy Chaudhuri and Sailendra Nath Mitra — for Petitioners.

Tarakeswar Nath Mitra — for Opposite Party.

DERBYSHIRE C. J. — The Rajshahi Banking and Trading Corporation, Limited, who are the petitioners before us, obtained a decree against Surendra Nath Mitra, a pleader of 6, Kabir Road, Tollygunge, for money lent to him which had not been repaid in the Court of the Subordinate Judge of Rajshahi. The decree was transferred to Alipore where the judgment-debtor lived ; a money execution case was started in the Court of the Fourth Subordinate Judge at Alipore and a warrant of attachment of moveable property in Form No. P. 24 was issued and signed by the Subordinate Judge. It was directed to the bailiff of the Court and after stating the amount of the decree it directed the bailiff to attach the moveable property of the debtor "which shall be pointed out to you by the plaintiff sufficient to cover the amount of this warrant."

The secretary of the plaintiffs and two peons to whom the warrant of attachment had been handed by the Nazir of the Court went to the defendant's residence and, according to their story, explained the contents of the warrant to the defendant, and it is alleged that the defendant then got angry and assaulted the secretary and the two peons. Thereupon the bank moved the Subordinate Judge to take action in the matter against the defendant under S. 476/195, Criminal P. C., in respect of an offence alleged under S. 186, Penal Code. The learned Judge refused to do so. He, I think, rightly said that S. 476, Criminal P. C., had nothing to do with the matter. As regards S. 195 (1) (a), Criminal P. C., he said that the process server was at liberty to go and complain himself, but that he, the Judge, was not in charge of the Nezarat and it was doubtful whether the process server was a public servant within the meaning of S. 195 (1) (a), Criminal P. C., and he declined to make a complaint. Then it was suggested to him that he should direct the peon to make a complaint. By this time the debtor had taken steps under the Bengal Agricultural Debtors Act in respect of his debts and the Subordinate Judge had stayed the proceedings in the execution case. The learned Judge said :

"This proceeding has arisen in connection with the execution of the decree for the debt. Moreover the Board may decide that the debt does not exist. In these circumstances it will not be proper to prosecute the judgment-debtor for resisting execution of a decree for a non-existent debt. Under the above circumstances I refrain from directing the process server to lodge a complaint in the Criminal Court."

At the time, that is 22nd December 1940, the peon, as it is alleged, was assaulted, there was no question of any proceedings under the Bengal Agricultural Debtors Act. The position then was that the peon had been given a warrant, that is to say, an order from the same Subordinate Judge, to do certain things and he went presumably to do what the Judge order him to do. It was the Judge's duty to protect that peon when he was carrying out the order of the Court. Both the Subordinate Judge and the peon are public servants within the meaning of S. 21, Penal Code, and on the face of the application it would appear that there was a matter to be enquired into as to whether the defendant had committed an offence within the meaning of S. 186, Penal Code. Clearly, the peon was subordinate to the Subordinate Judge whilst he was carrying out the Judge's order. In my view, the Judge made excuses for not taking steps to protect the peon. Unless peons are protected they cannot carry out their duties and the administration of justice may become a farce. In my opinion on the facts before us the Subordinate Judge ought to have made a complaint in respect of the occurrence so that the matter could have been examined by the proper criminal Court to see whether an offence under S. 186, Penal Code, had been committed or not. The rule is accordingly made absolute, the order of the Court below is set aside, and the matter is remanded to the Court from which it came for the learned Judge to rehear the petitioners' complaint and in the light of the remarks I have made to deal with the matter according to law.

BARTLEY J. — I agree.

G.N./R.K. *Rule made absolute.*

Cr. P. C. —
('41) Chitaley, S. 195, N. 4, Pts. 1 and 14, and N. 5.
('41) Mitra, Page 636, Note 615 and Page 638 N. 615A Sub-heading "Resistance to civil Court peons."
Penal Code —
('36) Ratanlal, Page 50, Pts. 3 and 4.
('36) Gour, Page 153, N. 148 and Pt. 5.

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DERBYSHIRE C. J. AND BARTLEY J.

Makhan Lal Hazra — Petitioner

v.

Sashi Bhusan Hazra and another — Opposite Party.

Criminal Revn. Petn. No. 961 of 1941, Decided on 20th January 1942.

(a) Penal Code (1860), S. 324 — Accused's brother interfering with ploughing of land by labourers who claimed to have taken settlement of same from accused — Accused deliberately sending for his gun and firing at his brother who was struck by several pellets—Accused prosecuted under S. 324 — Findings which Magistrate ought to have come to, stated.

After the accused's brother had interfered with the ploughing of certain land by labourers who claimed to have taken settlement of the same from the accused, the accused deliberately sent for his gun and fired it at his brother who was struck by several pellets. The accused was prosecuted under S. 324 :

Held that the Magistrate ought to have come to a decision as to who were actually entitled to plough up the land on which the occurrence took place and if there was a right of private defence whether the accused had not exceeded that right. [P 436 C 2]

(b) Penal Code (1860), S. 96—Right of private defence — Onus.

When a right of private defence is set up the onus is on the party setting up that defence to prove it. [P 436 C 2]

Sudhansu Sekhar Mukherjee — for Petitioner.

Prokash Chandra Pakrashi — for Accused.

Hamidul Huq — for the Crown.

BARTLEY J. — This rule was issued upon the District Magistrate of the 24-Parganas and upon the opposite parties to show cause why an order of acquittal made by the learned Magistrate of Diamond Harbour should not be set aside. The facts of the case are briefly as follows : A certain plot of land was being ploughed by a number of labourers who claimed that they had taken settlement of it from the accused Sashi Bhusan Hazra who is a brother of the complainant Makhan Lal Hazra. Makhan attempted to put a stop to this and actually unyoked the ploughs or caused them to be unyoked. Thereupon his brother Sashi sent for his gun which was brought by accused 2, Rajani Kanta Haldar, loaded it and fired a shot with the result that Makhan was struck by several pellets and one or two other people who were with him also sustained injuries from gun shot wounds. On this case Sashi and Rajani were sent up on charges framed under Ss. 324 and 324/109, Penal Code. The learned Magistrate acquitted both of them and against that acquittal the present rule has been issued.

The findings of the learned Magistrate in the Court below upon which he based his order of acquittal are unfortunately vague in the extreme. He holds in the first place that the prosecution case of undisturbed possession of the land in dispute has not been proved beyond doubt. What he appears to have thought is that actually the disputed land was in possession of tenants to whom it had been let out by the accused Sashi Bhusan Hazra, and it was on this assumption that the case has been argued before us. The only other findings of fact at which the learned Magistrate arrives are that he cannot believe the prosecution case that the persons injured went as independent sightseers and that the accused man Rajani had injuries on his person which might have been caused by a lathi, and that, therefore, the defence suggestion that he received these injuries at the time of the alleged occurrence is quite probable. It may be noted that the accused themselves did not set up any specific case of a right of private defence of property, nor did they adduce any evidence in support of such a case. The only other finding arrived at by the learned Magistrate is that from the nature of the injuries inflicted on the opposite party it cannot be said that the accused intended anything more than causing hurt to Makhan Lal Hazra and that the shot appears to have been fired from a considerable distance away.

In our opinion these findings are not by any means sufficient to justify the order of acquittal made by the learned Magistrate. The admitted facts in the case are that the accused Sashi deliberately sent for his gun and then fired at his brother Makhan after Makhan had interfered with the ploughing of the land. It may well be that there was a right of private defence of property, but the learned Magistrate has come to no definite decision as to who were actually entitled to plough up the land on which the occurrence took place, nor has he come to any decision that in the circumstances of the particular case; if there was a right of private defence of property the accused persons had not exceeded that right. The learned Magistrate appears to have overlooked the position that when a right of private defence is set up the onus is on the party setting up that defence to prove it, while his judgment makes it perfectly clear that there is nothing in the present case except suggestions unsupported by evidence to make out the existence of any such right. It may very well be that after a trial properly conducted and in which the evidence is directed to the material issues a finding that there was a right of private defence which was not exceeded may be justified. But on the materials before us at present, we are unable to take any such view and are constrained to hold that the order of acquittal passed by the Court below is improper. This rule must accordingly be made absolute. The order complained of must be set aside and the case remanded for retrial on the lines indicated above by some other Magistrate. Let the counter affidavit filed in Court to-day be kept on the record.

DERBYSHIRE C. J. — I agree.

G.N./R.K. *Rule made absolute.*

Penal Code —

(a) ('36) Ratanlal, Page 207, N. 2 and Pages 208 and 209, Note "Defence of property."
('36) Gour, Page 364, N. 855.

(b) ('36) Ratanlal, Page 205 Pt. 1.
('36) Gour, Pages 360 and 361, N. 845.

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EDGLEY AND MOHAMAD AKRAM JJ.

Faizaddi Taluqdar — Defendant — Appellant

v.

Rezia Begum w/o Chowdhury Shamsuddin Ahmmed alias Badsha Mia, Plaintiff and others — Respondents.

Appeal No. 1157 of 1939, Decided on 10th March 1942, from appellate decree of Dist. Judge, Faridpur, D/- 24th March 1939.

* Civil P. C. (1908), S. 50 and O. 21, R. 22 — Death of judgment-debtor pending execution — No application under S. 50 and heirs not brought on record — Sale held in such execution is void and not merely voidable—Fact that decree executed is rent decree makes no difference.

Though the death of a judgment-debtor will not cause a pending execution proceeding to abate, at the same time, it is clear from S. 50 that, if the holder of an unsatisfied decree wishes to continue the execution proceedings or wishes to execute the decree against the legal representatives of a deceased judgment-debtor, he must make an application to this effect to the Court. Further, the language of O. 21, R. 22 of the Code implies that, when an application is made under S. 50 of the Code, the legal representative of the deceased person must be

called upon to show cause why the decree should not be executed against him. The mere fact that, in connexion with a rent decree, execution proceedings are taken against the holding of the deceased person makes no difference. The holding represents a portion of the estate of the deceased judgment-debtor and the latter's heirs are therefore entitled to be brought on the record of the case and to receive the notice which the law requires in order that they may be given an opportunity either to satisfy the outstanding decree or to show cause why execution should not proceed. [P 437 C 2]

Therefore a sale held in execution of a rent decree without an application under S. 50 and without bringing the heirs of the deceased judgment-debtor on record is void and not merely voidable: 115 I.C. 520 (Cal.), *Dissent.*; ('36) 23 A.I.R. 1936 Mad. 205 (F.B.) and ('14) 1 A.I.R. 1914 P.C. 129, *Rel. on.* [P 438 C 1]

Syed Nausher Ali and Khondkar Mahammad Hasan — for Appellant.

Gopendra Nath Das — for Respondents.

EDGLEY J. — This matter was referred to a Division Bench by Biswas J. on account of the fact that there appears to be a conflict of judicial opinion with regard to the main point which requires our decision. One of the defendants is the appellant in this case and the appeal is directed against the decision of the learned District Judge of Faridpur, dated 24th March 1939. It appears that in Suit No. 521 of 1928 the Maharaja of Cossimbazar obtained a rent decree against Jainuddin Talukdar, the predecessor-in-interest of the appellant. In the rent suit the Maharaja had also impleaded the other cosharer landlords. Subsequently, the rent decree was assigned to the father of the plaintiff who, on 19th September 1931, initiated execution proceedings with reference thereto after serving the judgment-debtor with the notice required under O. 21, R. 16, Civil P. C. On 13th October 1931 Jainuddin Talukdar died. The fact of his death apparently was not brought to the notice of the decree-holder with the result that Jainuddin Talukdar's legal representatives were not brought on the record in connexion with the subsequent proceedings in execution. The sale proclamation is said to have been published on 18th January 1932 and the execution sale was held on 24th February 1932. Symbolical possession was taken by the plaintiff's father on 6th April 1935, but subsequently he made a gift of the holding to the plaintiff who was resisted by the heirs of Jainuddin Talukdar when she attempted to take actual possession of the property. She therefore instituted the suit out of which this appeal arises for a declaration of her title and for recovery of khas possession of the property which she claimed by virtue of the sale which took place on 24th February 1932.

The case for the defendants was to the effect that the execution sale was a nullity having regard to the fact that the heirs of Jainuddin Talukdar had not been brought on the record of the execution proceedings after his death. Both the Courts below decided, that on the authority of the case in 32 C. W. N. 418,[1] the sale, dated 24th February 1932, was merely voidable at the instance of the defendants in appropriate proceedings under S. 174, Ben. Ten. Act, and as such proceedings had not been taken, the plaintiff was entitled to the decree which she sought. The only point which has been urged in connexion with this appeal is that the Courts below were wrong in holding that the sale, dated 24th February 1932, was voidable, but that it should have been held that this sale was wholly void on account of the failure of the decree-holder to bring the heirs of Jainuddin Talukdar on the record after the latter's death on 13th October 1931. Mr. Nausher Ali on behalf of the appellant contends that it was incumbent upon the decree-holder, if she wished to proceed with the execution of the decree against the legal representatives of Jainuddin Talukdar, to substitute them on the record under the provisions of S. 50, Civil P. C. He also contends that in this particular case there had been failure to comply with the provisions of O. 21, R. 22 of the Code. Mr. Das, on the other hand, contends that in a case in which it is sought to execute a rent decree it is not necessary to substitute the legal representatives of a deceased judgment-debtor. He argues that S. 50, Civil P. C., is merely permissive and, in any event, the view that an execution sale such as the one with which we are now dealing in merely voidable is supported by the authority of Sir George Rankin's judgment in 32 C. W. N. 418.[1]

During the course of his argument, Mr. Das referred to the provisions of O. 22, Rr. 4 and 12, Civil P. C. It is of course true that the death of a judgment-debtor will not cause a pending execution proceeding to abate, but at the same time, it is clear from S. 50 of the Code, that if the holder of an unsatisfied decree wishes to continue the execution proceedings or wishes to execute the decree against the legal representatives of a deceased judgment-debtor, he must make an application to this effect to the Court. Further, the language of O. 21, R. 22 of the Code implies that, when an application is made under S. 50 of the Code, the legal representative of the deceased person must be called upon to show cause why the decree should not be executed against him. The mere fact that, in connexion with a rent decree, execution proceedings are taken against the holding of the deceased person makes no difference. The holding represents a portion of the estate of the deceased judgment-debtor and the latter's heirs are, therefore, entitled to be brought on the record of the case and to receive the notice which the law requires in order that they may be given an opportunity either to satisfy the outstanding decree or to show cause why execution should not proceed.

In support of his argument to the effect that the execution sale, dated 24th February 1932, was merely voidable Mr. Das mainly relies upon the decision of this Court in 32 C. W. N. 418[1] cited above. The judgment of Sir George Rankin in that case is dated 15th August 1927. The learned Chief Justice held that, although it is proper to bring the heirs of a deceased judgment-debtor on the record, failure to do so should be regarded merely as an irregularity. His Lordship referred to several cases during the course of his judgment, but apparently his attention was not directed to a decision of the Privy Council in 42 Cal. 72.[2] In that case it was held that where there had been a devolution of property by reason of insolvency the Official Assignee as the legal representative of the insolvent was entitled to receive a notice under S. 248, Civil P. C. (which corresponds to O. 21, R. 22 (1) of the present Code), and that failure to serve such a notice rendered inoperative any sale in execution of a decree against the original judgment-debtors. Their Lordships observed that :

1. ('28) 115 I. C. 520 : 32 C. W. N. 418, Tarangini Debi v. Raj Krishna Mandal.

2. ('14) 1 A.I.R. 1914 P. C. 129 : 24 I. C. 304 : 42 Cal. 72 : 41 I. A. 251 (P. C.), Raghunath Das v. Sundar Das Khetri.

"As laid down in 20 Cal. 370,[3] a notice under S. 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor."

Recently, this question has been fully discussed by a Full Bench of the Madras High Court in 59 Mad. 461.[4] The learned Judges appear to have been unanimous in holding that an execution sale was void and not merely voidable in a case in which no application had been made under S. 50, Civil P. C., to execute a decree against the legal representatives of the deceased judgment-debtor and where no notice had been served on such legal representatives in accordance with O. 21, R. 22 (1) of the Code. After discussing the effect of the judgment of the Privy Council in 42 Cal. 72,[2] Cornish J. pointed out at page 473 that :

"On this authority, I think, there can be no doubt that, where there has been no application under S. 50, and consequently no issue of notice under O. 21, R. 22 (1), the foundations of the Court's jurisdiction to execute a decree against the legal representative are entirely wanting. And a sale held without this jurisdiction would be void."

We entirely agree with the view which has been adopted with regard to this matter by the Madras High Court in 59 Mad. 461[4] and we think that it is not unlikely that the decision in 32 C.W.N. 418[1] might have been different had the attention of the learned Judges been directed to the judgment of the Judicial Committee in 42 Cal. 72[2] cited above. It follows, therefore, that this appeal must be allowed with costs throughout. The plaintiff's prayer for khas possession is refused and her suit is dismissed without prejudice to any right which the plaintiff may hereafter claim as landlord of the disputed holding.

MOHAMAD AKRAM J. — I agree.

K.S./R.K. *Appeal allowed.*

3. ('93) 20 Cal. 370, Gopal Chunder v. Gunamoni Dasi.

4. ('36) 23 A.I.R. 1936 Mad. 205 : 162 I. C. 156 : 59 Mad. 461 : 70 M.L.J. 162 (F.B.), Kanchamalai Pathar v. Ry. Shahaji Rajah Sahib.

C. P. C. —

('40) Chitaley, S. 50, N. 13 Pt. 1 and N. 16 Pt. 1; O. 21 R. 22, N. 2 Pt. 3, N. 5 Pt. 8.

('41) Mulla, Page 214 see Pts. (y) and (e), Page 266 Pt. (m), Page 784 Pt. (i), Page 786 Pt. (d).

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B. K. MUKHERJEA AND BLANK JJ.

Kishorilal Marwari — Plaintiff — Appellant

v.

Adhar Chandra Banerjee and others — Respondents.

Appeal No. 343 of 1939, Decided on 4th February 1942, from appellate decree of Dist. Judge, Burdwan, D/- 31st October 1938.

Evidence Act (1872), Ss. 157, 35 and 32 (5)— Certificate of guardianship is not admissible to prove minor's age in subsequent proceedings— S. 32 (5) can be of no avail when guardian whose statement as to age is contained in certificate is living—Guardian examined as witness in subsequent suit to prove minor's age—Application for guardianship filed by him containing statement as to minor's age can be used to corroborate his oral testimony under S. 157.

A certificate of guardianship is neither a book nor a register nor a record kept by an officer in the discharge of his duties and hence it is not admisible under S. 35 to prove the minor's age in subsequent proceedings. S. 32 (5) can also be of no avail to the minor when the guardian whose statement as to the minor's age is contained in the certificate is living at the time of the subsequent proceedings.

Where the guardian is examined as a witness in the subsequent proceedings and the statement as to the minor's age in the application by him for appointment as guardian of the minor was made before a competent authority and long before the subsequent dispute arose and there is no suggestion that it was a fictitious statement designedly made to support subsequent evidence, the application for guardianship containing the guardian's statement as to the minor's age can be used as corroborative evidence in support of the guardian's oral testimony under S. 157 : ('24) 11 A.I.R. 1924 Cal. 526; ('24) 11 A.I.R. 1924 Cal. 420 and ('28) 15 A.I.R. 1928 P. C. 152, *Expl.* [P 439 C 1,2]

Gunada Charan Sen, Hiralal Chakravarty and Rabindra Nath Bhattacharjee—for Appellant.

Dr. S. C. Basak, Gopendra Nath Das, Jagadish Chandra Ghose, Himaja Sankar Majumdar, Arunendra Nath Tagore and Satyendra Nath Mitra (for Deputy Registrar) —

for Respondents.

B. K. MUKHERJEA J.—The facts giving rise to this appeal may be shortly stated as follows : The property in dispute is a colliery known as the Ninga Colliery and it belonged originally to one Ganpat Marwari. Ganpat had four sons, namely, Shewkaran, Baijnath, Ramkumar and Thakursidas, and the father together with the four sons constituted a joint Hindu family governed by the Mitakshara law. Of these four sons Baijnath passed out of the family by adoption. Shewkaran also separated from the joint family sometime before the death of Ganpat on taking a sum of Rs. 25,000 as the value of his share in the joint property. Thakursidas died in the lifetime of Ganpat leaving behind him a widow and a son named Ramjiban. After Thakursidas, Ganpat died and the latter was followed soon after by Ramkumar. At the time of Ramkumar's death which happened in 1919 the only male members of this joint family were Jagamohan and Kishori, the sons of Ramkumar and Ramjiban, the son of Thakursidas. Kishori is the plaintiff in the present suit. On 30th March 1920, Ramkumar's widow, Bhagabani Bai, applied to the District Judge of Burdwan, for appointment of a guardian in respect of the person and property of her two minor sons, Jagamohan and Kishori. The order appointing her as guardian was made on 20th April 1920 and both in the application for guardianship as well as in the certificate the date of birth of Kishori was stated to be 17th May 1917. If this date was correctly given Kishori would attain majority on 17th May 1938.

In 1935 defendants 1 to 57 who are the superior landlords of the Ninga Colliery instituted a suit for recovery of rent due in respect of the same. The two sons of Shewkaran as well as Jagamohan and Kishori were made parties defendants to that suit. The suit culminated in an ex parte decree on 22nd August 1935. The decree was put into execution and the colliery was sold and purchased by defendant 58. Kishori, through his certificated guardian, at-

tempted to have the ex parte decree set aside, but this application was dismissed for default. His attempt at revival of this proceeding was also dismissed and then the present suit was instituted on 4th February 1937. Kishori in this suit, prays for a declaration that the ex parte rent decree as well as the sale held thereunder were not binding on him inasmuch as he was a minor both at the date of the institution of the suit as well as at the time when the decree was obtained and far from being represented by a competent guardian he was wrongly described as a major in the suit. He further prays for a declaration that on subsequent partition between him on the one hand and Jagamohan and Ramjiban on the other, he acquired a sixteen annas title to the colliery. The suit was contested by defendants 1 to 58. The other defendants who are the brother and the agnatic cousins of the plaintiff supported the plaintiff's case. The trial Court held on evidence that the plaintiff was a minor when the decree was made and consequently the decree and the sale held in pursuance of that, were not binding on him. It however rejected the story of partition set out by the plaintiff and held that Kishori was entitled to the colliery jointly with Ramjiban and Jagamohan.

Against this decision there was an appeal taken to the Court of the District Judge of Burdwan by the auction purchaser. Kishori also filed an appeal attacking that part of the judgment which negatived his claim to the sixteen annas share of the colliery. Both the two appeals were heard together by the learned District Judge and by his judgment dated 31st October 1938, he allowed the appeal of the auction purchaser being of the opinion that Kishori was not a minor at the date when the decree was obtained. The other appeal was allowed in part on a finding that Ramjiban had no interest in the colliery although the property was still joint as between the plaintiff and Jagamohan. It is against this decision that the present second appeal has been preferred. Mr. Sen who appears in support of the appeal has argued before us that in arriving at a finding regarding the age of the plaintiff the learned District Judge was in error in law in refusing to consider certain material pieces of evidence which consisted of the application for guardianship made by the mother and the order of the District Judge passed thereon, both of which contained a recital regarding the age of the plaintiff. He contended that had the District Judge taken this evidence into consideration his decision would have been different.

The District Judge in support of the view which he took that these documents were not admissible in evidence relied upon two decisions of this Court, namely, 38 C. L. J. 186[1] and 38 C. L. J. 213.[2] The question has undoubtedly to be determined with reference to the provisions of the Evidence Act. It is conceded by Mr. Sen that the certificate of guardianship was neither a book nor a register nor a record kept by an officer in the discharge of his duties and, consequently, it could not be admissible under S. 35, Evidence Act. Section 32 (5), Evidence Act, is also of no assistance to the present appellant inasmuch as the mother of the plaintiff whose statement as regards the age of the latter is contained in this document was living at the time. The mother however was examined as a witness in this case and the statement in the application for appointment of a guardian was made by her before a competent authority and long before the present dispute arose. There is no suggestion that it was a fictitious statement designedly made to support subsequent evidence. We think that in these circumstances the application for guardianship can be used as a corroborative evidence in support of her oral testimony under S. 157, Evidence Act. In 38 C.L.J. 186[1] what was adduced as evidence was the certificate of guardianship itself and not the petition and neither in this nor in the other case was the person who made the statement examined as a witness. In 38 C. L. J. 213,[2] Asutosh Mookerjee J., in course of his judgment observed as follows :

"These decisions support the view that the recital of the date of birth in a guardianship application is not by itself admissible in evidence upon mere production of the document, but may be rendered admissible in contingencies which need not be exhaustively specified for our present purpose."

In that case it was held that the evidence could be adduced for the purpose of contradicting a statement made by the witness under S. 155, Evidence Act. In our opinion, the circumstance referred to in S. 157, Evidence Act, is also a contingency upon which such statements could be used as evidence by way of corroboration of the testimony given by a witness. Our attention has been drawn by Mr. Sen to a pronouncement of the Judicial Committee in 32 C. W. N. 874.[3] In that case a mortgage suit was resisted by the defendants on the ground that they were minors at the date when the mortgage document was executed. To prove this fact reliance was placed upon the application for appointment of a guardian made by the father of the defendants as well as the certificate of guardianship granted by the Judge. On the strength of these documents it was held by their Lordships of the Judicial Committee that the defendants had discharged the burden which lay upon them of showing that they were really minors at the date when the document was executed. It is not clear from the report as to whether the father who applied for guardianship was alive or dead at the time when the suit was brought and we also do not know whether he was examined as a witness in the case. The only thing that appears from the judgment is that these papers were used as evidence without any objection by either side. We cannot certainly rely upon this decision as an authority for the proposition that the application in the guardianship proceeding or an order passed on the same is admissible under all circumstances to prove the age of the minor and, in our opinion, the decisions in 38 C. L. J. 186[1] and 38 C. L. J. 213[2] are quite correct. As we have held, the only section under which such evidence could be adduced is S. 157, Evidence Act. The District Judge also, it seems, was inclined to hold the same view. The learned District Judge observed in his judgment as follows :

"She could of course have proved the petition and it could have corroborated her evidence. But not only did she not prove the petition but she admitted on p. 38 of her evidence that she did not know the contents of the application for guardianship."

1. ('24) 11 A.I.R. 1924 Cal. 526 : 71 I. C. 336 : 38 C. L. J. 186, Hara Kumar Dey v. Jogendra Krishna Ray.

2. ('24) 11 A.I.R. 1924 Cal. 420 : 81 I. C. 680 : 38 C. L. J. 213, Prohlad Chandra Chowdhury v. Ramsaran Chowdhury.

3. ('28) 15 A. I. R. 1928 P. C. 152 : 109 I. C. 387 : 32 C. W. N. 874 (P. C.), Sadiq Ali Khan v. Jai Kishori.

a It appears that this document was proved at the instance of the defendants. It was not necessary therefore for the lady herself to prove it further. We do not know whether any formal proof was adduced when this document was made an exhibit. It appears that the original of this guardianship proceeding was sent for and after it was compared with the certified copy filed by the defendants it was made an exhibit presumably without any objection from either side. There is of course the statement of the lady herself that she did not know the contents of this application, and unless the plaintiff is in a position to show that it was really the statement of his mother it could not be relied on as a corroboration of her present testimony. It may be that as the document was made an exhibit at the instance of the other side the plaintiff did not think it necessary to adduce any further evidence on this b point. In our opinion, the matter requires further investigation.

We think, therefore, that the proper way of disposing of this case would be to set aside the judgment of the lower appellate Court and to send the case back in order that the appeal may be reheard. The plaintiff will be given an opportunity to prove that the statement contained in Ex. F was really the statement of his mother and the defendant will be at liberty to adduce any evidence in rebuttal thereof. We express no opinion as to the value to be attached to the recital of the date of birth in the guardianship application. It will be for the last Court of facts to consider this matter along with other evidence on the record and to come to a conclusion as to whether in fact the plaintiff was or was not a minor at the material date. The case will c be disposed of on a consideration of the entire evidence that has been already adduced or may be adduced after the case goes back on remand. The finding of the lower appellate Court regarding the shares of the plaintiff in the property in suit will stand intact. The lower appellate Court will also consider the point which was raised by the defendants in the trial Court, namely whether, even if the plaintiff was a minor, he was sufficiently represented by the other defendants in the suit and, consequently, the decree was binding on him. No additional evidence however will be allowed to be adduced on this point. The result is that this appeal is allowed and the case is sent back to the lower appellate Court to be heard and disposed of in accordance with the directions given above. We make no order as to costs in this appeal. Further costs will abide the result.

d BLANK J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 440

LODGE AND ROXBURGH JJ.

Indu Bhusan Pal—Accused Petitioner

v.

Emperor.

Criminal Revn. Petn. No. 944 of 1941, Decided on 20th February 1942.

(a) Penal Code (1860), S. 411—Stolen articles found in room — Prosecution alleging *A* and *B* to be in joint possession of room—Finding that *B* was not joint occupant must be based on positive evidence that he was not in joint possession — It cannot be based on inadequacy of prosecution evidence.

Where the prosecution case is that *A* and *B* were e in joint possession of a room in which stolen articles were found, a finding that *B* was not the joint occupant of the room must be based on positive evidence that *B* was not in possession. It cannot be based on the inadequacy of the prosecution evidence.

[P 441 C 1]

(b) Penal Code (1860), S. 411—Stolen articles found in room—Accused sole occupant of room —He cannot be taken to be aware of all articles found in room — Points to be considered by Judge stated — Accused's failure to prove that he had guests previous to search is not sufficient to preclude possibility of other persons introducing stolen goods in room.

In a prosecution under S. 411 even if it be found that the accused was the sole occupant of the room in which the stolen articles were found it does not f necessarily follow that he must have been aware of the presence in the room of all the articles that were found therein. It is incumbent upon the Judge to consider the circumstances of the occupation of the room and to consider whether it was reasonably possible for other persons to introduce the articles into the room without the accused's knowledge. The mere fact that the accused failed to prove that he had guests in his house in the night previous to the search is not in itself sufficient to prove that the circumstances of his possession of the house were such as to preclude the reasonable possibility of other persons introducting the stolen goods into the house.

[P 441 C 1]

D. N. Bhattacharya and Surati M. Sanyal— for Petitioner.

Nirmal Chandra Chakravarti — for the Crown.

g ORDER.—This rule was issued unpon the District Magistrate of Hughly to show cause why the conviction of and sentence passed upon one Indu Bhusan Pal should not be set aside. Indu Bhusan Pal and one Krishna Arya were jointly tried under S. 411, Penal Code, on the charge that they at or about 14th February 1941 at Queen Street, Serampore, dishonestly received and retained a wrist-watch, a gold champa and four silver buttons knowing or having reason to believe the same to be stolen properties. The learned Magistrate found the case against Krishna Arya had not been proved. He accordingly acquitted that accused. He found the case against Indu Bhusan Pal had been satisfactorily proved. He convicted Indu Bhusan Pal under S. 411, Penal Code, and sentenced him to undergo rigorous imprisonment for four months. An appeal to the Sessions Judge of Hughly was dismissed. It h has been urged before us that on the facts found by the learned Sessions Judge the guilt of the petitioner Indu Bhusan Pal was not proved beyond reasonable doubt.

The case for the prosecution was that on 10th February 1941 a burglary was committed in the house of one Panchanan Chatterji. On the morning of 14th February 1941 the police went to the room occupied by Indu Bhusan Pal to search the same. The room was found closed from inside. Indu Bhusan Pal was then the sole occupant. He opened the room for the police to enter. The police on search of the room found the stolen articles mentioned in the charge, behind a picture. Indu Bhusan Pal was taken away under arrest. On the same afternoon the police again visited this room and conducted a further search. The second accused Krishna Arya was present during that search and laid claim to a trunk which was found in the room. The learned Sessions Judge considered whether the

evidence on record was sufficient to prove that the petitioner Indu Bhusan Pal was in possession of the property which was found behind the picture. The learned Judge found that Indu Bhusan Pal was in fact the sole occupant of this room. Having found that Indu Bhusan was the sole occupant he considered certain defence evidence which was offered to prove that Indu Bhusan had guests in his house in the previous night. The learned Judge came to the conclusion that the evidence that there were guests in the house in the previous night was untrue. He then proceeded to hold that Indu Bhusan was the real occupant of the room and there was no evidence that guests had been in his house in the previous night, and consequently that Indu Bhusan might be considered to have been in possession of the articles in the room.

The learned Sessions Judge seems to have overlooked the fact that it was the prosecution case that Indu Bhusan Pal and Krishna Arya were in joint possession of the room and that the finding that Krishna Arya was not the joint occupant of the room was based on the inadequacy of the prosecution evidence. It was not based really on positive evidence that Krishna Arya was not in possession. Moreover, even if it be found that Indu Bhusan Pal was the sole occupant of the room it does not necessarily follow that he must have been aware of the presence in the room of all the articles that were found therein. It was incumbent upon the learned Judge to consider the circumstances of the occupation of the room and to consider whether it was reasonably possible for other persons to introduce the articles into the room without Indu Bhusan's knowledge. The mere fact that Indu Bhusan failed to prove that he had guests in his house in the previous night is not in itself sufficient to prove that the circumstances of his possession of the house were such as to preclude the reasonable possibility of other persons introducing the stolen goods into the house. In our opinion, the actual findings of fact of the learned Sessions Judge do not justify the inference that Indu Bhusan Pal was necessarily in possession of the stolen goods. The very nature of the charge framed against Indu Bhusan Pal and Krishna Arya is in itself sufficient, to raise a grave suspicion as to Indu Bhusan's sole possession of the articles. The result therefore is that this rule is made absolute. The conviction and the sentence passed upon Indu Bhusan Pal are set aside. He is acquitted and discharged from his bail.

G.N./R.K. *Rule made absolute.*

Penal Code —
(a) ('36) Gour, Page 1399, Notes 4910 & 4911.
('36) Ratanlal, Page 1010 Note "Joint possession."
(b) ('36) Gour, Page 1399, N. 4912 and Page 1409 Note 4943.
('36) Ratanlal, Page 1013 Note "Evidence."

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B. K. MUKHERJEA AND BLANK JJ.

Ramkumar De s/o Anantalal De — Borrower — Petitioner

v.

Abhayapada Bhattacharji s/o Bhairab Chandra Bhattacharji — Lender — Opposite Party.

Civil Rule No. 1337 of 1941, Decided on 10th March 1942, issued in matter of application for setting aside order of Sub-Judge, Bankura, D/- 30th June 1941.

(a) Bengal Money-lenders Act (10 of 1940), Ss. 36, 2 (22) — Merely because decree is not satisfied, suit or execution cannot be said to be pending — Decretal amount partly satisfied by sale of mortgaged property — Personal decree obtained and in execution thereof other properties sold and taken possession of by decree-holder in March 1938—No further steps taken by decree-holder—Application by judgment-debtor in 1941 under S. 36 held not maintainable even though personal decree was not satisfied.

The word "pending" has a well recognized meaning and ordinarily it would mean something which still awaits decision and is not yet concluded. Therefore, merely because the decree passed in a suit is not satisfied, it cannot be said that the suit or execution is pending within S. 2 (22). [P 442 C 1]

As the entire decretal amount was not satisfied by the sale of the mortgaged properties, the decree-holder started a proceeding under O. 34, Rule 6, Civil P. C., and got a personal decree and in execution thereof some other properties belonging to the judgment-debtor were sold and purchased and taken possession of by the decree-holder. After taking possession of the properties in March 1938 no further steps were taken by the decree-holder in connexion with the personal decree and in February 1941 an application was made by the judgment-debtor under S. 36 praying that the decrees passed in the mortgage suit might be reopened :

Held that the suit was not one to which this Act applied as defined in S. 2, cl. (22), as merely because the personal decree was not satisfied, the suit or execution could not be deemed to be pending : ('42) 29 A. I. R. 1942 Cal. 153 and ('42) 29 A. I. R. 1942 Cal. 121, *Expl.* [P 442 C 1, 2]

(b) Bengal Money-lenders Act (10 of 1940)— Interpretation.

It is true that the Bengal Money-lenders Act is intended to give relief to borrowers, but at the same time the Court cannot overlook the plain meaning of the words used by the Legislature. [P 442 C 2]

Purushottam Chatterjee — for Petitioner.

Gopendranath Das and Radhikaranjan Guha — for Opposite Party.

ORDER. — This is a rule directed against an order of the Subordinate Judge of Bankura dated 30th June 1941, refusing the petitioner's application for certain reliefs under section 36, Bengal Money-lenders Act. The material facts are not in controversy and may be briefly stated as follows : The opposite party before us advanced moneys on four different mortgages to the present petitioner at different times. There was a suit commenced on the four mortgage bonds on 16th April 1934, and a preliminary decree was passed on 6th June 1935, for a sum of about Rs. 11,212 annas odd. The decree was made final on 15th November 1935 and in execution of the final decree the mortgaged properties were put up to sale and they were purchased by the decree-holder on 25th April 1936. The decree-holder took possession of the properties sometime in July 1936. As the entire decretal amount was not satisfied by the sale of the mortgaged properties, the decree-holder started a proceeding under O. 34, R. 6, Civil P. C., and got a personal decree on 12th June 1937. In execution of this personal decree, some other properties belonging to the judgment-debtor were sold on 11th November 1937 and they were also purchased by the

decree-holder. After taking possession of these properties on 22nd March 1938, no further steps were taken by the decree-holder in connexion with the personal decree and on 27th February 1941, the present application was made by the judgment-debtor under S. 36, Bengal Money-lenders Act, praying that the decrees passed in the mortgage suit might be re-opened. The application was rejected by the Court on the ground that the suit was not one to which this Act applied as defined in S. 2, cl. (22), Bengal Money-lenders Act. It is the propriety of the decision that has been challenged before us by Mr. Chatterji who appears in support of the rule.

We may state at the outset that the learned Judge was apparently labouring under a misapprehension regarding one material fact. The learned Judge thought that the decree-holder had not taken any steps under O. 34, R. 6, Civil P. C., and no personal decree under that section was obtained. This is certainly a mistake as the facts stated above will show. But Mr. Das appearing on behalf of the opposite party has contended before us that even though that statement is incorrect, yet as there was no proceeding in execution of the personal decree pending on or after 1st January 1939, the mortgage suit could not be deemed to be a suit to which this Act applied. Mr. Chatterji, on the other hand, refers to the decision of Edgley J., in 45 C. W. N. 859[1] and argues that so long as the personal decree is not satisfied the suit must be deemed to be pending. It may be pointed out that the opinion expressed by Edgley J., in that case was subsequently approved of in a later decision of a Division Bench to which also Edgley J., was a party : *vide* 46 C. W. N. 33.[2] With reference to the case in 45 C. W. N. 859,[1] we venture to point out that the report of the case would clearly show that the sale in execution of the final mortgage decree in that case took place on 30th August 1939 that is to say, long after 1st January 1939. The mortgage suit must, therefore, on the admitted facts of that case, be a suit to which the Act applied according to S. 2, cl. (22), Bengal Money-lenders Act, and it was not necessary for our learned brother to go further and say that if the mortgage decree had not been fully satisfied before 1st January 1939, it must be deemed to be a suit to which the Bengal Money-lenders Act, applied. With great respect to Edgley J., we desire to point out that the view taken by him would really go against the plain words of S. 2, cl. (22) of the Act. The wording of that section is perfectly clear and lays down that the expression "suit to which this Act applies means any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution." The suit apparently was neither instituted nor filed nor was pending on or after 1st January 1939. So far as the proceeding in execution is concerned, it was also not instituted or filed at any time after 22nd March 1938. We cannot say that it was pending after that time simply because the decree was still not satisfied. The word "pending" has a well-recognized meaning and ordinarily it would mean something which still awaits decision and is not yet concluded. If the decision of my learned brother is right, then we are to conceive of the execution case as still pending after 22nd March 1938 although as a matter of fact it was not pending at any time after that. It is true that the Bengal Money-lenders Act, was intended to give relief to borrowers, but at the same time we eannot overlook the plain meaning of the words used by the Legislature. Ordinarily, it seems no injustice will be done unless of course the judgment-debtor wants a refund of the money which he has already paid, for, if any execution proceeding is started later on by the decree-holder, the judgment-debtor will have his right to come and apply under S. 36 (6) (a) (i), Bengal Money-lenders Act.

As regards the decision in the case in 46 C.W.N. 33[2] it is conceded that the observation of Biswas J. was nothing but obiter. As a matter of fact, in that case there was an appeal pending after 1st January 1939, against the decree made by the trial Court and consequently as the learned Judge himself observed in the judgment it would be a suit to which the Act applies within the meaning of S. 2 (22), Bengal Money-lenders Act. As the observation was nothing more than obiter, it is not necessary for us to refer the matter to a Full Bench. The result, therefore, is that in our opinion the mortgage suit was not one to which this Act applied within the meaning of the Bengal Money-lenders Act, and consequently the Subordinate Judge was right in dismissing the application under S. 36, Bengal Money-lenders Act. The rule is discharged. We make no order for costs. Let the counter-affidavit filed in Court to-day be kept on the record.

K.S./R.K. *Rule discharged.*

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1. ('42) 29 A. I. R. 1942 Cal. 121 : 199 I. C. 825 : I. L. R. (1941) 2 Cal. 184 : 45 C. W. N. 859, Suresh Chandra v. Lal Mohan.
2. ('42) 29 A. I. R. 1942 Cal. 153: 46 C. W. N. 33: 74 C. L. J. 61: I. L. R. (1942) 1 Cal. 326, Saradindu Mukherjee v. Jahar Lal Agarwalla.

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B. K. MUKHERJEA AND BLANK JJ.

Haricharan Karanjai — Decree-holder —Appellant

v.

Ulipur Bank, Ltd.—Judgment-debtor—Respondent.

Appeal No. 60 of 1941, Decided on 26th February 1942, from appellate order of District Judge, Rangpur, dated 19th November 1940.

(a) Companies Act (1913), S. 153 (as amended by Act 22 of 1936)—Composition scheme applies to all creditors including those who have already obtained decrees—Separate meeting of decree-holder creditors is not necessary.

Under S. 153 the scheme of composition is applicable to all creditors including those who have already obtained decrees. It is not necessary to convene a separate meeting of the decree-holder creditors in order to make the scheme binding on them : 39 C. W. N. 1198 and ('35) 22 A. I. R. 1935 Cal. 777, *Approved*; ('36) 23 A.I.R. 1936 Cal. 162; 40 C.W.N. 1104 and 42 C.W.N. 610, *held not good law*.

[P 443 C 2]

(b) Interpretation of statutes—Later legislation attaching meaning to words in previous Act—Interpretation applies to old Act.

Where it is gathered from a later Act, that the Legislature attached a particular meaning to certain

words in an earlier cognate one it would be taken to be a legislative declaration of its meaning there. [P 443 C 2]

(c) Companies Act (1913), S. 153 (as amended by Act 22 of 1936)—Amending Act only explains expression "creditors of same class" in S. 153 and hence it relates back to time when prior Act was passed.

The Amending Act 22 of 1936, in view of the uncertainty of judicial decisions which manifested itself, purports to explain the meaning of the particular expression "creditors of the same class" in S. 153 of the earlier Act and as such the amending Act must have relation back to the date when the earlier Act was passed. [P 443 C 2]

Priyanath Bhattacharji — for Appellant.

Gopendra Nath Das and Jyotish Ch. Pal — for Respondent.

B. K. MUKHERJEA J. — This appeal is on behalf of the decree-holder, and is directed against an appellate order of the District Judge of Rangpur, affirming that of the Subordinate Judge of that place, made in a proceeding under S. 47, Civil P. C. The material facts may be shortly stated as follows: The appellant was a depositor in the Ulipur Bank Ltd., and obtained a decree against the latter in respect of his deposit money on 8th July 1933. The Ulipur Bank which figures as the respondent in this appeal was in financial difficulties from some time past, and in or about April 1933, it embarked upon a scheme of arrangement and compromise with its creditors under S. 153, Companies Act. The application under that section was presented by the bank to this Court on 10th April 1933; and an order was made on 17th May 1933, directing the convening of a meeting of the depositors of the said Bank. The meeting was held on 30th July 1933, when the scheme was settled and it was finally sanctioned by this Court on 29th November 1933. The scheme provided inter alia that "the creditors of the Bank shall not be entitled to demand payment of their dues at once except in terms of the scheme which shall remain in force for a period of ten years."

After certain previous applications for execution, the present proceeding for execution of the decree was started by the decree-holder in 1940. The Bank took the objection that under the scheme mentioned above, the decree-holder could claim payment only in accordance with the provisions of the scheme and not otherwise, and the application for execution was consequently not maintainable. This contention found favour with both the Courts below, and they have allowed the objection of the judgment-debtor and dismissed the decree-holder's application for execution. The decree-holder has now come up on appeal to this Court. The contention raised on behalf of the appellant in substance is that he was not a depositor at the time when the scheme was put forward or sanctioned by the Court but had already become a decree-holder, and as there was no arrangement with the class of creditors to which he belonged, he was not bound by the scheme.

The whole question therefore is whether the depositors who obtained decrees against the company formed a separate class of creditors from the others who had not obtained decrees, and it was necessary to convene a meeting of the decree-holder creditors before the scheme could be made binding on them. This question was raised in quite a large number of cases in recent years, and there is apparently a diversity of judicial opinion regarding it. In 39 C.W.N. 1198[1] it was held by Guha and Lodge JJ. that the scheme of composition was applicable to all creditors including those who had already obtained decrees, and it was not necessary that there should be a separate meeting of the decree-holder creditors. This decision was affirmed by Mitter J. in 39 C.W.N. 1199.[2] On the other hand, there are a number of cases where a different view has been taken and it has been held that depositors who obtained decrees against a banking company before any scheme was embarked upon by the latter, ceased to be depositors and became decree-holders. They would constitute a separate class from ordinary depositors and it was necessary that there should be a separate meeting of such creditors before the scheme could be sanctioned by the Court: *vide* 40 C. W. N. 580,[3] 40 C.W.N. 1104[4] and 42 C.W.N. 610.[5] The Companies Act was amended by Act 22 of 1936, and sub-s. (6) of S. 153 of the new Act, now expressly lays down that "for purposes of this section unsecured creditors who may have filed suits or obtained decrees, shall be deemed to be of the same class as other unsecured creditors." The Legislature, therefore, has distinctly approved of the first set of judicial decisions referred to above and disapproved of the other group.

It has been argued by the learned advocate for the appellant that in this case the decree was obtained in 1933, and the amended provision of 1936 cannot be held to be retrospective in operation. The Legislature however cannot be said to have altered the existing law by addition of these words in S. 153, Companies Act. The expression "creditors of the same class" occurred also in the Act as it stood before amendment. The object of the added clause was to explain the meaning of the expression, in view of the uncertainty of judicial opinion which manifested itself on the point. In other words, the amending Act purported only to explain the meaning of a particular expression used in the earlier Act, and as such it must have relation back to the time when the prior Act was passed: *vide* Craies on Statute Law, p. 341. As has been pointed out by Maxwell in his "Interpretation of Statutes" where it is gathered, from a later Act, that the Legislature attached a particular meaning to certain words in an earlier cognate one this would be taken to be a Legislative declaration of its meaning there, (Maxwell, 8th Edn., page 269). We hold therefore that the view taken by the Courts below is right.

The learned advocate for the appellant has contended further that as there was a previous execution case in connexion with this decree, and the decree was allowed to be executed without any objection by the Bank, the latter was now precluded from raising any objection. This point has not been dealt with in the judgment of any of the Courts below, and even if it was raised, there were no materials placed before the Court, upon which it could be substantiated. The result therefore is that

1. ('35) 39 C. W. N. 1198, Barisal Loan Office Ltd. v. Shasthi Charan Bhattacharya.
2. ('35) 22 A.I.R. 1935 Cal. 777 : 62 C. L. J. 310 : 39 C. W. N. 1199, Serajganj Loan Office v. Nilkantha Lahiri.
3. ('36) 23 A.I.R. 1936 Cal. 162 : 166 I. C. 957 : 40 C.W.N. 580, Manikganj Trading and Banking Co. Ltd. v. Madhabendra Kumar Shaha.
4. ('36) 40 C.W.N. 1104, Rajshahi Banking Corporation v. Sura Bala Debi.
5. ('38) 42 C. W. N. 610, Rajshahi Banking and Trading Corporation Ltd. v. Pulin Behari Mukherjee.

the appeal fails and is dismissed. We make no order as to costs.

BLANK J. — I agree.

G.N./R.K. *Appeal dismissed.*

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R. C. MITTER AND KHUNDKAR JJ.

Sachindra Nath Chatterjee—Plaintiff — Appellant

v.

Bengal Nagpur Railway Co., Ltd. — Defendant — Respondent.

Appeal No. 158 of 1938, Decided on 14th November 1941, from original decree of Sub-Judge, 4th Court, 24-Parganas (at Alipore), D/- 28th February 1938.

Limitation Act (1908), Arts. 56 and 120 — Pleader and client—No contract as to payment of fee—Pleader to submit bill at conclusion of his employment in case and to be paid such charges as client considered reasonable — Suit by pleader to recover fee held governed by Art. 56 and not Art. 120.

There was no contract between the pleader and his client regarding the payment of the fees. The pleader was to submit a bill upon the conclusion of his employment in the case and was to be paid such charges as the client considered reasonable :

Held that the suit by the pleader for recovery of his fees was governed by Art. 56 and not by Art. 120. [P 444 C 2; P 445 C 1]

Limitation Act —

('42) Chitaley, Art. 56, Note 1; Art. 120, Note 2 Pt. 2.

('38) Rustomji, Page 721, Pt. 11.

A. N. Bose, Sitaram Banerjee, Surja Kumar Aich, Amal Kumar Mukherji and Khagendra Nath Ganguly — for Appellant.

Surajit Chandra Lahiri and Rakhal Chandra Dutt—for Respondent.

KHUNDKAR J. — This appeal arises out of a suit instituted by an advocate for his fees. The learned advocate was engaged by the defendant company to watch their interests in connection with the prosecution of a criminal case which was first instituted in the Court at Cuttack. This criminal prosecution arose out of an accident which took place at a level-crossing of defendant's railway, and in which a railway-train and a motor bus were involved. The Crown decided to prosecute the driver of the motor bus. The accident in question occurred on 9th November 1924. Although the prosecution was conducted on behalf of the Crown, the defendant Railway Company were anxious that their interests should be watched by their own lawyers during the continuance of the case. For this purpose they accordingly engaged the services of the Public Prosecutor and the Government Pleader of Howrah. Although the case was instituted at Cuttack, it was transferred to a Court at Balasore before any evidence had been recorded. After the order for transfer was obtained, the defendant company engaged the services of Mr. Bose the Public Prosecutor of Balasore to hold a second watching brief in addition to that already held by the Government Pleader and Public Prosecutor of Howrah. The plaintiff would appear to have been engaged as a junior to these gentlemen. The order for the transfer of the case from Cuttack to Balasore was made by the High Court at Patna upon an application filed on behalf of the defendant company. It is not disputed that the plaintiff did some work in connexion with this transfer application. It is in evidence that he came down to Calcutta where he had a conference with the officers of the defendant company at their offices. Thereafter he proceeded to Patna and instructed learned counsel who actually moved the application. This seems to have been the only substantial piece of work which the plaintiff did in connexion with his employment. It is true that on one or two occasions he travelled backwards and forwards between Calcutta, Cuttack and Balasore. But these journeys seem to have been undertaken only in connexion with certain so-called conferences or interviews which the plaintiff had with officers and the Solicitors of the defendant company, at their offices in Calcutta.

Regarding the question of his fees, the plaintiff had an interview with the deputy manager of the defendant company Mr. Duncan at a very early stage of his employment. The evidence is that nothing was settled between the plaintiff and Mr. Duncan with regard to the amount to which the plaintiff would be entitled as his fees. It is in evidence that Mr. Duncan left it to the plaintiff to submit a bill upon the conclusion of his employment, and made it clear that only such charges would be paid as the company considered reasonable. The case was taken up in the Court at Balasore on 3rd May 1925 and was heard continuously until 9th May 1925. It was again taken up on 25th May and heard until the 28th. After that there were hearings each day between 15th and 27th June. On 29th July the defendant company sent a telegram to the plaintiff asking him to submit his bill in respect of the days on which the case had been so far heard. It would seem that at this stage the defendant company contemplated dispensing with the services of the plaintiff. There is evidence to show that the plaintiff ignored the defendant company's request for the payment of his bill and managed to have his employment continued. The case was taken up and heard again on 26th August, and again from 5th September until 9th September. The judgment was delivered on 15th September. After the conclusion of the trial, the plaintiff submitted three bills; one was for fees, another was for out-of-pocket expenses, and the third was for halting allowances during journies which took the plaintiff away from Cuttack. The plaintiff charged fees at the rate of Rs. 200 a day, for days upon which the case was actually taken up in Court, Rs. 100 a day for days upon which the case was not being heard, and under the heading of 'halting allowances' charges were made upon an extremely extravagant scale. The defendant company considered these bills to be exorbitant and cut them down disallowing the halting charges in their totality, and allowing the plaintiff fees at the rate of Rs. 50 a day for working days and Rs. 25 a day for non-working days.

The suit was instituted on 17th June 1933. It is contended on behalf of the plaintiff that as the contract was an oral contract, the case was not covered by Art. 115 or Art. 116, Limitation Act, but by Art. 120. Alternatively, it is contended that that Article applies in any case because the plaintiff was suing also on a quantum meruit. Upon the question of contract the evidence which relates to the meeting between the plaintiff and Mr. Duncan at which the subject of fees was discussed, shows that no contract had been entered into between the plaintiff

and Mr. Duncan acting on behalf of the defendant company. For the reasons given by the learned Subordinate Judge, reasons with which we entirely agree, we are satisfied that the matter comes under Art. 56, Limitation Act, and that the plaintiff's suit was hopelessly time-barred. The merits of the case, however, have been argued before us, and we have examined with care the relevant evidence for ourselves. The plaintiff's standing at the Bar was not such as to entitle him in any view of the case, to the fees which he claimed, and in all the facts and circumstances of the case we are satisfied that the sums of Rs. 50 and Rs. 25 a day allowed to him by the defendant company, were more than ample. We are also satisfied that the halting allowances were rightly disallowed. The plaintiff was paid by the defendant company altogether a sum of rupees 3566-1-6, for his services in connection with the case, and, in our judgment, regard being had to the plaintiff's position at the Bar, this was a most liberal payment. The appeal must, accordingly, be dismissed. We allow a consolidated sum of Rs. 150 (one hundred and fifty) to the defendant company as total costs of this appeal.

R. C. MITTER J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 445

PAL J.

Maharaja Srish Chandra Nandi by Manager Kasimbazar Raj Wards Estate — Plaintiff — Appellant

v.

Kala Chand Roy and others — Respondents.

Appeal No. 961 of 1939, Decided on 19th November 1941, from appellate decree of Sub-Judge, Burdwan, D/- 6th February 1939.

(a) Civil P. C. (1908), S. 11—No issue as to res judicata raised—Only particular decision incidentally considered as bar by trial Court and no bar by appellate Court—Plea is not wholly excluded especially when whole suit is remanded.

Normally, res judicata is pleaded in bar to the hearing of the whole suit or some issue in it. When so pleaded, all the available grounds in support of it must be urged once for all. But when no issue as to res judicata is raised in the trial Court but only a particular decision is incidentally considered as a bar by the trial Court and no bar by the appellate Court, the plea is not wholly excluded thereby especially when the whole suit is remanded to be tried on fresh evidence. [P 446 C 2]

C. P. C. —

('40) Chitaley, S. 11, N. 6.

('41) Mulla, Page 92, Note "Plea of res judicata."

(b) Res judicata — Principles of—Applicability—Previous proceeding must be in nature of suit and not summary one.

For the applicability of the priciples of res judicata, it is necessary that the previous proceeding must not be a summary one and must be a proceeding of the nature of a suit : ('40) 27 A. I. R. 1940 P.C. 7, *Rel. on.* [P 447 C 1]

C. P. C.—

('40) Chitaley, S. 11, N. 2; S. 11, N. 21.

('41) Mulla, Page 38, Pt. (x).

(c) Bengal Tenancy Act (8 of 1885), S. 26J—Order under S. 26J does not operate as res judicata in subsequent suit involving determination of status.

The immediate subject of adjudication in an application under S. 26J is whether the landlord is entitled to transfer fees on a particular transfer. That matter cannot be withdrawn from the operation of that order, but however much it may be necessary to pass that order that the Court should determine the nature of the tenancy, such matter being outside the jurisdiction of the Court dealing with the petition would only be 'incidentally cognizable' and hence the order under S. 26J cannot operate as res judicata in a subsequent suit involving determination of status : 43 C.W.N. 1046, *Rel. on*; ('39) 26 A. I. R. 1939 Cal. 169, *Not foll.* [P 447 C 2]

C. P. C.—

('40) Chitaley, S. 11, N. 13 Pt. 1.

('41) Mulla, Page 41, Note "Matter collaterally or incidentally in issue."

(d) Evidence Act (1872), S. 13 and S. 13 (b)—Construction—Word "claimed" implies demand which involves presence of person against whom it is made—Statements by tenant in mortgage deeds or kobalas executed by him or in decree to which landlord was no party that his tenancy was niskar are inadmissible under S. 13 (b) against landlord in rent suit—Nor are they admissible under S. 18A, Ben. Ten. Act, against landlord.

Section 13 does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights but contemplates only certain transactions and instances as evidence of facts relevant to the fact in issue in any particular case, and makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue. Section 13 (b) does not bring in the particular instances in which the right was asserted. It speaks of the particular instances in which the right was claimed or in which its exercise was asserted. The word 'claimed' implies a demand which involves the presence of the party against whom such demand is made. Consequently, statements in documents such as a decree or a mortgage deed or kobala executed by the mortgagor to which the landlord was no party are not admissible in evidence under S. 13 (b) against the landlord in a rent suit instituted by him, inasmuch as they are not instances in which the niskar right was exercised or its exercise was asserted. Moreover S. 13 (b) does not bring in the statement itself but only the instances in which the exercise of the right was asserted. Nor are the statements in the aforesaid documents admissible against the landlord under S. 18A, Ben. Ten. Act. Section 18A, Ben. Ten. Act, even as it stood before its amendment by Act 4 of 1928 excluded from evidence the statements contained in the aforesaid documents. [P 448 C 1, 2]

(e) Bengal Tenancy Act (8 of 1885), S. 18A, as amended by Act 4 of 1928—Words "evidence of any incident" in S. 18A—Meaning—Amendment has only made position clear.

When any incident of a tenancy or right is in question in a suit, "the particular instances" which are made relevant by S. 13 (b), Evidence Act, become thereby evidence of the right or incident within the meaning of S. 18A, Ben. Ten. Act. The

words "evidence of any incident" in S. 18A, Ben. Ten. Act, were, even before amendment of 1928 comprehensive enough to mean and include the evidence of the existence or non-existence of the incident in question as also of such other facts as would be relevant in respect thereof by the Evidence Act. In any case after the amendment of S. 18A by the Amending Act of 1928 the position has been clear in this respect. If the words 'evidence of any incident' in S. 18A, Ben. Ten. Act, be taken in the narrow sense of only evidence of any incident of any tenure or holding against the landlord then the words introduced by the amendment of 1928 will be absolutely without any significance. With the narrow meaning given to the substantive portion of S. 18A, Ben. Ten. Act, no case can be thought of where the facts relevant under S. 13, Evidence Act, will be excluded by S. 18A, Ben. Ten. Act.

[P 448 C 1, 2]

(f) Landlord and tenant—Rent suit—Tenant alleging that tenancy being niskar no rent was payable—Prior to suit in petition for execution of decree against tenant landlord describing holding as lakheraj — No rent realized prior to suit—Long inaction on part of successive landlords coupled with admission in execution petition made before trouble as to tenant's status had arisen held sufficient to establish tenancy as niskar.

In the rent suit by the landlord the tenant contended that no rent was payable as the tenancy was a niskar tenancy. Prior to suit the landlord in an application for execution of a decree against the tenant had described the tenant's holding as lakheraj. There had been no realization of rent in respect of the tenancy prior to suit and it was not the plaintiff's case that he ever demanded or realized any rent for the tenancy :

Held that the long inaction on the part of the successive landlords in the matter of demanding or realizing rent coupled with the admission in the execution application made before any trouble arose as to the status of the tenant were sufficient to establish that the tenancy was a niskar one.

[P 448 C 2]

Bankim Chandra Banerji — for Appellant.

Gunada Charan Sen and Purushottam Chatterji — for Respondents.

Paresh Nath Mukherji (Jr.) for Ramendra Chandra Roy — for Deputy Registrar.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. Defendant 11 appears and contests the suit alleging that the tenancy is a niskar one. The learned Munsif who heard the suit at first instance raised inter alia issue 2 in the following terms : "Is the plaintiff entitled to recover any rent for the holding ?" While deciding this issue, the learned Munsif observes :

"It appears from khatian (Ex. 2) that the holding was assessed with rent. The assessment was under the provisions of S. 105A, Ben. Ten. Act. This assessment has the effect of a decree. I do not think the defendant is competent to agitate the matter in this Court. So I find that the plaintiff is entitled to recover rents as claimed."

He, therefore, decreed the suit. On appeal by the defendant, the learned District Judge, being of opinion that an ex parte decision under S. 105, Ben. Ten. Act, settling a fair and equitable rent does not bar a tenant from claiming niskar title in a subsequent rent suit, and finding that S. 105 proceedings were decided ex parte in this case, allowed the appeal, and after setting aside the judgment and decree of the Court of first instance, remanded the whole suit for re-hearing, giving both the parties opportunity to adduce further evidence. The learned Munsif who heard the case after this remand raised the following issue : "Is the jama a niskar one ?" He took this to be the only point for decision. While deciding this point, the learned Munsif observed as follows :

"The plaintiff contends that the defendant cannot agitate the matter after remand in view of the fact that the plaintiff filed an application under S. 26J, Ben. Ten. Act, which was allowed. It appears from Exs. 3, 4-4A and 5 that the plaintiff filed an application under S. 26J, Ben. Ten. Act, claiming landlords' fee in respect of the disputed tank describing it belonging to an occupancy holding. The defendant in this suit filed an objection similar to the objection taken in this suit. On the date of hearing the defendant did not contest and the application was allowed ex parte. The plaintiff contends that the objection of the defendant is barred by res judicata. In support the learned pleader for the plaintiff refers to a case in 42 C. W. N. 793.[1] The present suit was sent on remand after setting aside the judgment and decree of this Court, and after remand the suit is taken up anew. In view of the reported decision the objection of the defendant in this suit at this stage must be held to be barred by the principle of res judicata."

In this view the learned Munsif held that the jama was not a niskar one and that the plaintiff was entitled to recover the rent as claimed. Defendant 1 preferred an appeal against this decision and the learned Subordinate Judge allowed the appeal and dismissed the plaintiff's suit. He held that (1) after the decision of the Court of appeal remanding the suit the question of res judicata was no longer open for decision by the learned Munsif and (2) that defendants succeeded in showing that the tenancy was niskar. In the present appeal by the plaintiff, it is contended : 1 (a)—that the Court of appeal below was wrong in holding that after remand, the question of res judicata was no longer open; 1 (b) that the Court of appeal below should have held that the decision in the proceeding under S. 26J, Ben. Ten. Act, operated as res judicata in respect of the incidents of the tenancy; (2) that the statements in the documents relied on by the Court of appeal below were not admissible in evidence against the landlord, S. 18A, Ben. Ten. Act, made them inadmissible, and consequently, the finding of the Court of appeal below that the tenancy is a niskar one cannot be maintained, having been passed on this inadmissible evidence. As regards point 1 (a) the learned Subordinate Judge was wrong in holding that the plea of res judicata could no longer be taken after remand. Normally, res judicata is pleaded in bar to the hearing of the whole suit or some issue in it. When so pleaded, all the available grounds in support of it must be urged once for all. But when, as in the present case, no issue as to res judicata is raised, but only a particular decision is incidentally considered as a bar by one Court and no bar by the appellate Court, the plea is not wholly excluded thereby specially when the whole suit is directed to be tried on fresh evidence.

1. ('39) 26 A. I. R. 1939 Cal. 169 : 182 I. C. 69 : I. L. R. (1938) 2 Cal. 418 : 42 C. W. N. 793 : 67 C. L. J. 363, Krishna Chandra v. Maniklal.

a As regards point 1 (b), the question is whether the decision in the proceeding under S. 26J, Ben. Ten. Act, operates as res judicata in this case. It appears from Exs. 3, 4-4A and 5 that the plaintiff filed an application under S. 26J, Ben. Ten. Act, claiming landlords' fees in respect of the disputed tank described in it as an occupancy holding bearing rent. The defendant in that proceeding filed an objection on the ground that the tenancy was a niskar one. On the date of hearing, however, he did not contest and the application was allowed ex parte. The question is whether this decision given under S. 26J, Ben. Ten. Act, involves a decision that the tenancy is not a niskar one, and whether it would operate as res judicata in the present suit. In support of the view that this decision in the proceeding under S. 26J, Ben. Ten. Act, would debar the defendant from re-agitating the question in any b subsequent suit or proceeding, the learned Munsif relied on the decision in 42 C. W. N. 793.[1] Mr. Banerji appearing for the appellant very fairly pointed out that a contrary view was taken in the later case in 43 C.W.N. 1046.[2] In 42 C.W.N. 793[1] at p. 802 Costello J. summarised the essentials of the principles of res judicata thus :

"In order that the principles of res judicata should apply, it is essential that the former judgment in the present matter, i. e., the decision of the Munsif given in the proceedings under S. 26J must be (i) that of a Court of concurrent jurisdiction, (ii) directly in question in the subsequent suit, and (iii) between the same parties."

The learned Judge, it may be pointed out, omitted to notice that the previous proceeding must not be a summary one and must be a proceeding of the c nature of a suit as has been pointed out by the Judicial Committee in 44 C.W.N. 294[3] at p. 296. In 43 C.W.N. 1046[2] my learned brothers Mukherjea and Roxburgh JJ. took the contrary view. In delivering judgment in that case, my learned brother Mukherjea J. observed as follows :

"With all respect to the learned Judges who decided that case, (referring to the case in 42 C.W.N. 793[1]) I find it extremely difficult to accept this decision as correct. I think that the learned Judges entirely overlooked the fact that there is a vital difference between a suit and an application both as regards the scope and nature of the orders passed therein, and that the powers of the Court while dealing with the one are not the same as are exercised with regard to the other."

Then later on the learned Judge observes :

"In my opinion, the order of the Court in the d S. 26J proceeding cannot operate as res judicata in a subsequent suit for determination of status. Section 11, Civil P. C., has obviously no application . . . The question is whether there would be a bar under the general principles of res judicata, quite apart from S. 11, Civil P. C. I think the answer to this question must be in the negative."

Later on, he says :

"The immediate subject of adjudication in an application under S. 26J, Ben. Ten. Act, is whether the landlord is entitled to transfer fees on a particular transfer. That matter cannot be withdrawn from the operation of that order, but however much it may be necessary to pass that order that the Court should determine the nature of the tenancy, such matter being outside the jurisdiction of the Court dealing with the petition would only be 'incidentally cognizable' and could not operate as res judicata." e

I respectfully agree with the view expressed by my learned brother in 43 C. W. N. 1046.[2] As regards point (2) raised in this appeal, viz., that the statements in the documents relied on by the Court of appeal below are not admissible in evidence against the landlord, the documents in question are: "Ex. B, a mortgage decree dated 14th June 1933, in which the property is described as lakheraj but to which the landlord was not a party ; Ex. D1, a mortgage deed of the year 1883 wherein the tenant mortgagor described his interest as niskar ; Ex. D2 another mortgage deed of the year 1899 ; Ex. D, a mortgage deed of 1904 by the old tenant describing his interest as niskar ; Ex. D3, a kobala of the year f 1904 to which again the landlord was not a party and Ex. D4, another kobala of the year 1924 wherein the property was described as niskar to which the landlord was not a party.

Mr. Banerjee appearing for the appellant contends (1) that the statements in these documents as to the niskar character of the tenancy are not at all relevant under any of the provisions of the Evidence Act, and (2) that even if so relevant they are excluded from evidence by S. 18A, Ben. Ten. Act. In support of this contention, he relies on the language of that section as also on the cases in 74 C. L. J. 145[4] at p. 158, 39 C. W. N. 311[5] and 31 C. W. N. 32.[6] Mr. Sen appearing for the respondent contends that these statements may not be used against the landlord as evidence of the niskar incident of the tenancy but there is no bar to their being taken in g evidence as instances in which the niskar right was asserted by the tenant within the meaning of S. 13 (b), Evidence Act. In support of this contention he relies on the cases in 29 C. L. J. 577[7] and A. I. R. 1933 Pat. 656.[8] The only provision of the Evidence Act that could be referred to by Mr. Sen as making these statements relevant is S. 13 of the Act. The section runs as follows :

Where the question is as to the existence of any right or custom, the following facts are relevant :

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence ;

(b) particular instances in which the right or custom was claimed, recognized or exercised or in which its exercise was disputed, asserted or departed from. h

In view of the earlier decisions of this Court noticed in 74 C. L. J. 145[4] at p. 158 Mr. Sen conceded that the statements in question would not be relevant under cl. (a) of the section. He, however,

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2. ('39) 43 C.W.N. 1046, Mahaluxmi Bank Ltd. v. Abdul Khaleque.
3. ('40) 27 A.I.R. 1940 P.C. 7 : 185 I.C. 305 : 15 Luck. 1 : I.L.R. (1940) Kar. P. C. 25 : 67 I.A. 1 : 44 C.W.N. 294 (P. C.), Bhagwan Din v. Gir Har Saroop.
4. ('41) 28 A. I. R. 1941 Cal. 541 : 197 I. C. 376 : I. L. R. (1941) 2 Cal. 44 : 74 C. L. J. 145 : 45 C. W. N. 590, Jogendra Krishna Banerjee v. Sm. Subashini Dassi.
5. ('35) 164 I. C. 319 : 39 C. W. N. 311, Kanta Mohan Mallik v. Basudeb Ghora.
6. ('27) 14 A. I. R. 1927 Cal. 1 : 99 I. C. 189 : 31 C. W. N. 32, Brojendra Kishore v. Mohim Chandra.
7. ('18) 5 A. I. R. 1918 Cal. 34 : 52 I. C. 825 : 29 C. L. J. 577, Banwarilal Singh v. Dwarkanath Missir.
8. ('33) 20 A. I. R. 1933 Pat. 656 : 149 I. C. 1177 : 13 Pat. 45, Keshava Prasad Singh v. Brahmdev Rai.

contends that these would be relevant under cl. (b) of that section and in support of his contention strongly relies on 29 C. L. J. 577[7] at p. 581. Mr. Sen contends that the question in the present case is as to the existence of the niskar right. The above documents give instances in which this niskar right was asserted by the tenant. Consequently they are relevant under S. 13 (b), Evidence Act.

Clause (b), however, does not bring in the particular instances in which the right was asserted. The clause speaks of the particular instences (1) in which the right was claimed . . . . or (2) in which its exercise was asserted. The word 'claimed' implies a demand which involves the presence of the party against whom such demand is made. In my opinion, none of the instances evidenced by the documents in question was an instance in which the niskar right was exercised or its exercise was asserted. In my judgment, therefore, the documents in question were not admissible in evidence in this case under S. 13 (b), Evidence Act. Moreover, the section does not bring in the statement itself, but only the instances in which the exercise of the right was asserted. Even assuming that the documents are relevant under S. 13 (b), Evidence Act, S. 18A, Ben. Ten. Act excludes them from being used in evidence against the landlord. Section 18A, Ben. Ten. Act, stands as follows :

"Notwithstanding anything contained in S. 13, Evidence Act, nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, the amount or fixity of rent, the area, the transferability or any incident of any tenure or holding referred to in such instrument."

The words "notwithstanding anything contained in S. 13, Evidence Act" have been added by the Bengal Tenancy (Amendment) Act, 1928, (Act 4 of 1928). The case in 29 C. L. J. 577[7] at p. 581 was decided long before this amendment of the section and the Patna decision referred to by Mr. Sen was also in respect of a rule of law without these words. Mr. Sen contends that the addition of these words did not in the least affect the substantive portion of the section which prohibits only evidence of any incident of any tenure or holding against the landlord. His contention is that he is using those statements not as evidence of the niskar incident of the tenancy but as evidence of instances in which this incident was asserted. He contends that these two are distinct things and he supports his contention by reference to S. 5, Evidence Act, as also the decision in 29 C. L. J. 577.[7] In my judgment S. 18A, Ben. Ten. Act, even as it stood before the above amendment, excluded from evidence the statements contained in documents of the kind in question in the present case. When any incident of a tenancy or right is in question in a suit, 'the particular instances' which are made relevant by S. 13 (b), Evidence Act, become thereby evidence of the right or incident within the meaning of S. 18A, Ben. Ten. Act. The words "evidence of any incident" in S. 18A, Ben. Ten. Act, were, in my judgment, comprehensive enough to mean and include the evidence of the existence or non-existence of the incident in question as also of such other facts as would be relevant in respect thereof by the Evidence Act.

In any case after the amendment of the section by the amending Act of 1928 the position has been clear in this respect. As has been pointed out by Mr. Mukherjee appearing for the minor pro forma respondents, S. 13, Evidence Act, does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights. Section 13 contemplates only certain transactions and instances as evidence of facts relevant to the fact in issue in any particular case, and it makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue. If the words "evidence of any incident" in S. 18A, Ben. Ten. Act, be taken in the narrow sense contended for by Mr. Sen, then the words introduced by the amendment will be absolutely without any significance. With the narrow meaning given to the substantive portion of S. 18A, Ben. Ten. Act, no case can be thought of where the facts relevant under S. 13, Evidence Act, will be excluded by S. 18A, Ben. Ten. Act. In my opinion the contents of the documents in question are not admissible in evidence against the present appellant and these must be excluded from consideration.

I am, however, of opinion that even excluding these documents there is enough evidence in this case to establish the niskar right of the respondents. In order to come to his finding on the point the learned Subordinate Judge relied on three items of evidence: (1) The first item Ex. A, is an application dated 6th March 1933, for execution of a decree obtained by the present plaintiff against respondent 2. The plaintiff prayed for execution of his decree by attaching and selling the present property along with certain other properties and in that application he described the interest of his debtor as lakheraj so far as this property was concerned so that this document contains an admission of the plaintiff that the tenancy was a rent-free one. (2) The second item of evidence taken into consideration by the learned Subordinate Judge is the long course of conduct. There has been no realisation of rent in respect of this tenancy, and it is not the plaintiff's case that he ever demanded any rent or ever realised any rent for this tenancy. (3) The third item of evidence taken into consideration is the statements contained in the documents objected to by the appellants in the present appeal. The admission in question is dated 6th March 1933, before any trouble arose as to the status of this tenant. The cadastral survey record was finally published two months after this date, and it recorded that though no rent was paid for this tenancy, rent was payable for it. The whole trouble seems to have arisen after this record and the landlord who evidently has all along been inactive in this respect proceeded immediately to have the rent assessed and succeeded in getting an order ex parte from the revenue authorities. In my opinion, the long inaction on the part of the successive landlords coupled with this admission contained in Ex. A amply entitles me to come to the conclusion that the tenancy is a niskar one. In the result, this appeal is dismissed, but I make no order as to costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 448

B. K. MUKHERJEA AND BLANK JJ.

Joychand Seraogi and another — *Appellants*

v.

Shyama Charan Nath and others — *Respondents.*

Appeal No. 1803 of 1938, Decided on 2nd February 1942, from appellate decree of District Judge, Murshidabad, D/- 8th July 1938.

(a) Hindu law—Widow — Income from husband's property—Widow has absolute power of disposal—Widow acquiring immovable property out of income — Whether property is accretion to husband's estate or stridhan depends on widow's intention — Prima facie it is accretion to husband's estate—Onus—Property purchased from income held accretion to husband's estate.

Under Hindu law a widow has absolute power of disposition over the income of her husband's property and she is not bound to save a single farthing. If, however, she chooses not to spend the entire income and invests a portion thereof in the acquisition of immovable properties, the test for determining the question whether such properties are to be treated as an accretion to the husband's estate or are to be regarded as stridhan properties of her own is to ascertain the intention of the widow. If the widow evinces an intention to appropriate the property to herself and separate it from the corpus of the estate, it would be her absolute property. But if she deals with it in the same way as the rest of her husband's property it would follow the estate from whence it came : 10 Cal. 324 (P.C.), *Rel. on.* [P 450 C 1]

If the widow does not choose to spend the entire income but prefers to invest it in immovable property prima facie her intention must be deemed to have been to increase her husband's estate. The onus is on the widow to prove that the property so acquired is her stridhan property: 14 Cal. 387 (P.C.) and ('22) 9 A. I. R. 1922 P. C. 39, *Rel. on*; ('18) 5 A.I.R. 1918 P.C. 156, *Expl.*; 25 Mad. 351, *Not foll.*; ('27) 14 A.I.R. 1927 Cal. 868, *Disting.* [P 450 C 2]

A twelve annas share of certain patni property was acquired by the husband during his lifetime and after his death, the remaining four annas share was purchased by his widow. The accounts of the sixteen annas putni were kept together and rents were realized similarly and the whole thing was treated as one integral property through out the lifetime of the widow :

Held that the subsequent acquisition by the widow was an accretion to the husband's property.

[P 450 C 2]

Hindu law —

('40) Mulla, Page 165, Pt. (l) and Page 171, S. 177 (6), Pages 172-173, Note "Presumption as to savings."

('38) Gour, Page 1034, S. 338, Page 1035, N. 2435, Page 1037, N. 2441, Page 1040, N. 2448 and Pages 1041-1042, Notes 2450 and 2452.

(b) Estoppel — Reversioners' suit against widow compromised — Reversioners becoming managers of widow's husband's property during widow's lifetime and agreeing to pay off widow's debts from income of property — Widow's creditor obtaining personal decree against her and in execution purchasing part of her husband's estate — On widow's death reversioners suing purchaser for possession on ground that his interest in property purchased by him ceased on widow's death — Purchaser contending that plaintiffs were estopped by compromise from challenging his debt—Purchaser being no party to compromise held entitled to no benefit under it—Plea of estoppel held without foundation.

In a suit by the reversioners against the widow who was the shebait of her husband's debutter estate the parties entered into a compromise whereby the reversioners became the managers of the property during the widow's lifetime and undertook to pay off the debts due to the creditors of the widow from the income of the property left by the widow's husband. A creditor of the widow had obtained a personal decree against the widow and in execution thereof purchased a part of her husband's estate. In the suit after the widow's death, by the reversioners against the creditor for recovery of possession of the property purchased by him on the ground that the purchaser's interest had ceased on the death of the widow. The defendant contended that as the plaintiffs had bound themselves personally to pay the debts due to all the creditors of the widow and the debt due to the defendant was not paid, the plaintiffs were estopped from challenging the sale which took place in execution of the decree obtained by the defendant :

Held that the defendant not being parties to the compromise at all could not take any benefit under it. The plaintiffs did not by any means constitute themselves as trustees for the defendant so as to be bound to pay his debt. Moreover, the particular compromise could not be said to have influenced the conduct of the plaintiffs in any manner and it could not be said that they were misled into acting in a particular way which they would not have done but for the compromise. Consequently there was no foundation for a case of estoppel. [P 451 C 1]

Hiralal Chakravarty and Rabindra Nath Bhattacharji — for Appellants.

Dr. S.C. Basak, Narendra Krishna Basu, Nalin Chandra Pal and Amarendra Narain Bagchi — for Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants and it arises out of a suit commenced by the plaintiffs for establishment of their title to a 2/3rds share of the property in suit and for recovery of possession to the extent of that share. There was a prayer for mesne profits also. The facts so far as they are material for our present purpose may be briefly stated as follows : According to the plaintiffs, the property in suit belonged to one Rakhaldas Boral who died sometime in 1295 B. S. leaving behind him one Nrityakali Dasi as his sole heir under the Hindu law. Rakhaldas had considerable properties, both debutter and secular, and Nrityakali succeeded to these properties in the limited interest of a Hindu widow. In 1923 Nrityakali took an advance of a certain sum of money from the defendants appellants on a promissory note. In 1927 the defendants instituted a suit upon the promissory note and got a decree against Nrityakali herself. They wanted to have a declaration that the decretal dues might be realised from the estate left by Nrityakali's husband, but this prayer, it may be noted, was refused. Nrityakali died in the year 1932 and the present suit was instituted in July 1933. The plaintiffs' case was that the decree obtained by the defendants was a mere personal decree and could not bind the estate of Rakhaldas Boral. The purchaser in execution of such a decree could not therefore, acquire any interest in the property which would enure beyond the lifetime of the widow. It was contended, therefore, that the interest which the purchasers acquired ceased on the death of Nrityakali and the plaintiffs, who were two out of the three reversioners to the estate of Rakhaldas, were entitled to recover possession of the property to the extent of their share. Both the Courts below have decreed the plaintiffs' suit and the defendants have come up on appeal to this Court. Mr. Hiralal Chakravarty who appears for the appellants has put forward a two-fold contention. He has contended in the first place that the properties should have been held to belong to Nrityakali herself and not to Rakhaldas and consequently the reversioners had

no claim to these properties. The second point taken is that the plaintiffs were estopped from denying that the debt due to the present appellants was binding on the estate left by Rakhaldas.

Now, so far as the first point is concerned, the facts stand thus : The property in dispute is a putni property which belonged to several persons. It was acquired at different times by three different instruments. The first purchase was in 1294 B. S. made by Rakhaldas himself and that related to a four annas share of the putni property. The next purchase was of an eight annas share and that was also in the lifetime of Rakhaldas. The ostensible purchaser on this occasion was one Srinath, an officer of Rakhaldas, but it is found by both the Courts below that Srinath was a mere benamidar of Rakhaldas and this finding has not been challenged before us by Mr. Chakravarty. The controversy really centres round the remaining four annas share acquired a year after Rakhaldas' death by Nrityakali herself. Both the Courts below have found that this was really an accretion to the estate left by Rakhaldas and the propriety of this finding has been assailed by Mr. Chakravarty. It is now well-settled that a widow has absolute power of disposition over the income of her husband's property and she is not bound to save a single farthing. If, however, she chooses not to spend the entire income and invests a portion thereof in the acquisition of immovable properties, the question arises as to whether such properties are to be treated as an accretion to the husband's estate or are to be regarded as stridhan properties of her own. The cases go to show that in such suits the true test is to ascertain the intention of the limited owner under the Hindu law : *vide* 10 I. A. 150.[1] If the widow evinces an intention to appropriate the property to herself and separate it from the corpus of the estate, it would certainly be her absolute property. But if she deals with it in the same way as the rest of her husband's property it would follow the estate from whence it came. Mr. Chakravarty argues that the presumption in such cases must be that the property was the stridhan property of the widow and the burden of proving the contrary would lie heavily upon the reversioners. There seems to be some amount of divergence of judicial opinion as regards the question of onus in a case like this. The Madras High Court favours the contention of Mr. Chakravarty and enunciates the view that as the widow has absolute power of disposition over the income derived from her husband's estate she must be presumed to retain the same control over the investment of such income unless there is an indication to the contrary: *vide* 25 Mad. 351.[2] There are also some observations of this Court in 55 Cal. 269[3] which at first sight seem to support the contention of Mr. Chakravarty. The facts of that case, however, were quite different and as a matter of fact the widow in that case had purchased the property in the benami of another person—a fact which would unmistakeably show what really her intention was. In one of the earliest pronouncements of the Judicial Committee which is to be found in 14 I. A. 63[4] the law was laid down that :

"Where a Hindu widow invests the accumulations from her deceased husband's estate, prima facie it is her intention that they should be regarded as accretions thereto, and not as a separate estate descendible in a different line of succession."

It is true that the widow has uncontrolled powers over the income of her husband's property and is in a position to spend everything she likes without any control whatsoever, but if she does not choose to spend the entire income but prefers to invest it in immovable property it can be argued that prima facie, it was her intention to increase her husband's estate. The same view was reiterated by the Judicial Committee in 26 C.W.N. 322.[5] Mr. Chakravarty has drawn our attention to certain observations of the Privy Council in 46 I.A. 64[6]—the passage occurring at p. 71. It appears that the decision of the Madras High Court in 25 Mad. 351[2] was cited before their Lordships and their Lordships observed in course of their judgment that it may be that the presumption was the other way as laid down in that case. "But at the outside," so runs the judgment, "it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property." We do not think that the Privy Council has really gone back upon its pronouncements in the earlier cases referred to above, but even assuming that the initial onus is upon the reversioners, I do not think that it is of any assistance to the appellants in the present case. The facts found by the Courts below would conclusively go to show that the widow really treated the subsequent acquisition as a part of the original corpus. As I have said already, a twelve annas share of this identical putni property was acquired by Rakhaldas during his lifetime. The subsequent purchase by the widow was in the nature of an acquisition which had the effect of enlarging the original nucleus. It has been found by the last Court of facts that accounts of the sixteen annas putni were kept together and rents were realized similarly and as a matter of fact the whole thing was treated as one integral property throughout the lifetime of the widow. At the top of all, we find this significant fact that the appellants themselves, when they put up the property to sale, described it as the property of Rakhaldas. If the presumption was in favour of the defendants and the initial onus was upon the plaintiffs, even then we are of the opinion that the onus has been sufficiently discharged in the present case. The result is that the first contention of Mr. Chakravarty fails.

The second point raised by Mr. Chakravarty relates to the question of estoppel and the question arises in the following way : It appears that in 1918, when Nrityakali was alive, a suit was instituted by the present plaintiffs against her, praying inter alia for removing her from the shebaitship of the debutter estate and for the appointment of a receiver. The matter came up on appeal to this Court and this Court held concurring with the trial Judge that Nrityakali could not be removed from the shebaitship but that a receiver should be appointed. Leave was prayed for and granted, to appeal to the Privy Council against this decision and

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1. ('84) 10 Cal. 324 : 10 I. A. 150 : 13 C. L. R. 418 (P.C.), Isri Dutt Koer v. Mt. Hunsbutti Koerin.
2. ('02) 25 Mad. 351 : 12 M. L. J. 5, Akkanna v. Venkayya.
3. ('27) 14 A. I. R. 1927 Cal. 868 : 104 I. C. 284 : 55 Cal. 269, Nirmala Sundari Dassi v. Deva Narayan Das.
4. ('87) 14 Cal. 387 : 14 I. A. 63 : 5 Sar. 1 (P. C.), Babu Sheo Lochun Singh v. Babu Saheb Singh.
5. ('22) 9 A. I. R. 1922 P. C. 39 : 65 I. C. 305 : 26 C. W. N. 322 (P. C.), Nabakishore Mandal v. Upendrakishore Mandal.
6. ('18) 5 A. I. R. 1918 P. C. 156 : 49 I. C. 704 : 42 Mad. 581 : 46 I. A. 64 (P. C.), Raja of Ramnad v. Sundara Pandiyasami Tevar.

at this stage the parties came to a compromise which is embodied in Ex. F. Under this compromise, the two plaintiffs became the managers of the property during the lifetime of Nrityakali on certain terms and they agreed further to pay off the debts due to the creditors of Nrityakali from the income of the properties left by Rakhaldas. It is argued that as the present plaintiffs bound themselves personally to pay the debts due to all the creditors of Nrityakali and as the debt due to the defendants was not paid, the plaintiffs are precluded from challenging the sale which took place in execution of the decree obtained by the defendants. In our opinion, this contention has got absolutely no substance. In the first place, the defendants were not parties to the compromise at all and could not take any benefit under it and we are unable to agree with Mr. Chakravarty that the plaintiffs by any means constituted themselves trustees for the benefit of this particular creditor. But be that as it may, this particular compromise cannot be said to have influenced the conduct of the plaintiffs in any manner and it cannot be said that they were misled into acting in a particular way which they would not have done but for the compromise. In these circumstances there is no foundation for a case of estoppel. The result is that we agree with the view taken by the Courts below and dismiss this appeal with costs, hearing fee being assessed at two gold mohurs, to the plaintiffs-respondents.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 451

EDGLEY AND BISWAS JJ.

Sm. Rajkumari Prafullanalini Dassi w/o Girija Kishore Ghosh and another — Decree-holders — Appellants

v.

Mohini Mohan Dutt and others — Respondents.

Appeal No. 180 of 1939 (F. M. A.), Decided on 1st May 1941, from original order of Sub-Judge, Nadia, D/- 29th April 1939.

Civil P. C. (1908), S. 47 — Decree-holder's pleader misled by judgment-debtor's agent giving credit to extent of Rs. 1000 in excess of that to which judgment-debtor was entitled— Mistake continued in suit register — Decree-holder obtaining information as to extent of decretal amount and applying for execution— Information based on erroneous entries in suit register—On certain payments by judgment-debtor execution case dismissed on full satisfaction — On subsequent discovery of mistake, decree-holder applying for re-opening execution proceedings—Judgment-debtor held could not be allowed to take advantage of mistake— Court held could reopen proceedings and continue execution.

The pleader of the decree-holder who was misled by the agent of one of the judgment-debtors gave credit to the judgment-debtors to the extent of Rs. 1000 in excess of that to which they were entitled. This mistake was continued in the entry made in the execution column of the suit register. The decree-holder before filing execution application applied to the office for information as to the extent to which the decree was satisfied. The information given to him was based on the erroneous entries in the suit register. In due course in proceedings in execution certain payments were made by the judgment-debtors which resulted in the execution case being dismissed on full satisfaction, on mistake being discovered the decree-holder applied to reopen the execution proceedings :

Held that the judgment-debtors could not be allowed to take advantage of the mistake and the Court had power to reopen the execution proceedings and to continue them : ('29) 16 A. I. R. 1929 Cal. 670, *Disting.* [P 452 C 1]

C. P. C.—

('40) Chitaley, S. 47 N. 71a Pt. 14.

('41) Mulla, Page 180 Item 6 "Adjustment of decree."

Gopendra Nath Das and Biraj Mohan Roy — — for Appellants.

Abinash Chandra Ghose and Amarendra Nath Roy Choudhury — for Respondent 43.

Surjya Kumar Aich — for Deputy Registrar.

EDGLEY J. — This appeal is directed against the order of Mr. S. C. Sen, Subordinate Judge of Nadia, dated 29th April 1939, by which he refused to re-open certain execution proceedings on the ground that an order had been passed in these proceedings, namely Execution Case No. 159 of 1937, that the decree had been fully satisfied. Admittedly, the order in question was based on a mistake. It appears that in a previous Execution Case No. 242 of 1936, the sum of Rs. 1000 had been paid by one of the judgment-debtors to the pleader for the decree-holders who accordingly entered part satisfaction in respect of this payment in the execution case. Thereafter the agent of judgment-debtor 18 told the pleader for the decree-holders that the execution case had actually been dismissed for default and the pleader relying on this statement entered satisfaction to the extent of Rs. 1000 in the suit. It subsequently transpired that Execution Case No. 242 of 1936 had not in fact been dismissed for default. The result was that, when the requisite entries were made in the suit register, these entries indicated that on 16th January 1937 the sum of Rs. 2000 had been paid towards the satisfaction of the decree. On a subsequent date, the decree-holders again put their decree into execution in Execution Case No. 159 of 1937 and before doing so they applied to the office for information as to the extent to which the decree had been satisfied. The information which was supplied to them was admittedly based on the erroneous entries which had been made in the suit register, which gave the judgment-debtors credit for a sum of Rs. 1000 in excess of that to which they were entitled. In due course in the proceedings in Execution Case No. 159 of 1937 various payments were made by the judgment-debtors, which resulted in the execution case being dismissed on full satisfaction. It is clear that the judgment-debtors would not have been entitled to this order in the execution case but for the mistake which had resulted in the credit to them of a sum of Rs. 1000 which in fact they had not paid on 16th January 1937.

It is contended on behalf of the judgment-debtors that the Court was functus officio after having dismissed Execution Case No. 159 of 1937 on full satisfaction, and that consequently the decree-holders are not entitled to have their execution proceedings reopened as they should have discovered at the time of filing their application for execution that there was an erroneous entry in the execution column of the suit register, and, in this connexion, we have been referred to a decision of this Court in

33 C. W. N. 739.[1] We are not prepared to accept this argument. The case cited above is clearly distinguishable on its facts. In that case, as pointed out in the judgment, the sole ground upon which the decree-holder sought to re-open the proceedings was that there was a mistake which must have been due to his own negligence or negligence of his own agents. In the present case, on the other hand, the pleader of the decree-holders was clearly misled by the agent of one of the judgment-debtors. Further, it is clear that the mistake which occurred on 16th January 1937 was continued in the entry made in the execution column of the suit register upon which the information was based which was subsequently obtained by the decree-holders before they filed their application for execution in Case No. 159 of 1937. In my view, it would not be proper to allow the judgment-debtors to take advantage of a mistake of this nature and I do not think that the order of the learned Subordinate Judge can be supported. We, therefore, allow this appeal with costs. The order of the Court below in so far as the learned Judge refused to re-open Execution Case No. 159 of 1937 is set aside and it is directed that the decree-holders be at liberty to continue the execution proceedings. The appellants are entitled to their costs in this appeal. The hearing fee is assessed at one gold mohur.

BISWAS J. — I agree.

G.N./R.K. *Appeal allowed.*

1. ('29) 16 A. I. R. 1929 Cal. 670: 124 I. C. 79: 33 C. W. N. 739, Dwijendra Krishna Dutt v. Kedar Nath Poddar.

A. I. R. (29) 1942 Calcutta 452 (1)

HENDERSON J.

Jitendra Nath Bera and others — *Petitioners*

v.

Makham Lal Bera — *Opposite Party.*

Civil Revn. Appln. No. 1124 of 1941, Decided on 19th March 1942, for setting aside the order of Munsif, Second Court, Diamond Harbour (24-Parganas), dated 30th June 1941.

Bengal Money-lenders Act (10 of 1940), Ss. 2 (22), 36 (6) — Proceedings in execution must be by decree-holder — Application by stranger under O. 21, R. 90, Civil P. C., is not suit within S. 2 (22).

Under S. 2 (22) a proceeding in execution is "a suit to which this Act applies;" but proceedings in execution must be proceedings in which the decree-holder asks the Court to assist him to realise the money due under that decree. Therefore, an application by somebody else to set aside a sale under O. 21, R. 90, Civil P. C., is not a proceeding in execution of the decree and therefore is not a suit to which this Act applies or has the effect of turning an old execution case into such a suit. [P 452 C 2]

Shyama Charan Mitter — for Petitioners.

Kalipada Sinha — for Opposite Party.

ORDER. — This rule has been obtained by the judgment-debtors and is directed against an order of the Munsif rejecting an application for review under S. 36 (6), Bengal Money-lenders Act. The decree was passed on 17th August 1933. It is conceded that it infringes the provisions of the Bengal Money-lenders Act. In the course of Execution Case No. 702 of 1934 a certain property was put up to sale and purchased by the opposite party for Rs. 210 on 6th July 1934. Possession of the property was delivered in August 1935. It may be noted that the judgment-debtors are the sons of the executant of the hand-note upon which the suit was based and the decree is to be executed against such property of their father as may be within their hands. Their mother filed an application under O. 21, R. 90, Civil P. C., which was pending on 1st January 1939. The question now at issue between the parties is whether in view of that application it can be said that either that application or Execution Case No. 702 of 1934 is a suit to which this Act applies within the meaning of S. 2 (22). The learned Munsif held that it was not, because the application was rejected. He thought that if it had been successful, the petitioners would have been entitled to a review. No attempt has been made to support that view here. Now, if it can be said that the application under O. 21, R. 90 is a suit to which this Act applies or that as a result of it Execution Case No. 702 of 1934 is such a suit, then a judgment-debtor can always make a good case for himself by filing a futile application under this rule. Mr. Mitter conceded that dishonest petition would not have such an effect and argued that it must be a question of fact in each case whether the application is bona fide or not.

In my judgment it is impossible to draw any such distinction. Under S. 2 (22), a proceeding in execution is "a suit to which this Act applies;" but proceedings in execution must be proceedings in which the decree-holder asks the Court to assist him to realise the money due under that decree. It is meaningless to say that an application by somebody else to set aside a sale is a proceeding in execution of the decree. It is quite true that, if such an application is successful, the decree-holder will either have to rest content with what he had already got by previous executions or file a new application which will certainly become "a suit to which this Act applies." This is probably what the learned Munsif had in his mind when he gave his decision. But it affords no ground for saying that an application under O. 21, R. 90 is "a suit to which this Act applies" or has the effect of turning an old execution case into such a suit. The rule is discharged. I make no order as to costs.

K.S./R.K. *Rule discharged.*

A. I. R. (29) 1942 Calcutta 452 (2)

BISWAS AND MOHAMED AKRAM JJ.

Rai Chandi Charan Chatterjee Bahadur — *Appellant*

v.

Tara Nath Dutta (defendant No. 1) and others — *Respondents.*

Appeal No. 1094 of 1940, Decided on 21st April 1942, from appellate decree of Addl. Dist. Judge, Second Court, 24-Parganas at Alipore, D/ 27th March 1940.

(a) Landlord and tenant—Kabuliyat by *R* in landlord *P*'s favour — On transfer of kabuliat land by *R*, *R* to pay as chouth one-fourth of sale price to *P*—All terms of kabuliat to be binding on parties and their representatives—On failure to pay chouth *P* entitled to khas possession of land—On *R*'s death his widow selling land to *B* who mortgaged it by conditional sale to *D*—

a **No chouth having been paid *P* obtaining decree for same and purchasing land in execution thereof subject to *D's* mortgage — Foreclosure suit by *D*—*P* impleaded not as landlord but as purchaser of equity of redemption — *P* setting up claim to chouth — Claim not considered as no court-fee paid—*D's* suit decreed and *D* put in possession — Subsequent suit by *P* against *D* for possession on ground of failure to pay chouth or alternatively for amount of chouth—Terms of kabuliat held perfectly valid — Mortgage to *D* coupled with *D's* foreclosure decree and his possession held amounted to transfer within kabuliat—*D* held bound to pay chouth—*P* held entitled to eject *D*.**

The kabuliat executed by *R* the original tenant in favour of the landlord *P* contained a stipulation
b that if *R* or his successors gifted or sold or otherwise transferred the lands of the kabuliyat, *R* and vendee or transferee of the land would be liable to pay *P* as chouth one-fourth of the price of the land; otherwise the purchase or transfer would not be valid and *P* would be entitled to khas possession of the land and title under the kabuliat would be extinguished, and that all the terms of the kabuliat would be operative and hold good as between the parties themselves and their respective heirs, successors and representatives. On *R's* death his widow *S* sold the holding to *B* who executed a mortgage by conditional sale in favour of *D*. No chouth having been paid on the transfer by *S*, *P* sued to recover the same, obtained a decree and in execution thereof purchased the holding himself subject to *D's* mortgage. Thereafter *D* sued for foreclosure on his mortgage, obtained a decree and was put in possess-
c sion of the lands. In the foreclosure suit *P* was impleaded and though he had set up his claim for chouth it was not considered as he failed to pay the court-fee on his claim. Subsequently, *P* instituted a suit to recover possession of the lands on the ground of failure to pay the transfer fee as per terms of the kabuliat or alternatively for the amount of chouth :

Held that (1) the mortgage by conditional sale in *D's* favour followed by *D's* decree for foreclosure and the taking of possession thereunder constituted a transfer within the meaning of the kabuliyat and hence *D* was liable to pay chouth to the plaintiff; [P 454 C 2]

(2) the stipulation in the kabuliat was perfectly valid and legal and was binding on all persons deriving title through or from any of the original parties to it and hence *D* was bound to pay chouth
d in terms of kabuliat; [P 454 C 2]

(3) since the plaintiff was not a necessary party to *D's* foreclosure suit and was impleaded not as landlord but as purchaser of the equity of redemption, his claim was not barred by res judicata or constructive res judicata. The claim to chouth by the plaintiff in *D's* suit was wholly outside the scope of that suit and in any case the claim to chouth at that stage would have been premature, the foreclosure decree not then having been passed; [P 455 C 1]

(4) the plaintiff was entitled to a decree for ejecting *D*. [P 455 C 1]

C. P. C. —

('40) Chitaley, S. 11 N. 36 Pt. 1, N. 37 Pt. 6.
('41) Mulla, Page 47, Note "Matter constructively in issue" and Page 50, Note "Test."

(b) Mortgage—Mortgage by conditional sale, out and out transfer and sale coupled with condition of repurchase—Distinction — Mort- e **gage by conditional sale—Mortgagor suffering foreclosure decree to be passed against him — Transaction amounts to execution of sale in favour of mortgagee.**

A mortgage by conditional sale as such does not amount to an out and out transfer like a sale or a gift; such a transaction is in fact distinct from a sale coupled with a condition for a re-purchase, inasmuch as it does not pass title forthwith. At the same time a mortgage by conditional sale, although it may not work out into a sale on default of payment on the due date, still implies that the transaction may in a certain contingency ripen into a sale. In bringing about this result, the intervention of the Court may be necessary. A mortgage by conditional sale is no doubt essentially in the nature of a security, and that being so, notwithstanding the form of the transaction, the mortgagor's f right to redeem the security will remain, even if the due date of payment may have passed. But once the right to redeem is effectively cut off, there will be nothing to prevent the mortgagee acquiring full title to the property. The fact that the mortgagee will have to bring a suit to foreclose the mortgage is not sufficient to detract from the fact that the mortgagee will be acquiring title to the property by reason of a voluntary act on the part of the mortgagor. Consequently, where a person executes a kot kobala or mortgage by conditional sale, and then suffers a foreclosure decree to be passed against him, he virtually executes thereby an out and out transfer in favour of the mortgagee. [P 453 C 1, 2]

T. P. Act —

('36) Mulla, Page 338, Note "Mortgage by conditional sale." g

('37) Mitra, Page 311, N. 339.

Paresh Nath Mukherjee (Jr.) — for Appellant.

Surendra Nath Basu (Sr.) — for Respondents.

BISWAS J.—This is an appeal by the plaintiff whose suit was dismissed by both the Courts below. The plaintiff is the admitted landlord of the holding in dispute, and he brought this suit to enforce a certain covenant in the kabuliyat by which the tenancy had been created. The kabuliyat is Ex. 1 in the case and had been executed on 5th May 1921, by one Radha Raman Chandra. The clause in question is contained in para. 11 of the document and is as follows :

"If I or my successors make a gift of, or sell or otherwise transfer the lands of this kabuliyat, then myself and the vendee or transferee of this land will h be bound to pay you as chouth one-fourth of the proper price of this land down to heirs and successors; otherwise, the purchase or transfer will not be valid. If the one-fourth amount be not paid as chouth in this manner, then you will be entitled to take khas possession of the lands of this kabuliyat and the title under this kabuliyat will be extinguished."

The plaintiff's case is that no chouth was paid under this clause in respect of the transfer of the holding to defendant 1, Tara Nath Dutta, who was the principal contesting defendant in the suit. He accordingly asked for a decree for eviction, and in the alternative, asked for a sum of Rs. 1684.0-7 as chouth. Both the learned Subordinate Judge of Alipur, who tried the suit in the first instance, and the learned Additional District Judge in appeal held that as the transfer to defendant 1 was not an out and out transfer, but by way of a mortgage by conditional sale, it was not hit by clause (11) of the

kabuliyat, and that defendant 1 was accordingly not liable to pay any chouth. It was further held that, in any case, the claim was barred by res judicata.

The original tenant Radha Raman is not now in the picture. After his death, his widow Sukumari, as guardian of his minor son and heir, sold the holding to defendant 2, Panchu Bala Debi. This was on 4th January 1924. No chouth was paid on this transfer, and the plaintiff was accordingly obliged to bring a suit for recovery of the same, being Money Suit No. 61 of 1927. In this suit, the plaintiff obtained a decree on 19th September 1927 and thereafter in execution of it, purchased the holding on 9th July 1930. The sale was confirmed in due course, and the plaintiff purported to take delivery of possession through Court on 17th November 1930. This purchase by the plaintiff was merely of the right, title and interest of the judgment-debtor. It appears that prior to the sale, Panchu Bala, jointly with her husband, defendant 3, executed a kot kobala or mortgage by conditional sale in respect of this holding in favour of Tara Nath Dutta, defendant 1. The plaintiff's purchase under the decree in Money Suit No. 61 of 1927 was consequently subject to this mortgage. In other words, the plaintiff, though he was the landlord of the holding, acquired merely the equity of redemption from defendant 2.

Defendants 2 and 3 failed to redeem the mortgage, and thereupon, Tara Nath commenced a suit for foreclosure of the mortgage, being Suit No. 6 of 1936, making the present plaintiff a party as a subsequent transferee from the mortgagor. A preliminary decree for foreclosure was made in this suit on 30th March 1937, and on 3rd July following, the final decree was passed. The total amount which was declared due under the decree was Rs. 6736-2-4. Defendant 1 thereafter took possession of the holding under the decree. The present suit was accordingly instituted by the plaintiff on 12th May 1938 for eviction of defendant 1, on the allegation that no chouth had been paid by him in terms of cl. (11) of the kabuliyat, Ex. 1, with the result already stated.

The question is whether or not, in the circumstances of this case, defendant 1 could be held liable to pay chouth, and, if so, what was the effect of non-payment. Defendant 1 disputed his liability on various grounds. In the first place, it was contended that the transfer to him was not such a transfer as was contemplated in cl. (11) of the kabuliyat. Secondly, it was said that, in any case, defendant 1, having taken his transfer not from the original tenant or his heirs, but from defendants 2 and 3, who were assignees from the original tenant's heirs, was not bound by the stipulation in that clause. And, thirdly, it was urged that the plaintiff's claim was barred by the principle of constructive res judicata. As the Courts below held in favour of defendant 1 on the first contention, it was not necessary for them to consider the second. In answer to the appellant's case in this Court, all the three grounds were, however, urged before us in this appeal.

As regards the first point, the Bengali words in the kabuliyat on which reliance is placed on behalf of the contesting defendant are: "*Dan bikray ityadi hastantar karile.*" These words, it is said, contemplate an out and out transfer, either by way of gift or by way of sale, and do not include a transfer by way of mortgage by conditional sale. That may be so and this was in fact the view accepted by the Courts below. It may be further conceded that a mortgage by conditional sale as such does not amount to an out and out transfer like a sale or a gift; such a transaction is in fact distinct from a sale coupled with a condition for a repurchase, inasmuch as it does not pass title forthwith. At the same time, it is hardly possible to deny that a mortgage by conditional sale, although it may not work out into a sale on default of payment on the due date, still implies that the transaction may in a certain contingency ripen into a sale. It may be that in bringing about this result, the intervention of the Court is necessary. All the same, the possibility of an eventual transfer of title to the mortgagee as a result of default cannot be altogether ruled out. A mortgage by conditional sale is no doubt essentially in the nature of a security, and that being so, notwithstanding the form of the transaction, the mortgagor's right to redeem the security will remain, even if the due date of payment may have passed. But once the right to redeem is effectively cut off, there will be nothing to prevent the mortgagee acquiring full title to the property. The mortgagee will, of course have to bring a suit to foreclose the mortgage, but we do not think that that circumstance is sufficient to detract from the fact that the mortgagee will be acquiring title to the property by reason of a voluntary act on the part of the mortgagor. In our opinion, where a person executes a kot kobala or mortgage by conditional sale, and then suffers a foreclosure decree to be passed against him, he virtually executes thereby a transfer in favour of the mortgagee. In this view of the matter we do not think that defendant 1 could escape liability for payment of the chouth under the terms of the kabuliyat, if he was otherwise liable, merely on the ground that he acquired the property directly as a result of the Court proceedings under the foreclosure decree. The mortgage by conditional sale, followed by the decree for foreclosure, and the taking of possession thereunder did, in our opinion, constitute such a transfer as was contemplated in cl. (11) of the kabuliyat.

Turning to the next question as to whether defendant 1 was otherwise liable, the contention is that the stipulation was not binding on this defendant, because he was not a party to the kabuliyat. It was argued that, in any case, on the wording of the clause, the stipulation was binding as between the plaintiff on the one hand, and the original tenant and his heirs on the other, and that it could not bind a transferee from the original tenant, or from any of his heirs. In answer, it is sufficient to refer to cl. (15) of the kabuliyat, which expressly lays down that all the terms and incidents of the kabuliyat will be operative and hold good as between the parties themselves and as between their respective heirs, successors and representatives. Apart from that, it was conceded on behalf of defendant 1 in both the Courts below, and the trial proceeded on the basis, that the stipulation in question amounted to a covenant running with the land. It will be observed that the kabuliyat contained an express proviso for re-entry in default of payment of chouth. From that point of view, even treating the clause as a mere restrictive condition against assignment, it is quite clear that this would be sufficient to invalidate a transfer in breach of such condition. It cannot be disputed that the clause was perfectly valid and legal, and we see no reason therefore why it should not be held to be binding on all persons deriving title through or from any of the original parties to it. The second contention on behalf of defendant 1 must, therefore, be also overruled.

It is next urged that the plaintiff's claim is barred by res judicata. This contention is based on the

fact that in the suit brought by defendant 1, he had joined the present plaintiff as a party, and it appears that the plaintiff did put forward a claim to chouth in his written statement. In view of this claim the plaintiff was, in fact, called upon to pay the proper court-fee, but this was not paid, and the claim, accordingly, was not gone into. It is now contended that the claim to chouth having been thus set up and then abandoned in the previous suit, it is no longer open to the plaintiff to maintain the present suit for the same relief. In any case, it is argued that the matter is one which, on the plaintiff's own showing, might and ought to have been raised in the previous suit, and, not having been raised, would still operate as res judicata under Expl. 4 of S. 11, Civil P. C.

This argument, in our opinion, betrays a confusion of ideas. It overlooks the essential fact that the present suit is instituted by the plaintiff in his capacity as landlord, whereas he had been impleaded in the foreclosure suit in a different capacity altogether. As stated above, the present plaintiff had obtained a decree for money against defendant 2 on account of chouth, and it was in execution of that decree that he purchased the right, title and interest of that defendant in the holding in dispute. It was in consequence of such purchase, that defendant 1 had made the plaintiff a party to his suit. In fact, it is obvious that the landlord as such could possibly have no place in a suit for foreclosure in respect of a mortgage executed by the tenant. The only proper and necessary parties to such a suit would be the mortgagee, on the one hand, and the mortgagor on the other or persons having a right in the equity of redemption. The landlord of the holding could not be possibly brought within this category. It may be that the present plaintiff, though made a party in the suit as a subsequent transferee from the mortgagor, did yet put forward a claim for chouth. But this was a matter wholly outside the scope of the suit, and in any case, it is clear that the claim would have been premature at that stage, the foreclosure decree not having yet been passed. In these circumstances, we cannot agree with the Courts below that there was any scope for the application of the doctrine of constructive res judicata. The result is that this contention on behalf of the respondent must also be overruled.

The next question is as to the effect of the non-payment of chouth by defendant 1. As already pointed out, the kabuliyat expressly provides that if the chouth was not paid, not only would the transfer be invalid but also the landlord would have the right to re-enter. There can be no doubt, therefore, that in the events which have happened, defendant 1 made himself liable to eviction. The liability to pay chouth accrued on the date the foreclosure decree was made. In so far as chouth was not paid by him on that date, he must be deemed to have been in possession since as a trespasser. There will accordingly be a decree against defendant 1 for his eviction and for mesne profits with effect from the said date until possession is delivered by him, but in the circumstances of the case, we think that we ought to relieve him against eviction, if he should still be prepared to pay the chouth with interest at 6 per cent. per annum with effect from the date of the foreclosure decree.

In the view which the Courts below took, it was not necessary for them to ascertain the amount of the chouth. Instead of directing a remand on the point, the parties agree that the amount which should be payable on account of the chouth including interest should be assessed by us at a reasonable figure. We consider that Rs. 1250 would be fair, and we, accordingly, make a decree for this amount. If half of this amount is paid by the end of Aswin 1349 B. S., defendant 1 will have time till the end of Chaitra following to pay the balance. If there is default in payment of one or both of these instalments, the plaintiff will be entitled to enforce the decree for eviction, and mesne profits as directed above. This appeal is thus allowed with costs in all the Courts.

MOHAMED AKRAM J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 455

B. K. Mukherjea and Mohamed Akram JJ.

Bengal Nagpur Railway Co. Ltd. — Plaintiff — Appellant

v.

Corporation of Calcutta—Defendant—Respondent.

Appeal No. 127 of 1940, Decided on 20th March 1942, from original order of Judge, Small Cause Court at Sealdah, 24-Parganas, D/- 22nd February 1940.

(a) Calcutta Municipal Act (3 of 1923), S. 127 (a)—Liability to pay rates—Distinction between S. 127 (a) and English law indicated.

Under the English law the liability to pay rates is dependent on beneficial occupation. The owner of land or building who does not use it in any way is not rateable because he is not in occupation, although he may have legal possession in the sense that he can exclude other persons from it. What constitutes "occupation" for purposes of rating depends on various considerations and no exhaustive or accurate definition has yet been formulated. But "occupation" includes possession and something more. Bare possession without the taking of profit or advantage is not sufficient to constitute rateable occupation. There must be use and enjoyment which is capable of being beneficial: (1760) 2 Burr. 1053, *Rel. on.* [P 456 C 2; P 457 C 1]

The law as laid down in the Calcutta Municipal Act differs in this respect from English law that an owner under the Municipal Act, even if he does not occupy or enjoy a land or building, will be bound to pay rates. The owner is rateable, even if he keeps the land vacant and unoccupied though he gets certain vacancy remissions as are provided in S. 151 of the Act. [P 457 C 1]

(b) Calcutta Municipal Act (3 of 1923), S. 127 (a) — Basis of rating under English law and S. 127 (a) is same namely yearly rent which hypothetical tenant would reasonably pay for hereditament — Property must be valued as it stands—Vacant land not used in any particular way—Standard of valuation indicated.

The fundamental basis of rating in English law in respect of all classes of property is the yearly rent which a hypothetical tenant would reasonably pay for the hereditament. The property to be valued must be assumed to be let, and the gross annual rent is the rent which a tenant might be reasonably expected to pay for a hereditament, if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command the rent. The tenant is assumed to take the hereditament from year to year, though he is supposed to

have a reasonable expectation of continuing in occupation. Barring certain matters of detail the principle embodied in S. 127 (a) is substantially the same. In case of land which is not covered by any building and in case of building erected for letting purposes the annual value is the rent, which would be worth to a hypothetical tenant who takes it from year to year. It is a well established principle of English law which applies to cases under S.127(a) that for purposes of rating a property must be valued as it stands; in other words only the present circumstances must be looked at, and neither the past conditions nor the future possibilities are to be taken into account : (1871) 6 Q. B. 193 and (1937) A. C. 419, *Rel. on.* [P 457 C 1]

The words 'at the time of assessment' in S. 127(a) clearly indicate that in determining the value regard must be had to the conditions existing at the time when the assessment is made. The land cannot be valued on the basis of a different kind of user than that to which it is put at the time of assessment. Under S. 127 (a) an owner who keeps his land vacant is bound to pay rates. In determining the value of such land it cannot be said that the standard would be the amount of rent payable by a tenant who would keep it fallow and unoccupied. When the owner is not using it in any particular way, there is no presumption in favour of the continuance of any kind of user. The standard in such cases must be the rent which could be expected from a tenant, who would take the land as it is, and put it to such use, as is possible for a yearly tenant to do. [P 457 C 2]

(c) Calcutta Municipal Act (3 of 1923), S. 127 (a) — House or structures built or equipped in certain manner to be used for particular purpose — Their employment for which they are suited or are readily capable of being suited in their then actual condition must be presumed — If they cannot be let for their intended purpose rating authority can find out whether they can be let for other or subsidiary purpose.

According to English decisions when the house or structures are built or equipped in a certain manner, and intended to be used for any particular purpose, an employment of them for which they are suited or readily capable of being suited in their then actual condition is to be presumed. But if they cannot be let for the purpose for which they were built, then, it would be quite within the competence of the rating authority to find out whether they could be let for any other or subsidiary purpose : 10 Mad. 38, *Rel. on.* [P 457 C 2]

S. M. Bose, B. B. Chatterjee and Basanta Kr. Mukherjee — for Appellant.

Atul Ch. Gupta, Krishna Lal Banerji and Balaram Basu — for Respondent.

JUDGMENT. — This appeal is by the Bengal Nagpur Railway Company, and it is directed against an order of the Small Cause Court Judge at Sealdah, dated 22nd February 1940 made in an appeal filed before him by the appellant company, under S. 141, Calcutta Municipal Act. The case relates to the assessment of premises No. 10 (B), Garden Reach Road which is owned by the appellant. It is a vacant piece of land, measuring 12 bighas 16 cottas and 31 sq. ft., and the appellant's story is that some members of railway officers' club occasionally use it for golf practice. The Calcutta Corporation have on their last revaluation assessed the land, on the basis of annual letting value of lands in the vicinity, at the rate of Rs. 1750 per bigha. The case of the assessee is that calculated on the basis of beneficial user the annual value could not exceed Rs. 1000. They, therefore, claimed reduction of a sum of Rs. 21,485 in assessment, and of Rs. 4297 in tax per year. The appeal was resisted by the Corporation of Calcutta who maintained that the premises was rightly valued in accordance with the provisions of S. 127 (a), Calcutta Municipal Act. The Small Cause Court Judge has, by his judgment dated 22nd February 1940, negatived the contention of the assessee, and dismissed the appeal. It is against this decision that the present appeal has been taken.

Mr. Bose who appeared in support of the appeal has contended before us, that the basis upon which the premises in question has been assessed by the respondent Corporation is altogether wrong. His argument is that for purposes of rating, a property must be valued as it exists, when the rate is made, with all the then existing conditions *(rebus sic stantibus)*. The rating authority must find out the annual value on the basis of the existing user to which the land is put, and it would be illegal to impose rates on the basis of rents that it would fetch if it were used in a different manner. It is argued by Mr. Bose that this principle has uniformly been applied in England in determining annual value for purposes of rating and in construing S. 127 (a), Calcutta Municipal Act, which is in substantial agreement with the provisions of the English Acts, the same principle ought to be followed. The argument amounts to this that as the land assessed is practically a piece of vacant land which is not used by the assessee except for occasional golf practices, the annual value of such lands must be the rent which a tenant would be willing to pay, if he were to use the land in exactly the same way as it is being used at present without any change whatsoever. Judged by this standard the annual value would be almost nothing; at any rate it would not exceed Rs. 1000 a month, which a tenant taking an imperfect golf course like this might be expected to pay.

To decide this point, it is necessary in the first place to turn to the relevant provisions of the Calcutta Municipal Act. Section 124 of the Act empowers the Corporation of Calcutta to impose consolidated rates on land and building on the basis of annual valuation determined under Chap. 10 of the Act. Sections 127 and 128 lay down the way in which the annual value is to be determined. We may leave out for our present purposes S. 128 altogether, which deals with cases where the land and building to be assessed belong to the Board of Trustees for the improvement of Calcutta. In case of land or building erected for letting purposes S. 127 (a) lays down that the annual value shall be deemed to be the gross annual rent at which the land or building might, at the time of assessment, be reasonably expected to let from year to year, less a ten per cent. deduction in case of building, which is deemed necessary to meet the costs of repair and other expenses. Section 127 (b) provides a somewhat different method for determining the annual valuation of a building, which is not erected for letting purposes and is used ordinarily by the owner for purposes of residence. By this method the price of land is added to the cost of construction of the building and deducting a certain amount as depreciation allowance, 5 per cent. of the balance is taken to be the annual value of the building.

Under the English law the liability to pay rates is dependent on beneficial occupation. The owner of land or building who does not use it in any way is not rateable because he is not in occupation,

a although he may have legal possession in the sense that he can exclude other persons from it : *vide* Ryde on Rating, Edn. 17, p. 16. What constitutes "occupation" for purposes of rating depends on various considerations and no exhaustive or accurate definition has yet been formulated. Briefly speaking "occupation" includes possession and something more. Bare possession without the taking of profit or advantage is not sufficient to constitute rateable occupation. There must be use and enjoyment which is capable of being beneficial : *vide* (1760) 2 Burr. 1053.[1] The law as laid down in the Calcutta Municipal Act differs in this respect from English law that a owner under the Municipal Act, even if he does not occupy or enjoy a land or building, will be bound to pay rates. The owner is rateable, even if he keeps the land vacant and unoccupied though b he gets certain vacancy remissions as are provided in S. 151 of the Act. How far this distinction has any bearing on the question for consideration in the present case we will see presently.

In England when it is shown that a person is rateable, the question on what sum he is to be rated depends on the definition of "net annual value" and "rateable value" as given in S. 22, Rating and Valuation Act of 1925; or in case of lands in the City and County of London, on the definition of 'rateable value' in S. (4), Valuation (Metropolis) Act of 1869. There is detailed procedure laid down in the English Acts, by which the 'rateable value' is arrived at by making specified deductions from "gross value." Shortly speaking, the fundamental basis of rating in English law in respect of all classes of property is the yearly rent which a hypothetical tenant would reasonably pay for the c hereditament. The property to be valued must be assumed to be let, and the gross annual rent is the rent which a tenant might be reasonably expected to pay for a hereditament, if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command the rent. The tenant is assumed to take the hereditament from year to year, though he is supposed to have a reasonable expectation of continuing in occupation : *vide* Ryde on Rating, Edn. 17, p. 244.

It cannot be disputed that barring certain matters of detail, the principle embodied in S. 127 (a), Calcutta Municipal Act, is substantially the same. In case of land which is not covered by any building and in case of building erected for letting purposes the annual value is the rent, which would be worth to a hypothetical tenant who takes it from year to d year. Now, it is a well-established principle of English law that for purposes of rating, a property must be valued as it stands ; in other words only the present circumstances must be looked at, and neither the past conditions nor the future possibilities are to be taken into account.

"The rateable quality of land is not to be determined by what it once was, or what it may hereafter become . . . . it must be determined by what it was at the time when the rate was made:" (1871) 6 Q.B. 193[2] at p. 198. As Lord Maugham has expressed it in a recent case : "The hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition *(rebus sic stantibus)* and a continuation of the existing state of things was prima facie to be presumed:" 1937 A. C. 419[3] at p. 437. e

Mr. Bose argues that if this principle is applied to the present case, the premises in question ought to be valued on the basis of rent which would be paid by a hypothetical tenant who must be presumed to keep the land vacant, or at the most use it as an imperfect golf course as it is being used at present, and in either view the yearly rent would be considerably below what has been estimated by the Corporation. The Corporation, it is said, cannot value it on the basis of a different kind of user. We agree with Mr. Bose that the principle of valuing "*rebus sic stantibus*" could with perfect propriety be applied to cases coming under S. 127 (a), Calcutta Municipal Act. In fact the words "at the time of assessment" occurring in the section clearly indicate that in determining the value regard must be had to the conditions existing at the time when f the assessment is made. A flower garden cannot be valued at the rate at which it may be let as a brickfield. A dwelling house must be valued as such and not at a higher value which it would fetch if converted into a shop. The value that is to be ascertained is the value of the property to the owner, and consequently by determining the use to which the land would be put, the owner can determine to some extent the amount at which it shall be rated. But when the land is kept vacant, and the owner does not put it to any use at all, there is neither reason nor authority in support of the view that the value in such cases must be determined on the basis of the rent expected from a hypothetical tenant, who would take the land but would not use it in any way. Such a case could not possibly arise in English law, as a owner who does not use or g occupy his land is not rateable under the English law at all. All the decided cases in England go to show that when the house or structures are built or equipped in a certain manner, and intended to be used for any particular purpose, an employment of them for which they are suited or readily capable of being suited in their then actual condition, is to be presumed. But if they cannot be let for the purpose for which they were built, then, it would be quite within the competence of the rating authority to find out whether they could be let for any other or subsidiary purpose : *vide* the observations in 10 Mad. 38[4] at page 43.

Under the Calcutta Municipal Act, as we have already pointed out, an owner who keeps his land vacant would be bound to pay rates. In determining the value of such land, we cannot possibly hold that the standard would be the amount of rent payable h by a tenant who would keep it fallow and unoccupied. As the owner was not using it in any particular way, there is no presumption in favour of the continuance of any kind of user. The standard in such cases must be the rent which could be expected from a tenant, who would take the land as it is, and put it to such use, as is possible for a yearly tenant to do. To hold otherwise would be to make nugatory the provision of the Calcutta Municipal Act, which makes the owner of a vacant and unoccupied premises liable for rates.

In the case before us, the premises No. 10 (B) Garden Reach Road must be deemed to be a vacant

1. (1760) 2 Burr. 1053, R. v. St. Luke's Hospital.
2. (1871) 6 Q. B. 193 : 40 L. J. M. C. 30 : 23 L. T. 490 : 19 W. R. 246, Metropolitan Board of Wards v. West Ham.
3. (1937) 1937 A. C. 419: 106 L. J. K. B. 140: 156 L.T. 81 : 101 J.P. 125 : 35 L.G.R. 69 : 81 S. J.13: 53 T. L. R. 205 : (1937) 1 All. E. R. 11, Townley Mill Co. v. Oldham Assessment Committee.
4. ('87) 10 Mad. 38, Secy. of State v. Municipal Commissioners of the City of Madras.

land. Witness 1 for the appellant says that it a was a mere apology for a golf course. It is true that there are 4 holes in it, and the officers occasionally use it for golf practices, but the Railway Company expressly asked the Corporation to ignore such occasional user and treat it as vacant land, so that they might have the vacancy remissions (*vide* the evidence of witness 2 for the respondent at p. 18 of the Paper-book). This being the position, the question as to what rent it could have fetched if it was let out as a golf course does not in our opinion arise in this case. We can certainly conceive of cases, where a plot of land is laid out or is particularly suited to be used as a tennis court or a golf course, and in such cases, it might be quite proper to value it on that basis. But that question does not arise in the present case. Mr. Bose has not disputed before us that if the premises was let out as vacant land b to a yearly tenant, it could fetch the yearly rent, as is determined by the Calcutta Corporation. We hold therefore that the assessment is quite proper and the appeal should be dismissed with costs. Hearing-fee 10 gold mohurs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 458

SPECIAL BENCH

R. C. MITTER, B. K. MUKHERJEA AND SEN JJ.

Bijan Majumdar d/o Manindra Nath Majumdar — Petitioner

v.

Ranjit Lal Sen Gupta — Respondent.

c Divorce Suit No. 31 of 1940, Decided on 22nd May 1942.

(a) Hindu law—Marriage—Rule of prohibited degrees stated — Mode of calculating degree of remoteness explained.

According to the rules of Hindu law, a man cannot marry a female descendant within seven degrees from his father or any of his six immediate male ancestors. He is likewise incapable of marrying a damsel who is within five degrees from his maternal grandfather or any of his four paternal ancestors. The prohibition extends to the descendants of pitribandhus and matribandhus as well. The bride must not be a descendant within seven degrees of the bridegroom's pitribandhus or any of the latter's six male ancestors. She must not also be a descen- d dant within five degrees of the bridegroom's matribandhus or any of the latter's four male ancestors. [Mode of calculating degrees of remoteness explained.] [P 458 C 2; P 459 C 1]

Hindu law —

('40) Mulla, Pages 506 & 507 Pt. (z).

('38) Gour, Page 131 Pt. 1; Page 132 Para. 395.

(b) Hindu law—Marriage—Prohibited degrees — Exceptions — Trigotra rule explained — In counting gotras, bridegroom's gotra should always be excluded — Even if same gotra is repeated twice, interval of three gotras is established — Marriage with daughter's daughter of bridegroom's mother's sister held invalid.

One of the exceptions to the rule of prohibited degrees is the trigotra rule which sanctions marriage even with a girl within the prohibited degrees if she is removed from the bridegroom by three gotras. In computing the gotras for the purpose of applying the trigotra rule, the gotra of the bridegroom should always be excluded, the reason being that there is e no justification for including the gotra of the bridegroom who is not reckoned at all in computing the degrees for purposes of marriage either on the father's or the mother's side. The starting point in the computation would therefore be the gotra of any of the four persons, namely, the father, the pitribandhu, the maternal grandfather or the matribandhu through whom the girl is related and within seven or five degrees from whom the girl stands. The second gotra must differ from the first and the third from the second. If the same gotra is repeated twice then in spite of the sameness of the gotra the interval of three gotras is established. If the third gotra is the repetition of the first, that would not make any difference and the interval of three gotras would be established. [Marriage with daughter's daughter of bridegroom's mother's sister held invalid as the bride was within five degrees f from maternal grandfather of the bridegroom and the case did not come within the exception of the trigotra rule] : ('42) 29 A.I.R. 1942 Cal. 245, *Expl.* [P 459 C 1, 2]

Besides the trigotra rule there is another exception recognized by Hindu Smriti writers, to the ordinary rules of prohibited degrees and under this exception when a fit match is not otherwise favourable the khatryas in all forms of marriage and the other classes in the Asura or other inferior form of marriage may marry within the prohibited degrees, provided they do not marry within the fifth degree on the father's side and the third degree on the mother. This exception is based on the authority of Sulapani and has been supported by Paithanasi and Sakatayana, though it has not been accepted by Raghunandan. [P 459 C 2; P 460 C 1] g

Hindu law —

('40) Mulla, Pages 506 & 507 Pt. (z).

Radhika Ranjan Guha, Satis Chandra Sen and Sudhir Ranjan Dutt — for Petitioner.

Dr. Basak as Amicus Curiæ.

B. K. MUKHERJEA J. — This matter is brought before us, under S. 20 read with S. 17, Divorce Act, for confirmation of a decree of nullity of marriage made by the District Judge, 24 Parganas. The parties to the marriage are both Hindus belonging to the Baidya caste and they were married under the provisions of the Special Marriage Act, by the Registrar of Marriages for Calcutta on 8th April 1940. About six months after the marriage the wife presented a petition under S. 18, Divorce Act, for a declaration that the marriage was null h and void on the ground that she and the respondent were within prohibited degrees of consanguinity according to the Hindu law by which they are governed. There was no contest on the part of the respondent and the District Judge by his order dated 20th July 1940, declared the marriage to be a nullity. The learned Judge found on evidence adduced on behalf of the petitioner that she was the daughter's daughter of the respondent's mother's sister. Thus, the common ancestor of the parties was the maternal grandfather of the respondent and the petitioner was his great-granddaughter. The sole point for our consideration is whether the parties are within prohibited degrees of relationship for purposes of marriage under the Hindu law to which they are subject.

According to the rules of Hindu law, a man cannot marry a female descendant within seven degrees from his father or any of his six immediate male ancestors. He is likewise incapable of marrying a

damsel who is within five degrees from his maternal grandfather or any of his four paternal ancestors. The prohibition extends to the descendants of pitribandhus (पितृबन्धु) and matribandhus (मातृबन्धु) as well. The bride must not be a descendant within seven degrees of the bridegroom's pitribandhus (पितृबन्धु) or any of the latter's six male ancestors. She must not also be a descendant within five degrees of the bridegroom's matribandhus (मातृबन्धु) or any of the latter's four male ancestors. In the present case, the petitioner is within five degrees from the maternal grandfather of the respondent and consequently the marriage must be held to be invalid unless it comes within any of the exceptions recognised by the Hindu Smriti writers. One such exception is contained in the so-called trigotra rule which sanctions marriage with a girl otherwise prohibited if she is removed from the bridegroom by three gotras. The foundation of this rule is to be found in certain passages of Matsya Puran and Brihat Manu which are referred to by Raghunandan in his Udbahatatwa. The text of Matsya Puran stands as follows :

सन्निकर्षेपे कर्तव्यम् त्रिगोत्रात् परतो यदि।

which means that even in the case of nearness of relationship marriage is permissible if the girl is removed by three gotras. Raghunandan explained the term 'nearness' (सन्निकर्ष) as referring to the propinquity of relationship arising from the fact that the bride was within seven and five degrees respectively from the father's and the mother's side. The text of Brihat Manu is to the effect that one who is not connected by pinda or water is eligible for marriage and so also is one who is removed by three gotras.

असंबन्धभवेत् या तु पिण्डेनैवोदकेनवा।
सा विवाह्या द्विजातीनाम् त्रिगोत्रान्तरिता च या ॥

The mode of computing the gotras for the purpose of applying the trigotra rule has been thus stated by Raghunandan in his Udbahatatwa (*vide* Udbahatatwa by Raj Kumar Smriti Vedatirtha p. 41) :

अत्र सप्तमगणनप्रतियोगि पितृपितृबन्धु पञ्चमगणनप्रतियोगि मातामह मातृबन्धुगोत्रमादायैव प्रतिप्रसवे त्रिगोत्रगणनम्। ननु वरगोत्रापेक्षीया तस्य गणनायाम् प्रतियोगित्वात्, न वा तच्चतुष्टयगोत्रम् परित्यज्य त्रिगोत्रगणनम्, तथात्वेशूलपाणि महामहोपाध्यायोक्तिम् पंचमकिन्याया विवाहाभ्यनुज्ञानम् नोपपद्येत ॥

This means that in counting the gotras the gotra of the bridegroom should always be excluded, the reason given being, that there is no justification for including the gotra of the bridegroom who is, not reckoned at all in computing the degrees for purposes of marriage either on the father's or the mother's side. The starting point in the computation would be the gotra of any of the four persons namely, the father, the pitribandhu, the maternal grandfather or the matribandhu through whom the girl is related and within seven or five degrees from whom the girl stands. Raghunandan repels the suggestion made by some writers that these four gotras even are to be excluded for the purposes of ascertaining the three different gotras. This, he says, would militate against the opinion of the most learned professor Sulapani. The position, therefore, is that we have got to take the gotra of the father, the pitribandhu, the maternal grandfather or the matribandhu, as the case may be, to be the first in the order of computation and then if in coming down to the bride we meet with two other and different gotras before that of the bride is reached, the latter will be eligible for marriage on account of her being (त्रिगोत्रान्तरिता) or removed by three gotras though she is otherwise within the prohibited degrees. The second gotra must differ from the first and the third from the second, but if the third gotra is the repetition of the first, that would not make any difference according to Sree Krishna Tarkalankar, the well known commentator on Raghunandan though a different opinion is expressed by other writers. Sree Krishna's opinion is expressed in the following passage :

एवंच यत्रैकं गोत्रं वारद्वयम् निपतति तत्र गोत्रद्वयस्यैकत्वेपि त्रिगोत्रान्तरितत्वम् व्याहतमेवेति।

(*vide* Udbahatatwa by Srikrishna Tarkalankar, Edn. 2, p.172, 1845 Sakabda) which means "Further if the same gotra is repeated twice, then inspite of the sameness of the gotra the interval of three gotras is established." A contrary opinion is expressed in Udbaha Chandraloka as follows :

यत्र च एकं गोत्रं वारद्वयम् निपतति तत्र वारद्वयपातेहपि गोत्रस्य एकतान्न तत्र त्रिगोत्रान्तरित्वामिति वेविम्या

(when the same gotra falls twice, then, in spite of the fact that it has fallen twice, it must be understood that by reason of the sameness of the gotras the difference of three gotras is not established). We have no hesitation in giving preference to the opinion of Srikrishna Tarkalankar and this is quite in accordance with Hindu custom according to which change of gotra always takes place by reason of the marriage of a daughter who passing into the family of her husband acquires the gotra of the latter. Applying these rules to the case before us the first gotra in the order of computation must be taken to be that of Kali Kumar Das, the maternal grandfather of the bridegroom, whose fourth descendant the petitioner is. The gotra of Kali Kumar was Modgallya. The next gotra is that of Sarala Sundari, the daughter of Kali Kumar, who being born in the Modgallya gotra acquired by marriage the Sattari gotra of her husband. The third intervening gotra will be that of Chapala, the daughter of Sarala and mother of the petitioner, and as has been said already, that this gotra was Modgallya again would not make any difference. The petitioner, however, as the maiden daughter of Chapala must be deemed to be within and not beyond this third gotra. She is, therefore, not removed by three gotras according to the trigotra rule enunciated above and consequently is not eligible for marriage by the respondent. There is another exception recognised by Hindu Smriti writers, to the ordinary rules of prohibited degrees and under this exception when a fit match is not otherwise favourable the Khatryas in all forms of marriage and the other classes in the Asura or other inferior form of marriage may marry within the prohibited degrees, provided they do not marry within the fifth degree on the father's side and the third degree on the mother : *vide* Banerji's Marriage and Stridhana, p. 65 (Edn. 4). As has been pointed out by Sir Gurudas Banerji, this exception is based on the authority of Sulapani and

has been supported by Paithanasi and Sakatayana, though it has not been accepted by Raghunandan. It was not suggested either before us or in the Court below that the present case comes within this exception and there are no materials before us upon which we could express any opinion regarding it. We need not therefore consider this point at all. The result is that we hold that the present case does not come within the exceptions to the ordinary rules of prohibitive degrees as laid down by the Hindu Smriti writers and consequently the order of nullity of marriage made by the District Judge should be affirmed.

R. C. MITTER J. — I have had the advantage of reading the judgment of my learned brother which he has delivered just now. I agree with his conclusion that the marriage is a nullity, as the parties come within the prohibited degrees. But as I was a party to the decision in 46 C.W.N. 20[1] I wish to add few words. In that case Rajendu was connected with Santi Debi through the former's pitripoksha, i. e., through a pitribandhu, namely Raja Mohananda's grandson. In the case before us, the respondent is related to the appellant through the former's matripoksha, i. e., through his maternal grandfather, Kali Kumar Das. Their relationship is indicated by the following genealogical tree.

KALI KUMAR DAS (Modgallya gotra) = SANTO MONI DEBI

- Rasik Lal Sen (Sattari gotra) = Benodini Debi
  - Ranjit (respondent)
- Anath (Sattari gotra) = Sarala Sundari Debi
  - Chapala Bala = Manindra (Modgallya gotra)
    - Bijon Bala (appellant).

In my judgment for the decision of this case and cases of its kind texts which distribute themselves in three distinct groups and the comments of Raghunandan thereon are material. The first group of texts is noticed by Raghunandan in stanza 2 and the few following stanzas (I am following the numbering as given in Pandit Raj Kumar Vedathirtha's edition). It begins with the texts of Manu and Satatapa. "She who is the mother asapindia and who is also the father's agotra is commendable for marriage by the twice-born." He then examines the meaning of the word sapinda and then quotes a text from the Bishnupuran. Thereafter he quotes the text which literally translated runs as follows: "Seventh from the paternal relations (pitripaksha) and fifth from the maternal relations (matripaksha) a twice-born (dwija) may marry according to law." Commenting on this text Raghunandan takes the word pitripaksha to mean "the father and the pitribandhu as well, and the word matripaksha to mean "the mother and the matribandhu as well." For this computation he gives the eligible bride as are beyond the seventh (saptami) and the fifth (panchami) on the pitripaksha and matripaksha respectively. Thus Raghunandan gives the rule of computation of degrees and names the father and the pitribandhu on the paternal side and the mother and the matribandhu on the maternal side as the starting points for the computation of the seventh (saptami) and the fifth (panchami) up to which ineligibility would extend. He concludes this portion of the commentary by saying: "Here by the word mother the maternal grand-father is indicated." So the starting points become the father, the pitribandhu, the maternal grand-father and the matribandhu. The two texts of the Matsya Puran and Brihat Manu noticed in the judgment of my learned brother and which furnish the rule conveniently called the trigotra rule are then noticed by Raghunandan. The method of computation of the trigotras, for the trigotra rule, which is an exception to the general rules of prohibition, is dealt with in stanza 17. My learned brother has given the gist of this passage. The relevant passage as translated runs thus:

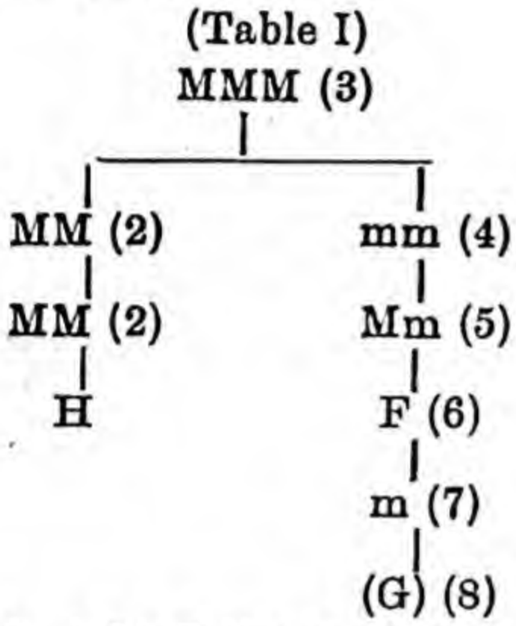
"Here in this excepting provision counting of trigotra should be including (adayoiba) the gotras of the father and the pitribandhu who are the starting points in the saptam reckoning and the gotras of the maternal grand-father and the matribandhu who are the starting points in the pancham reckoning; not, however, including the gotra of the bridegroom, as he never figures as a starting point in counting (in the general rule)."

Here, Raghunandan considers the question as to whether in counting the gotras for the trigotra rule the gotra of the father, pitribandhu, maternal grandfather or matribandhu, as the case may be, is to be reckoned or not. He notices the view that some sages exclude the gotras of the said persons but in this passage he disagrees with those views. To me his reasoning appears to be that as the trigotra rule is an exception to the general rule, namely, that a girl not removed from the pitripaksha by seven degrees or from the matripaksha by five degrees is ineligible, the gotras from the trigotra rule have to be counted from the same starting point from which the degree of remoteness is to be calculated for the purpose of the general rule. Raghunandan broadly gave the rule of computation of trigotra by saying that in the case of relation through pitripaksha, the computation should proceed from and including the gotra of the father and of the pitribandhu, and in case of relationship through matripaksha the computation should proceed from and including the gotra of the maternal grandfather and the matribandhu. Up to this point he did not specify which of the two starting points in each line (pitripaksha and matripaksha) should be the starting point in a particular case. So far as computation of the degree is concerned, it will be immaterial which of the two we take as the starting point, father or pitribandhu in the case of pitripaksha, or maternal grandfather or matribandhu in the case of matripaksha. But this specification would be material in the computation of gotras. Later on, Raghunandan introduces पितृबन्धु प्रभृति संबन्धघटक and मातृबन्धु प्रभृति संबन्धघटक producers of pitribandhu relationship and producers of matribandhu relationship. It is not necessary in this case to determine the exact signification of this introduction for the purpose of trigotra computation. The method of counting degrees is not fully indicated in this passage, but the starting point is indicated. They are the father, the pitribandhu, maternal grandfather and the matribandhu, as the case may be. As in counting degrees of remoteness for the general rule the bridegroom is not reckoned his gotra is not to be taken into account, for the trigotra rule. It is therefore necessary to consider how the degree of remoteness indicated in the general rule is calculated. That is

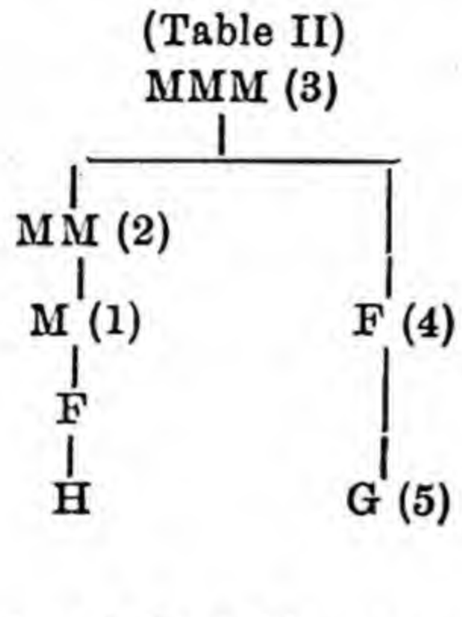
1. ('42) 29 A.I.R. 1942 Cal 245 : 200 I. C. 469 : 74 C. L. J. 241 : 46 C. W. N. 20, Anila Bala Debi v. Madhabendu Narain Roy.

indicated in other passages. The rule is that the bridegroom is not to be counted at all. But the counting must proceed from the starting point up to the common ancestor of the bridegroom and the bride and then down to the bride when the prohibition to be considered is through the father or the mother, and from the pitri or matribandhu, as the case may be, up to the Bandhu Ghatak relation, e. g., the Bandhu's ancestor and then from that relation down to the bride. To these general rules, one qualification must be made, namely where the relationship is through the mother of the bridegroom, the mother is taken into account by the Mitakshara School, but in the Bengal School she is not reckoned, but the upward counting proceeds from the maternal grandfather. The following illustrations would make the position clear. M or m represents males and F females, H, the bridegroom and G the bride :

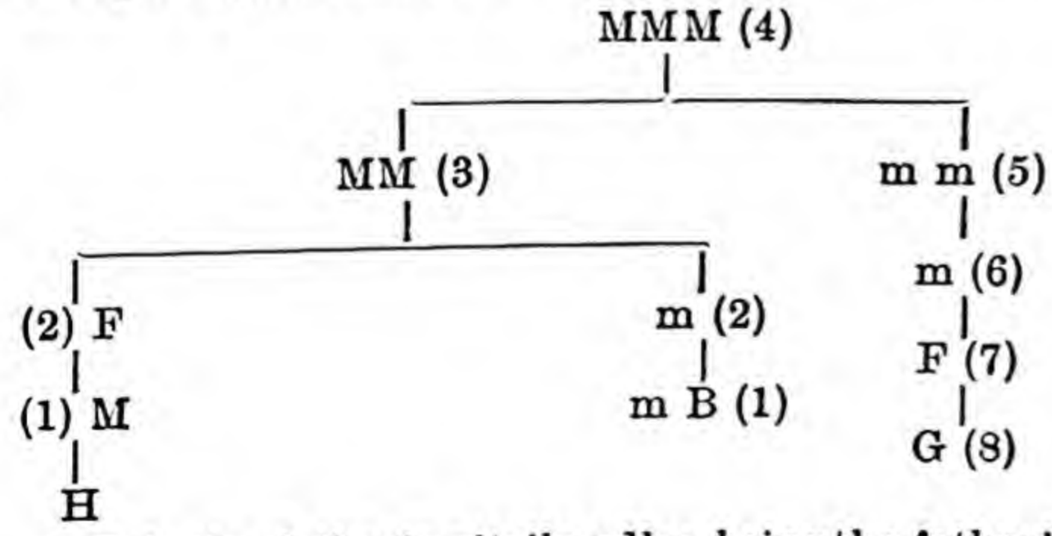
(Table I)



(Table II)



In table I, the common ancestor of the bridegroom and the girl is MMM, the boy's great-grandfather. The girl is removed by eight degrees. In table II, the bridegroom and the bride are related through the former's mother and the common ancestor is MMM, the boy's great-great-maternal grandfather. According to the Mitakshara School, the girl would be removed six degrees but according to the Dayabhaga she would be removed five degrees only the boy's mother (F) being not counted. As the parties to the appeal which we have before us are governed by the Bengal School Bijon Bala is removed by only four degrees. She is accordingly within the prohibited degrees and the marriage is invalid unless the exception, the trigotra rule, helps Ranjit. The following table illustrates the method of counting of degree of remoteness when the connexion is through a pitribandhu :



m B is the father's pitribandhu, being the father's maternal uncle's son. The girl is related through the Bandhu Ghatak relation, that is the Bandhu's ancestor MMM. The girl is thus removed eight degrees and is eligible. From the above illustrations it would appear that in counting of degrees of remoteness there is no difference in the number of degrees whether the counting proceeds from the father or the father's pitribandhu for both of them are on the same level. If the reason of the rule given by Raghunandan for the view that for the trigotra rule the gotras of the father and pitribandhu are not to be excluded but included be strictly followed I do not see how the observations which we made in 46 C. W. N. 20[1] at pp. 26 and 27 would be affected. I may, however, state that in view of the illustrations given in stanza 21 to clarify the conclusion to which he comes on considering the third group of texts, that the counting for the trigotra rule should start from the bandhu when the girl is a direct descendant of the bandhu or when the bandhu through him relationship is traced is the father's or the mother's maternal uncle's son, but in all other cases from the bandhus maternal grandfather, some of the expressions used in 46 C. W. N. 20[1] may have to be re-examined. The actual decision in that case, can, however, be supported on another ground not noticed there, as it was not urged by the advocates, that Santi Debi would not have been absolutely ineligible for marriage to Rajendu but could have been eligible under the second exception founded on the text of Paithinasi. That was not a case, where a marriage actually solemnised had been challenged but was a case of adoption, the question being whether in any circumstances Santi Debi whose son was adopted could have been married by Rajendu to whom the adoption was made. As in the case before us the gotra has to be counted form Kali Kumar the maternal grandfather and not from Benodini, the mother of Ranjit on the basis of what Raghunandan has said the marriage is invalid.

SEN J. — I agree.

G.N./R.K. *Order accordingly.*

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LORT-WILLIAMS J.

In the matter of Bengal Silk Mills Co., Ltd.

Application in Suit, Decided on 18th July 1941.

*** Company — Transfer of shares in blank — Death of original transferor — Transferee can fill in his own name as transferee and date of transfer and is entitled to have his name registered as holder of shares.**

Whether it be a matter of agency or authority or contract the transferee in cases of transfers of shares in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer, after the death of the original transferor. The instrument then is complete and the transferee is entitled to have his name registered as the holder of shares in the company's register: (1884) 25 Ch.D. 666, *Rel. on*; *English case law discussed.* [P 464 C 1]

S. K. Basu — for Applicant.

Sushil Sen — for the Company.

ORDER.—This is a petition by Mahomed Solaiman Ariff alias S. Monawar Nawab Ariff, who prays for rectification of the register of members of the respondent company. He states that Mt. Fatma Begum (since deceased) of No. 3, Amratolla Lane, who is the registered holder of six shares in the capital of the company, was the petitioner's grandmother. He says that he is the present holder of the shares for valuable consideration, as he holds a duly executed instrument of transfer in his favour. He presented this instrument to the company, together with the share script on 4th March 1941 for registration but on 5th March 1941 he was told that the directors had refused to register the transfer,

without giving any reason therefor. It appears that on 22nd March 1897 these six shares were issued in favour of Mt. Fatma Begum. On 5th December 1928 she transferred the shares in blank to one Mr. A.S.A. Suhrawardy for Rs. 2100 and on 10th December 1940 he transferred the shares in blank to the petitioner for Rs. 2400. Yusuf Cassim Ariff is one of the directors of the company, and in his affidavit dated 7th June 1941 he stated that the directors having examined the instrument of transfer and the original script, were not satisfied that the signature was that of Mt. Fatma Begum, nor that the shares were transferred by her to the applicant. Further, he stated that the instrument of transfer was incomplete, and alleged that it was filled up after the death of the alleged transferee and sometime after November 1940, whereas the transferee died about 1935. The directors and the petitioner are closely related. Yusuf is his uncle. No evidence has been tendered on behalf of the company in support of the objections contained in Yusuf's affidavit.

The signature of Fatma Begum was witnessed by one S. C. Ariff, and there is nothing to show that the signature is not genuine, or that the sum of Rs. 2100 was not paid by Suhrawardy to the original transferee. It is admitted that the instrument of transfer was filled up after the death of Fatma Begum, namely, at the date of the transfer from Suhrawardy to the petitioner, on 10th December 1940. It is true that the instrument is incomplete because the latter date has not been inserted and must be inserted before the shares can be registered. The relevant Articles of Association of the company are as follows:

"Transfer and Transmission of Shares.

37. The instrument of transfer of any share shall be signed by both the transferor and the transferee and the transferor shall be deemed to remain the holder of such share, until the name of the transferee is entered in the register in respect thereof."

Number 38 provides the form in which the instrument of transfer must be drawn up, and the transfer in the present case is in the form provided.

"39. The managing agents may decline to register any transfer of shares, upon which the company has a lien and in the case of shares not fully paid up, may refuse to register a transfer to a transferee of whom they do not approve."

There is no suggestion in the present case that anybody disapproves of the petitioner.

"40. Every instrument of transfer shall be left at the office for registration accompanied by the certificate of the shares to be transferred and such other evidence as the company may require to prove the title of the transferor his right to transfer the shares."

No question has been raised about the transferor's title or right to transfer. The only question therefore remaining to be decided is what is the effect of a transfer in blank made after the death of the original transferor, that is to say, the original and registered holder of the shares? In Sircar & Sen's Indian Companies Act, 1913, the learned authors at page 109 have stated as follows:

"In the case of a transfer executed in blank if the transferor dies before the ultimate transferee's name has been subsequently filled in, that would not in any way affect the right of such transferee to get his name registered. The reason is that so far as the transferor is concerned he loses his right in the shares as soon as he executed transfer in blank. The transfer is good as against him even though the transferee has not filled up the form."

In support of this statement they cite the case in (1891) 64 L. T. 476.[1] But, in my opinion, this case is no authority for the proposition. The case turns on the question of insolvency and not of the death of the original transferor. Nevertheless, in my opinion, the statement is correct. There is very little, if any, direct authority upon this question but transfers in blank have been described by various authorities. Thus in Balmer's Company Law, 13th Edn., at page 132 it is stated that "upon a sale or mortgage of shares, the transferor very commonly signs and hands over what is called a blank transfer (i. e., a transfer signed by the transferor, but with a blank for the name of the transferee), the intention being that the purchaser or mortgagee shall be at liberty later on to fill up the blank and perfect his security by getting himself registered. If however the regulations require the tranfer to be by deed, the transferee cannot effectively fill up the blank and deliver the deed unless authorized so to do by power of attorney under seal. Whereas, if the transfer may be under hand merely, the authority to fill up the blank may be oral and may be implied from the nature of the transaction."

In (1873) 17 Eq. 273[2] it was held, that the transfers although not good as deeds, were valid instruments in writing within the meaning of the Articles of Association, and conferred a good title to the shares at law as well as in equity; and the transferee was entitled to have his name on the register. It was contended that the transfers, though not valid as deeds, were evidence of a contract to transfer the shares, by virtue of which the transferees became equitably entitled to them. Sir George Jessel, M.R., at p. 279 described the transaction in the following words:

"The case is an unfortunate one, undoubtedly, for Mr. Joseph Fry; but the facts really are very plain indeed. Mr. Fry borrows what I will call for shortness' sake £450 of a Mr. Cannon, a share broker. He deposits with him as security the transfers of certain shares not quite filled up, that is, there was no date to them, and there was no name of the transferee; they were what are commonly called blank transfers. The deposits were made on two different occasions as a security. He hands to him also certificates of shares. I have no doubt that without express words Mr. Cannon was authorised, and was intended to be authorized by Mr. Fry, if necessary, to fill up the blank, and get the shares registered."

And on page 280, he said:

"Now, in the first place, there can be no question that these transfers were not valid as deeds; but then no deed is required by the Articles of Association of the company. As I have already said, I hold there was authority to fill up the blanks over the signature of Mr. Fry, and therefore they were validly signed, and I think ought to have been registered."

In (1890) 15 A. C. 267,[3] Lord Watson at p. 277 said as follows:

"As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English Court would be guided in similar circumstances when the indorsed transfer has been duly

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1. (1891) 64 L.T. 476 : 60 L.J.Q.B. 599 : 8 Morrell 86, In re Dodds; Ex parte Brown v. Coates.
2. (1873) 17 Eq. 273 : 43 L. J. Ch. 425 : 22 W. R. 815, In re Tahiti Cotton Company; Exparte Sargent.
3. (1890) 15 A.C. 267: 60 L.J.Ch. 131: 63 L.T. 27: 39 W.R. 17, Colonial Bank v. Cady.

P. N. Das
Calcutta High Court
Jammu & Kashmir
Srinagar

executed by the registered owner of the shares the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour.

The appellants' witnesses say that delivery of the certificate with the transfer executed in blank 'passes, the property' of the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer the original transferor, who is entered as owner in the certificate and register continues to be the only share-holder recognised by the company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares but a title, legal and equitable which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

In (1887) 36 Ch. D. 36[4] Chitty J. at p. 44 said as follows :

"The normal mode of transfer as appears from the documents themselves and the evidence is as follows : The transfer and power of attorney are signed by the registered share-holder whose name appears on the face of the certificate, and his signature is attested by a witness. The name of the transferee is filled in and the documents are taken to the office of the company; the certificates are surrendered and cancelled, and a new certificate is issued to the transferee whose name has been entered on the register. According to a practice which has extensively prevailed and has been recognised and acted upon by the company, the transferor signs the transfer and power of attorney without filling in the names of the transferee and attorney; and these blank transfers readily pass on the market from hand to hand by delivery only until the documents reach the hands of some holder who desires to be registered. His name is then filled in by himself or on his behalf. The documents are then left with the company, the certificates are cancelled, the transferee is registered, and new certificates in his name are issued in the manner already described.

The plain legal effect of this recognized practice is, that the transferor who executes in blank confers on the holder of the documents for the time being an authority to fill in the name of the transferee ; and each successive holder for the time being, when the documents pass through several hands, passes on this authority. The holders must of course be bona fide holders for value without notice."

And at page 53 :

"Having regard to the practice proved and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the bona fide holder for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority."

In addition to these statements there are the provisions of S. 202, Indian Contract Act, to the effect that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. And Illustration (a) provides as follows :

"*A* gives authority to *B* to sell *A's* land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death,"

the authority for the proposition being (1830) 10 B. & C. 731.[5] If the petitioner therefore is to be regarded as the agent of the original transferor, clearly he has an interest in the property for which he has paid Rs. 2400 to Suhrawardy and for which Suhrawardy paid Rs. 2100 to the original transferor. This section of the Contract Act, merely states in a codified form the well-known principles of English law regarding authority coupled with interest. Mr. Sushil Sen has drawn my attention to a passage in Gore-Browne's Hand-book on Joint Stock Companies, Edn. 38, at p. 246 as follows :

"Even when a deed is not required, it appears that if the original transferor died, the authority to fill in the blanks would be at an end, although no doubt an equity would subsist to compel the executors to give effect to the contract."

This is a tentative suggestion on behalf of the learned authors based upon the following authorities: (1873) 17 Eq. 273[2] (to which I have referred); (1893) 1 Ch. 612,[6] (1893) 2 Ch. 555[7] and (1891) L. R. 29 Ir. 19.[8] I have not been able to obtain the last authority, but I have carefully examined the other two and cannot find that they furnish any support for the proposition advanced in the text. On the contrary, the learned authors refer in a note on the same page to the case in (1884) 25 Ch. D. 666,[9] as an authority in opposition to the proposition stated. This case seems directly in point. The headnote is as follows :

" A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor."

Cotton, L. J. at p. 669 says as follows :

" It was said that the documents were not bills of exchange, and not promissory notes, and assuming that they could be filled up and made perfect before the death of the acceptor yet that after his death no one had power to fill them up. That was

4. (1887) 36 Ch. D. 36 : 56 L.J.Ch. 1089 : 57 L.T. 148 : 36 W. R. 259, Colonial Bank v. Hepworth.

5. (1830) 10 B. & C. 731 : 5 Man. & Ry. 613 : 8 L.J.K.B. 313 : 34 R. R. 558, Gaussen v. Martin.
6. (1893) 1 Ch. 612, Powell v. London & Provincial Bank.
7. (1893) 2 Ch. 555 : 62 L. J. Ch. 795 : 2 R. 482 : 69 L. T. 421 : 41 W. R. 545, Powell v. London & Provincial Bank.
8. (1891) L. R. 29 Ir. 19, Kelly v. Munster & Leinster Bank.
9. (1884) 25 Ch. D. 666 : 54 L. J. Ch. 138 : 50 L. T. 670 : 32 W. R. 692, Carter v. White.

the only point decided by Kay J. who held that they could be now filled up, and in my opinion it was correctly decided. The power which White had to fill up the acceptances was not in consequence of White being appointed by Randle his agent to fill them up on his behalf, but, in consequence of a contract that the person to whom they were given, or any one authorised by him, should be at liberty to fill them up. That contract was not put an end to by the death of the acceptor."

And Fry L. J. at p. 672 said as follows :

" The question before Kay J. was whether such a document as we have in this case can be filled up after the death of the acceptor ; and it was argued that the delivery of the acceptance conferred an authority to fill it up, which came to an end with the death of the person who gave it, and therefore that it was too late now to make the acceptance a complete bill. In my judgment that reasoning proceeds upon a false proposition. It is not by an authority, but by a contract between the acceptor and the intended drawer, that the drawer had a right to fill up the instrument and make it a complete bill. That is the nature of the transaction between them, you may call such a right an authority, but it is a right founded on a contract, and being a contract it does not come to an end by the death of the acceptor. The instrument may be made perfect after the death of the acceptor, as well as before. Therefore, in my opinion the judgment was right."

It seems clear therefore that whether it be a matter of agency or authority or contract, the transferee in cases of transfers in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer, after the death of the original transferor. If it were otherwise the vast amount of business done by means of blank transfers would have to cease, because it would be quite impossible in many cases to ascertain without much trouble and inconvenience whether the original transferor was alive or not. If therefore the petitioner fills in the date of the transfer from Suhrawardy to himself, namely, 10th December 1940, the instrument will be complete and he will be entitled to have his name registered as the holder of these shares. Subject therefore to that condition, he is entitled to an order for rectification of the register. The application is allowed with costs. Certified for counsel.

G.N./R.K. *Application allowed.*

A. I. R. (29) 1942 Calcutta 464

BARTLEY AND LODGE JJ.

Bimal Protiva Debi

v.

Emperor

Criminal Revn. Petn. No. 847 of 1941, Decided on 5th December 1941.

(a) Government of India Act (1935), S. 102 (1) and (3)—Defence of India Act — Proclamation of emergency made under S. 102 (1) was approved of by both Houses of Parliament — Defence of India Act is not ultra vires.

The proclamation of emergency which was made by the Governor-General under S. 102 (1) was approved by resolutions of both Houses of Parliament within the period provided by S. 102 (3). The official report of the proceedings of the House of Lords is proof that the proclamation was approved by that House. Hence the Defence of India Act is not ultra vires by reason of S. 102 (1) and (3). [P 465 C 1]

(b) Defence of India Act (1939), S. 1 (4) — Question whether S. 1 (4) is repugnant to S. 102 (4), Government of India Act depends on events which have not yet taken place — Aforesaid provisions of two Acts are not conflicting — S. 1 (4), Defence of India Act is valid — When it may become ultra vires stated.

At the time the Defence of India Act was passed, there was a proclamation of emergency under S. 102, Government of India Act, and that proclamation of emergency had not then ceased to operate. The Central Legislature was, therefore, competent under S. 102, Government of India Act, to pass the Defence of India Act and to provide under S. 1 (4) that that Act should remain in force for the period of the proclamation of emergency and for a period of six months after the proclamation had ceased to operate. The proclamation of emergency has, within the period of six months from its proclamation been approved by resolutions of both Houses of Parliament. Therefore, under S. 102 (3), Government of India Act, the proclamation of emergency still operates and has never ceased to operate since it was first made. The conditions necessary to enable the Central Legislature to pass the Defence of India Act still exist and have existed continuously from the time when the Act was first passed. Therefore the Defence of India Act was in force at the time it was passed, has remained in force up to date and will remain in force under S. 102 (4). Government of India Act, until the expiration of the period of six months after the proclamation of emergency has ceased to operate unless the present war comes to an end before the proclamation of emergency is revoked. If that period should not be the same as the period prescribed in S. 1 (4), Defence of India Act, then the provisions of S. 1 (4) will be ultra vires only in respect of the period not covered by S. 102 (4), Government of India Act. [P 465 C 2]

The question whether in fact S. 1 (4), Defence of India Act, is repugnant to the provisions of S. 102 (4), Government of India Act, is dependent upon events which have not yet taken place. The provisions of the two Acts are not necessarily conflicting. [P 465 C 2]

(c) Defence of India Act (1939), Rules under, R. 39 (2)—To prove possession under R. 39 (2) some element of knowledge on part of accused must be proved—Element of knowledge can be proved from attendant circumstances—Accused held in "possession" of prejudicial reports within R. 39 (2).

To prove possession under R. 39 (2) it is necessary for the prosecution to establish some element of knowledge on the part of the person said to be in possession: ('30) 17 A.I.R. 1930 Cal. 668, *Approved*. [P 466 C 1]

This element of knowledge can be established from the attendant circumstances. [P 466 C 1]

On a search of the premises of the accused documents containing prejudicial reports were found in a drawer in the desk in a room which the accused was occupying:

Held that the circumstances of the case were sufficient to establish beyond reasonable doubt that the accused had knowledge of the existence of the documents in the drawer of her desk and as she clearly had dominion over those documents she was in possession of them within R. 39 (2). [P 466 C 1]

(d) Defence of India Act (1939), Rules under, R. 39 (2) — Whether R. 39 (2) is ultra vires *(Quære)*.

Whether R. 39 (2) is ultra vires as being beyond the scope of the rule-making power conferred by S. 2, Defence of India Act. [P 466 C 1]

J. C. Gupta, P. K. Bose and Sudhansu Bhusan Sen—for Petitioner.

Jitendra Mohan Banerjee and Nirmal Kumar Sen—for the Crown.

LODGE J. — This is a rule issued upon the District Magistrate of 24-Parganas to show cause why the conviction of the petitioner under R. 39 (6) of the Defence of India Rules and the sentence passed thereunder should not be set aside. The material facts are as follows. On a search of the premises of the petitioner, Sreemati Bimal Protiva Debi on 3rd April 1941, documents which are alleged to be documents containing prejudicial reports were found in a drawer in the desk in a room which the lady was occupying. The lady was placed upon her trial on a charge of being in possession of documents containing prejudicial reports and was sentenced by the Additional District Magistrate of 24 Parganas to simple imprisonment for a period of one year and also to pay a fine of Rs. 250 and in default to serve a further term of simple imprisonment for six months. An appeal to the Sessions Judge was dismissed.

It has been argued before us that the Defence of India Act as a whole is ultra vires inasmuch as the Act was passed by the Central Legislature purporting to act under the provisions of S. 102, Government of India Act, 1935 though it was beyond the powers of the Indian Legislature to pass that Act. It has been argued before us that there is no evidence to show that the proclamation of emergency which was admittedly made by the Governor-General under S. 102 (1), Government of India Act, 1935, had been approved by resolutions of both Houses of Parliament. Mr. Gupta appearing for the petitioner has argued that the official report of the proceedings of the House of Lords on which reliance was placed before us to show that the approval of the House of Lords had been obtained was not admissible in evidence. In a previous case, we have already decided that the proclamation of emergency was approved by resolutions of both Houses of Parliament within the period provided by S. 102 (3), Government of India Act, 1935, and we have therefore no hesitation in holding that the proclamation of emergency was so approved and in accepting the official report of the proceedings of the House of Lords as proof that the proclamation was approved by that House. Mr. Gupta has further argued that the provisions of S. 1 (4), Defence of India Act, are repugnant to the provisions of S. 102 (4), Government of India Act, 1935, and that therefore the Defence of India Act was not legally in force at any time. Section 102 (4), Government of India Act, provides that : "A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

Section 1 (4), Defence of India Act, provides that the Act "shall be in force during the continuance of the present war and for a period of six months thereafter." It is clear that unless the proclamation of emergency remains in force for the period of the present war the Defence of India Act cannot continue in force for the period laid down in S. 1 (4) of the Act. In other words, S. 1 (4) provides that the Act shall be in force for a period which is dependent upon future events and which may in fact exceed the period for which the Legislature was entitled to legislate under S. 102 (4), Government of India Act. From these circumstances, Mr. Gupta has argued that S. 1 (4), Defence of India Act, was beyond the powers of the Central Legislature acting under S. 102, Government of India Act, and therefore the Defence of India Act should be interpreted as though these provisions did not exist in the Act. We are unable to accept this contention. In the first place, at the time the Defence of India Act was passed there was a proclamation of emergency under S. 102, Government of India Act, and that proclamation of emergency had not then ceased to operate. The Central Legislature was therefore competent under S. 102, Government of India Act, to pass the Defence of India Act and to provide that that Act should remain in force for the period of the proclamation of emergency and for a period of six months after the proclamation had ceased to operate; that is to say, the conditions necessary to enable the Central Legislature to pass an Act of this nature existed at the time the Act was passed. The proclamation of emergency has not been revoked by any subsequent proclamation under S. 102 (3) (a), Government of India Act. It has, within the period of six months from its proclamation been approved by resolutions of both Houses of Parliament. Therefore, under S. 102 (3), Government of India Act, the proclamation of emergency still operates and has never ceased to operate since it was first made. In other words, the conditions necessary to enable the Central Legislature to pass the Defence of India Act still exist and have existed continuously from the time when the Act was first passed. Such being the case, it is our opinion that the Defence of India Act was in force at the time it was passed, has remained in force up to date and will remain in force under S. 102 (4), Government of India Act, until the expiration of the period of six months after the proclamation of emergency has ceased to operate unless the present war comes to an end before the proclamation of emergency is revoked. If that period should not be the same as the period prescribed in S. 1 (4), Defence of India Act, then the provisions of S. 1 (4) will be ultra vires only in respect of the period not covered by S. 102 (4), Government of India Act.

The question whether in fact S. 1 (4), Defence of India Act, is repugnant to the provisions of S. 102 (4), Government of India Act, is dependent upon events which have not yet taken place. The provisions of the two Acts are not necessarily conflicting. Mr. Gupta has pointed out that in the judgment of the learned Additional Sessions Judge dismissing the appeal of his client, the learned Additional Sessions Judge relied upon R. 39 (2) of the Defence of India Rules in order to come to a finding that the petitioner was in possession of documents containing prejudicial reports. Rule 39 (2) reads as follows :

"Any person who, without lawful authority or excuse, has on any premises in his occupation or under his control any document containing any information likely to assist the enemy, any confidential information or any prejudicial report shall, unless he proves that he did not know, and had no reason to suspect, that the said document contained any such information or report as aforesaid, or that the said document was on such premises without his knowledge or against his consent, be deemed to have contravened this rule."

Mr. Gupta has argued that this rule is ultra vires in that it was beyond the scope of the rule-making power conferred by S. 2, Defence of India Act. The particular provision under S. 2, Defence of India Act, with which we are concerned is S. 2 (2) (iv) (b) which provides :

(2) "without prejudice to the generality of the powers conferred by sub-s. (1) the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely .... (iv) .... preventing anything likely to assist the enemy or to prejudice the successful conduct of war, including .... (b) acquisition, possession without lawful authority or excuse and publication of information likely to assist the enemy."

Mr. Gupta has conceded that under the rule-making power the Central Government was entitled to provide that no person should without lawful authority or excuse have in his possession any document containing a prejudicial report and was entitled under the Act to provide for the punishment of anybody contravening that rule. Mr. Gupta argues that the Central Government had no authority under the rules to provide that possession referred to in S. 2 (2) (iv) (b), Defence of India Act, should be possession other than as known to the law of the land. Such being the case, his argument is that any provision by rule to the effect that existence of a document in a particular place should be deemed to be possession, if the existence of that document in that place is not possession according to the ordinary law of the land, is ultra vires. We are not prepared to say that there is no substance in this argument, but it is not necessary in the present case for us to consider and determine whether or not this rule is ultra vires. The facts found in the present case by both the Courts below were, in our opinion, sufficient to prove possession of the documents by the petitioner according to the ordinary legal interpretation of the word 'possession.'

Mr. Gupta drew our attention to the ruling in A. I. R. 1930 Cal. 668,[1] in which it was held that to prove possession it was necessary for the prosecution to establish some element of knowledge on the part of the person said to be in possession. With that proposition we are in agreement, but we consider that this element of knowledge can be established from the attendant circumstances and that the circumstances proved in the present case were sufficient to establish beyond reasonable doubt that the lady had knowledge of the existence of those documents in a drawer of her desk and as she clearly had dominion over those documents she was, in our opinion, in possession of them. Such being the case, she was rightly convicted. In the result, therefore, we find that there is no ground for our interference. The rule is accordingly discharged. The petitioner must surrender to her bail to serve out her sentence. Certificate under S. 205 (1), Government of India Act, 1935, is granted.

BARTLEY J. — I agree.

G.N./R.K. *Rule discharged.*

1. ('30) 17 A.I.R. 1930 Cal. 668 : 129 I. C. 184 : 32 Cr. L. J. 245, C. C. Baker v. Emperor.

A. I. R. (29) 1942 Calcutta 466

EDGLEY AND BISWAS JJ.

Lilabati Debi—Defendant — Petitioner

v.

Ayesha Khatun w/o Mobarak Ali and another—Plaintiffs—Opposite Party.

Civil Revn. Appln. No. 1465 of 1941, Decided on 7th January 1942, for setting aside order of Judge Small Cause Court, Sealdah (24-Parganas), D/- 22nd August 1941.

Bengal Agricultural Debtors Act (7 of 1936 as amended by Act 8 of 1940), S. 2 (6A) — Small Cause Court at Sealdah constituted under Provincial Small Cause Courts Act is not civil Court within S. 2 (6A) — Fact that in notification appointing Judge as Small Cause Court Judge of Sealdah he was described as Sub-Judge does not make that Court one of Sub-Judge.

The Court of Small Causes at Sealdah constituted under the Provincial Small Cause Courts Act of 1887 is not a civil Court within the meaning of S. 2 (6A), Bengal Agricultural Debtors Act. The mere fact that in the notification whereby the Judge was appointed as Small Cause Court Judge of Sealdah he was described as a Subordinate Judge does not constitute the Small Cause Court at Sealdah the Court of a Subordinate Judge within the meaning of S. 3, Bengal, Agra and Assam Civil Courts Act. [P 466 C 2; P 467 C 1]

Hemendra Chandra Sen and Satyendra Chandra Sen — for Petitioner.

Shyama Charan Mitter — for Opposite Party.

EDGLEY J. — This rule is directed against the order of Mr. H. K. Mukherjee, Small Cause Court Judge at Sealdah, dated 22nd August 1941 in which he held that the Sealdah Small Cause Court was not a civil Court within the meaning of the Bengal Agricultural Debtors Act and that consequently S. 34 of that Act had no application to any suit or proceeding pending in that Court. It appears that the petitioner had been sued in the Sealdah Small Cause Court for the recovery of the sum of Rupees 400-6-0. Subsequently, she made an application to the Debt Settlement Board and a notice under S. 34, Bengal Agricultural Debtors Act, was served on the learned Small Cause Court Judge.

It is argued that the Sealdah Small Cause Court must be regarded as a civil Court within the meaning of the Bengal Agricultural Debtors Act, having regard to the language of S. 2 (6A) of that Act which is in the following terms : "'Civil Court' means a civil Court within the meaning of the Bengal, Agra and Assam Civil Courts Act, 1887, and includes any Court exercising appellate or revisional jurisdiction over any such Court." The "Civil Courts" within the meaning of the Bengal, Agra and Assam Civil Courts Act are mentioned in S. 3 of that Act and are as follows : (1) the Court of the District Judge; (2) the Court of the Additional Judge; (3) the Court of the Subordinate Judge and (4) the Court of the Munsiff. The Court of Small Causes at Sealdah is not included in any of the above mentioned categories, but has been constituted under S. 5, Provincial Small Cause Courts Act, 1887, and Mr. H. K. Mukherjee was duly appointed a Judge of that Court under S. 6 of the Act. The mere fact that in the notification whereby he was appointed as Small Cause Court Judge of Sealdah he is described as a Subordinate Judge does not

constitute the Small Cause Court at Sealdah the Court of a Subordinate Judge. The Sealdah Court remains a Court of Small Causes constituted under the Provincial Small Cause Courts Act of 1887 and it is not a civil Court within the meaning of the Bengal Agricultural Debtors Act. In these circumstances we are of opinion that the decision of the learned Small Cause Court Judge is correct. It is, therefore, affirmed and this rule is discharged with costs—the hearing fee being assessed at one gold mohur.

G.N./R.K. *Rule discharged.*

A. I. R. (29) 1942 Calcutta 467 (1)

B. K. MUKHERJEA AND SEN JJ.

Benoy Kumar Acharjee Choudhury and others—Defendants—Appellants

v.

Ahammad Ali and others—Respondents.

Appeal No. 11 of 1940, Decided on 18th November 1941, from appellate order of Dist. Judge, Dacca, D/- 27th September 1939.

Bengal Wakf Act (13 of 1934), S. 70—Object—It is mandatory on Court to issue notice under S. 70 even if claim that property is wakf is contested.

It is mandatory on Court to issue notice to the Commissioner of Wakfs under S. 70 even if the claim that the property is wakf is contested. The Commissioner of Wakfs is an officer appointed to protect wakf properties. The intention of S. 70 is to enable the Commissioner to carry out this function in suits. If in a suit a claim is made that certain property is wakf, the Commissioner of Wakfs as protector of all wakfs is obviously interested to see that the suit is properly conducted so that no wakf estate is destroyed and adversely affected. Section 70 enables him to do this. To limit the extent of S. 70 only to cases where the suit is in respect of property which is admittedly wakf would be to stultify the very object of the section.

[P 467 C 2]

Jatindra Mohan Choudhury and Ranajit Acharjya Choudhury—for Appellants.

Dr. Naresh Chandra Sen Gupta and Sharfuddin Ahmed—for Respondents.

SEN J.—This appeal arises out of a representative suit instituted by certain Mahomedans of the District of Mymensingh for a declaration that a certain property was wakf property. The suit was instituted in the District of Dacca. The learned Subordinate Judge dismissed the suit on two preliminary grounds. He held, first, that the plaintiffs had no cause of action and, secondly, that the suit was barred by the provisions of S. 42, Specific Relief Act, inasmuch as the plaintiffs had not prayed for consequential reliefs. Against this decision an appeal was taken to the District Judge. The learned Judge remanded the case holding that the decision of the learned Subordinate Judge on the preliminary issues was erroneous. The defendants have now appealed to this Court. In course of the argument it came to light that no notice was issued to the Commissioner of Wakfs. Section 70, Wakf Act, states that in every suit or proceeding in respect of wakf property the Court shall issue a notice to the Commissioner of Wakfs at the cost of the party instituting such suits, an exception being made in the case of suits or proceedings for the recovery of rent by or on behalf of the mutwalli. In our opinion, it was mandatory on the Court to issue this notice. Sub-section (4) of S. 70 says that if such notice has not been issued the Commissioner may apply to the Court to have a declaration that the decree passed in the suit is void.

It was contended on behalf of the appellants that S. 70, Wakf Act, applies only where the suit is in respect of property which is admittedly wakf and that no notice is necessary where the defendant, as in the present case, contends that the property is not wakf property. We are not impressed by this argument. The Commissioner of Wakfs is an officer appointed to protect wakf properties. The intention of the section is to enable the Commissioner to carry out this function in suits. If in a suit a claim is made that certain property is wakf, the Commissioner of Wakfs as protector of all wakfs is obviously interested to see that the suit is properly conducted so that no wakf estate is destroyed or adversely affected. Section 70 enables him to do this. To limit the extent of S. 70 in the manner suggested on behalf of the appellants would be to stultify the very object of the section. We are of opinion that a notice under S. 70 is necessary even if the claim that the property is wakf is contested. In these circumstances, we set aside the orders passed by both the Courts below and direct that the suit be heard de novo by the trial Court on all the points after the issue of notice to the Commissioner of Wakfs in accordance with the provisions of S. 70. We make no order as to cost.

B. K. MUKHERJEA J. — I agree.

G.N./R.K. *Orders set aside.*

A. I. R. (29) 1942 Calcutta 467 (2)

DERBYSHIRE C. J. AND PANCKRIDGE J.

In re Babu Brojendra Kishore Roy Choudhury.

References Nos. 4 and 4A of 1941, Decided on 19th February 1942.

Assam Agricultural Income-tax Act (9 of 1939), S. 7 (c) — Phrase "rent which accrued due in previous agricultural year" in S. 7 (c)—Meaning of.

The phrase "rent which accrued due in the previous agricultural year" in S. 7 (c) refers only to the current demand of rent for that year.

[P 468 C 1]

Dr. Naresh Ch. Sen Gupta and Amarendra M. Mitra—for Assessee.

Advocate General of Bengal—for Commissioner of Income-tax.

DERBYSHIRE C. J. — The facts of the case are set out in the reference to this Court. The question asked was—Does the phrase "accrued due in the previous agricultural year" in cl. (c) of S. 7 include arrears as well as current dues? Section 7, Assam Agricultural Income-tax Act of 1939 provides :

"The agricultural income mentioned in sub-cl. (1) of cl. (a) of S. 2 shall be deemed to be the sum realised in the previous agricultural year on account of agricultural income mentioned in the said sub-cl. (1) after making the following deductions :

(c) a sum equal to 15 per cent. of the total amount of the rent which accrued due in the previous agricultural year, in respect of the charges for collecting the same."

The member of the Board of Agricultural Income-tax for Assam, Mr. Higgins, has answered the question as follows :

"I would submit that the answer to the question should be that the phrase 'rent which accrued due in the previous agricultural year' refers only to the current demand of rent for that year."

Dr. Sen Gupta who has appeared for the assessee says that he is unable to contend that that answer is incorrect. I agree with Dr. Sen Gupta and, in my opinion, the answer which the member of the Board of Agricultural Income-tax for Assam has given is correct and that the phrase "rent which accrued due in the previous agricultural year" refers only to the current demand of rent for that year. Another question was asked, but that does not arise because of the answer which has been given to the question already discussed. The result is that the question which has been asked is answered in the manner I have indicated. No order is made as to costs. The same answer is given in Reference No. 4A of 1941.

PANCKRIDGE J.—I agree.

G.N./R.K. *Answer accordingly.*

A. I. R. (29) 1942 Calcutta 468

AMEER ALI J.

Bijon K. Nawn — Applicant

v.

Sudhir Ch. Nawn and others — Respondents.

Application in Suit No. 1970 of 1933, Decided on 28th July 1941 and 4th August 1941.

(a) Calcutta High Court (Original Side) Rules, Chap. 36, Rr. 32 (4), 6 and 9 — "Warning" is gist of R. 32 (4) — Consent to payment of "unusual" expenses is no consent unless client is aware that they are unusual—Rr. 32 (4), 6 and 9 allow no room for discretion — Court should exercise overriding discretion only in rarest cases.

The matter of "warning" is the very gist and substance of Chap. 36, R. 32 (4). No inference can be drawn from the difference in language between R. 6 and R. 32 (4). Rule 32 (4) means consent of the client and consent to the payment of "unusual" expenses is no consent unless the client is aware that they are "unusual." Rules 32 (4) and 6 though based on the English principle are specific and would seem to allow no room for discretion. Nor does R. 9 provide for any overriding discretion. The Court should exercise the overriding discretion only in the rarest cases: (1899) 2 Q.B. 488 and (1883) 10 Q. B. D. 207, *Ref.*; ('32) 19 A. I. R. 1932 Cal. 233, *Disting.* [P 469 C 1, 2]

(b) Calcutta High Court (Original Side) Rules —Partition suit—Costs—Compliance with rules is more necessary.

In partition suits it is more necessary than ever that the rules should be complied with, because although as between party and party, each party ultimately bears something of the costs, nevertheless by reason of the existing system of partition parties are more reckless in the costs they incur than in any other kind of suit. [P 469 C 2]

(c) Costs — Pure attorney and client costs— Meaning of.

"Pure" attorney and client costs mean costs which are allowed only by reason of some special order or which are allowed by reason of the written consent of client and costs which in the case of a bill taxed wholly as between attorney and client, are nevertheless put upon the client and not upon the party or fund who or which has been directed to bear them as between attorney and client. Such costs are taxed as "attorney and client pure." [P 469 C 2]

(d) Partition—Costs — Party and party costs after preliminary decree are most peculiar— They are not payable in net partition by client to his attorney but are paid out of pool created by Commissioner.

Party and party costs after preliminary decree in partition suits are a most peculiar affair. In net partitions they are not payable or not regarded as payable by the client to their attorneys. They are paid in full to the attorneys out of the pool created by the Commissioner. [P 470 C 1]

Barwell and Clough — for Applicant.

S. N. Banerjee and S. R. Das—for Respondents.

ORDER. *(28th July 1941)*— With a considerable part of the application I do not deal being, I consider a matter for the taxing authorities and then the taxing officer. I propose to deal only with three questions : (1) the matter relating to the preliminary enquiry; (2) the matters relating to the application for the confirmation of report on the preliminary enquiry; (3) the matter of counsel's fees in the principal enquiry.

The matter 1 involves counsel's fees. The matter 2 involves the fees of second counsel and second day's fees; not very important in amount, but the main question of principle on this application. Matter 3 involves Mr. P. N. Sen's fees, 315 gold mohurs.

The three matters, to my mind, should be dealt with on different principles.

(i) As regards matter 1, I am not called upon to consider the question of written consent of client or overriding discretion of the Court. The fees to counsel in this case would be covered by a certificate under Chap. 36, R. 56. The question is whether such a certificate exists, and this depends upon the construction of the order passed by me on the confirmation of the report.

The Commissioner or Referee granted a certificate. I varied the report before confirming it, and the question is, did I or did I not allow the certificate to stand? I admit having been extremely alarmed at the proportions which this preliminary enquiry attained (I forget the number of sittings). The fault was mine in not making it clear that this preliminary enquiry should be summary, and should not attract the services of expensive or, indeed, any counsel. But as a matter of construction, although the matter is not entirely clear, I do not think that I meant at the time to cancel the certificate of the Referee. This matter is, therefore, covered by a certificate, or may be deemed to be so covered.

(iii) I will take next the third matter. Note that these fees to counsel of attending the main partition enquiry would, in the normal course, have become part of the party and party costs in the partition, and normally there would have been a certificate under Chap. 36, R. 56 by the Referee and, normally, such certificate would have been confirmed with the final return. Normally, no question would have arisen in the taxation because this being a "net" partition, the Commissioner would have paid the various attorneys their costs, before distributing the balance, if any, to the parties.

In this case the solicitor has been discharged. He is what we may call a half-time solicitor, and the question is whether he should drop out entirely, proceed against the client and let the client do

what he can to protect himself in the partition. The attorney wants an order that as between attorney and client he can charge the client and recover, even if a certificate is not allowed, and irrespective of what may be done in the partition. In my view, this is not the correct course. I do not think it would be right to tax now as between attorney and client and leave the matter there. In other words, I do not think that the Court should be called upon to exercise its discretion, assuming it to have a discretion, and to allow "unusual" charges and expenses until it is known that they are "unusual". They are not apparently "unusual", and very probably, if not certainly, they will in the partition be allowed as ordinary party and party costs.

I think Mr. S. N. Banerjee, who appeared for the attorney, appreciated this point, but he was anxious to have the matter finally disposed of owing to the age of the attorney. Having regard to the fact that this is a partition suit, I can fully appreciate his anxiety, but, remember, that if this attorney had not been discharged, he or his heirs would have waited until the end of the partition in order to get their costs.

In my view, therefore, with regard to the third matter the following course should be adopted. Let the attorney tax his bills, proceeding upon the basis that the certificate of fitness for counsel has been granted. Let the client apply in the partition for a direction that taxed costs of his half-time attorney be paid out by the Commissioner or, alternatively, paid by the client and credited in the proper way in the partition accounts, and also that a certificate under Chap. 36, R. 56 be granted in respect of the main inquiry. Had I to decide the question of consent or no consent with regard to this matter, I should find on the statement of counsel that the client was aware of the employment of Mr. Sen, but that there had been no warning to the effect that fees might be disallowed.

(ii) The second matter does not depend on the question of certificate for counsel, but upon the question of "written consent" under R. 32 (iv) of Chap. 36, or on the overriding discretion which I am asked to exercise. On the facts I find that there was knowledge in the sense that the client knew that second counsel was being engaged and a second fee was being paid. I am not prepared to find "warning", i. e., that the client was warned that these fees would not be allowed on party and party taxation. I am asked to apply the decision in 58 Cal. 1439.[1] In that case the Advocate General's fees were involved. I find no reference to the matter of "warning" which indeed is the very gist and substance of the rule. I think no inference is to be drawn from the difference in language between R. 6 and R. 32 (iv). The rule means consent of the client, and consent to the payment of "unusual" expenses is no consent unless the client is aware that they are "unusual". It may be however that the Court in that case in finding consent (though not written) assumed the fact of warning. I do not again see that this overriding discretion is provided by Rule 9, Chap. 36. That such a discretion exists in England appears to be the case. See the authorities referred to in the notes on O. 65, R. 27 of the English Rules of Court. On the other hand, our rules in Chap. 36, R. 32 (iv), and R. 6 though based on the English principle are specific and would seem to allow no room for discretion. In future, therefore, speaking for myself, I shall only exercise that discretion in the rarest cases.

Certain further observations: First of all, this is a partition suit, and in such suits it is more necessary than ever that the rules should be complied with; because although as between party and party, each party ultimately bears something of the costs, nevertheless by reason of our system of partition parties are more reckless in the costs they incur than in any other kind of suit. They have been so in this case. As to compliance with the rule, I do not see why attorneys should not protect themselves by having signed by the client a form stating that the particular costs are liable to be disallowed on taxation as between party and party, and that the client is nevertheless ready to bear them. The form of warrant of attorney which used to be relied upon for this purpose is no longer sufficient. I refer to what used to be known as the "Be-Jabadi" warrant, i. e., costs allowed are not allowed.

Lastly, it is desirable to see how these matters fit in with our classification of costs—(1) Party and party costs; (2) Attorney and client costs.

Here is a mystery which I have always hesitated to unravel. As I understand it, of attorney and client costs there are, at any rate the following varieties: (i) First, "ordinary" attorney and client costs. Those are allowed on the taxation of any bill, i. e., without a special order and without written consent of client. (ii) "Pure" attorney and client costs, signify, according to my understanding of this mysterious and perhaps not wholly appropriate word, (a) cost which are allowed only by reason of some special order or which are allowed by reason of the written consent of client; (b) costs which, in the case of a bill taxed wholly as between attorney and client, are nevertheless put upon the client, and not upon the party or fund who or which has been directed to bear them as between attorney and client. Such costs are taxed as "attorney and client pure." (iii) Still purer attorney and client costs: So pure as to be invisible to the taxing eye: (a) Costs outside suit, not taxable at all. (b) Costs included in a bill which are taxed off because outside the rules, and not covered by special order or written consent of client. Such costs are irrecoverable by the attorney unless the client is pure.

The result is that as regards matter (1) this is covered by the certificate. Matter (3) I propose to grant the certificate, allow the bill of the attorney to be taxed and allow the Commissioner or the party to apply in the partition for payment of the bill when taxed. With regard to matter (2) I will in this case allow the fees. The remaining matters in the application will be dealt with by the Taxing Officer and are not matters for the Court in the first instance. There remain two questions, the first with regard to payment by the new attorney to the old attorney of Rs. 7000 odd deposited with the new attorney as a condition for the change. Mr. Das asks me to make an order for immediate payment on the ground that, as will appear from the figures, costs allowed in taxation will, apart from the disputed items, be as much as Rs. 17,000. As against this the attorney has received from client himself a sum of Rs. 7958. I see no ground for making a special order. The Rs. 7000 deposited with the new attorney was to be paid against finally ascertained costs. When ascertained that order will operate automatically. It is true that the attorney has to wait, but as I have pointed out in the body of this judgment had he continued to act he would have had to wait. As it is indeed the applicant's attorney has more on the credit side than might be expected. It is very rare

1. ('32) 19 A.I.R. 1932 Cal. 233 : 136 I. C. 539: 58 Cal. 1439 : 35 C.W.N. 993, Ramjash Agarvalla v. Orr, Dignam & Co.

in partition suits for clients to put their attorneys in funds. It must be remembered that party and party costs after preliminary decree in partition suits are a most peculiar affair. In net partitions such as this they are not payable or not regarded as payable by the client to their attorneys. They are paid in full to the attorneys out of the pool created by the Commissioner. Indeed that is his principal function.

With regard to the costs of this application the attorney has come here for special relief. As regards the first matter the minutes might have been spoken to. As regards the second matter the rule should have been followed. As regards the third matter I have expressed my opinion. On the whole the order which appeals to me is to give the attorney his out-of-pocket costs on the Chamber application. On both sides it will be certified for counsel against clients. The taxation should proceed forthwith. It will proceed on the basis that a certificate (under Ch. 36, R. 56) has been granted in respect of the two enquiries. The applicant's attorney may pay the requisition fee mentioned in cl. (c) of the summons and include it in the bill of costs. The Taxing Officer may act on counsel's endorsement.

4th August 1941.—There is apparently some dispute as to the amount mentioned by me on p. 11 of the judgment as having been advanced by the client to the attorney. I gather that in this case receipts were granted for the amounts paid by the client to the attorney, and the amount in dispute is that of a cheque received by the attorney from the parties having the management of the bazar. This, however, suggests another matter in respect of which attorneys should protect themselves against their clients. It is a matter to which I have referred before and which has given this Court a great deal of trouble. I refer to disputes between client and attorney with regard to the amount which has been paid to the attorney on account. I myself in three cases recently have had to direct an enquiry. I have already referred to the necessity of keeping books. I have also referred to the matter of receipts. I have previously suggested that the Incorporated Law Society should frame rules whereby it should be made compulsory on the clients to take receipts from the attorneys. I was told on those occasions that clients were in the habit of refusing to accept receipts. Now, I must protect the attorneys against such reprehensible conduct. I am unable to make the refusal to accept a receipt, a criminal offence, but I can suggest that where any attorney is so treated by the client he should bring it immediately to the notice of the Court and the Court can direct a change. The English case to which I referred in the course of my judgment is (1899) 2 Q. B. 488,[2] passage at p. 496, which appears to indicate that the rule in (1883) 10 Q. B. D. 207[3] is subject to an overriding discretion by the Court. As to the position under our rules I have already expressed my opinion. With regard to the costs of this application, if I have not made it clear my intention is that the respondent to the application should pay nothing more than the ordinary out-of-pocket costs of a Chamber application certified for counsel under the rules.

G.N./R.K. *Order accordingly.*

2. (1899) 2 Q. B. 488 : 68 L. J. Q. B. 1027 : 81 L. T. 254 : 48 W. R. 125, Osmond v. The Mutual Cycle & Manufacturing Supply Company Ltd.
3. (1883) 10 Q. B. D. 207 : 52 L. J. Q. B. 186 : 47 L. T. 610 : 31 W. R. 283, In re Blyth & Fanshawe.

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B. K. MUKHERJEA AND BLANK JJ.

Satish Chandra Bandapadhya — Judgment-debtor 1 — Appellant

v.

Bishnupada Pal and others — Decree-holders — Respondents.

Appeal No. 120 of 1941, Decided on 27th March 1942, against order of Sub-Judge, 24-Parganas, 4th Court at Alipore, D/- 28th February 1941.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A — S. 168A does not conflict with S. 51, Civil P. C. — Even if there is any conflict it is avoided by S. 4, Civil P. C. — Matter dealt with under S. 168A falls under Items 2 and 21, Provincial List, Government of India Act — S. 168A is intra vires of Local Legislature.

There is no real conflict between S. 168A, Ben. Ten. Act and S. 51, Civil P. C., which simply enumerates in general terms the various ways in which the Court may order execution of a decree, and presupposes that the property is saleable in law. If by virtue of any provision of substantive law a property cannot be sold, S. 51, Civil P. C., does not empower the Court to sell the same. Even if any conflict is found to exist, it is avoided by S. 4, Civil P. C., under which the general provisions contained in the Code have got to give way to a special procedure laid down by any law for the time being in force. [P 471 C 2]

The matter dealt with in S. 168 A, Ben. Ten. Act, does come under Items 2 and 21, taken together of the Provincial List of the Government of India Act and it is thus within the competence of the Provincial Legislature. What S. 168A, Ben. Ten. Act, purports to do is to give jurisdiction or power to Courts in Bengal to proceed in a particular way with regard to collection of arrears of rent by landlords by institution of suits and hence it is intra vires of the Local Legislature even if it is assumed that it is in conflict with an existing Indian law : ('42) 29 A.I.R. 1942 Cal. 429 and ('42) 29 A.I.R. 1942 Cal. 49, *Rel. on.* [P 472 C 1]

C. P. C. —
('40) Chitaley, S. 4 N 3 and S. 51 N. 1.
('41) Mulla, Page 18 Note "Special or local law."

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), Ss. 168A and 3 (13) — Rent and debt — Distinction — To invoke section 168A decree must be for rent even though it may not have effect of rent decree proper — Landlord granting ijara lease of certain lands and subsequently mortgaging his interest in property leased — Mortgagor assigning to mortgagee rent due to him from ijaradar to be appropriated towards interest and delivering possession of his interest to mortgagee — Mortgage held created simple and usutructuary mortgage — Rent paid to mortgagee by ijaradar held rent within S. 3 (13) and decree for same rent decree within S. 168A.

Two essential characteristics of rent under section 3 (13) which differentiate it from other forms of debt are that it is due for the use and occupation of the land and that it is payable to the person under whom the land is held. To invoke the provision of S. 168A it is necessary that the decree must be one for rent though it may not have the

effect of a rent decree proper and can operate only as a money decree. [P 472 C 1]

The landlord mortgaged his interest in certain lands of which he had granted an ijara lease to secure an advance. To ensure regular payment of interest due to the mortgagees, the mortgagor assigned to them the rent or munafa due to him by the ijaradar under the terms of the ijara lease. On the strength of this provision in the mortgage deed the mortgagees instituted a suit for rent against the ijaradar and obtained a decree :

Held that the mortgage bond executed by the landlord was a mixed, simple and usufructuary mortgage, as there was a personal covenant to pay the money and right of sale as in the case of a simple mortgage; and since the mortgagor expressly assigned to the mortgagees, his right to recover rent from the ijaradars and empowered them to appropriate so much of it as was necessary to pay the interest due to them, and possession of the property was delivered to the mortgagee in the only way possible, namely, by assigning over to him the right to realise rent, the mortgagees were usufructuary mortgagees and occupied the same position as landlords. The munafa paid to them by the ijaradars would be rent in the proper sense of the word : ('14) 1 A.I.R. 1914 Cal. 910, *Rel. on.* [P 472 C 1, 2]

It could not be said that the mortgagees were mere assignees of future rent. They were in possession of the landlord's interest also as usufructuary mortgagees and consequently the decree could not but be a decree for rent so as to attract the operation of S. 168A. [P 472 C 2]

Rama Prosad Mukherjee, Saroj Kumar Chatterjee, J. Majumdar for Niranjan Roy Choudhury and Chandidas Roy Choudhury — for Appellant.

Hiralal Chakravarti and Biswanath Naskar — for Respondents.

JUDGMENT. — This is an appeal on behalf of the judgment-debtor and it is directed against an order made by the Subordinate Judge, Fourth Court, Alipore, on 28th February 1941, rejecting certain objections preferred by the appellant under S. 168A, Ben. Ten. Act. The material facts are not in controversy and may be shortly stated as follows : One Brajendra Kumar Banerjee owned an undivided eight annas share in zemindary Lot. No. 10, Sunderbans, appertaining to touzi No. 2368 of the 24-Parganas Collectorate. On 14th December 1920, Brajendra granted an ejara lease in respect of his eight annas share in the aforesaid touzi to Satish Chandra Banerjee, the appellant before us, for a period of 30 years at an annual rental of Rs. 2100. In addition to the rent reserved, the lessee undertook to pay all revenue, cess and embankment charges payable to Government in respect to the property. On 8th February 1930, Brajendra mortgaged his interest in the aforesaid touzi to Nagendra Nath Pal and others, the predecessors of the present respondents, to secure an advance of rupees 12,000. To ensure regular payment of interest due to the mortgagees, the mortgagor assigned to them the rent or munafa due to him by the ijaradar Satis under the terms of the ijara lease dated 14th December 1920. On the strength of this provision in the mortgage deed, the mortgagees instituted a suit for rent against Satis on 6th April 1934, claiming rents payable under the ijara patta for the years 1337 to 1340 B. S. A decree was made by the trial Court on 15th December 1934, which was affirmed on appeal by this Court on 24th June 1937.

After certain previous applications for execution of the decree, the present execution case was started on 8th September 1939, and the decree-holders prayed for realization of the balance of the decretal dues by attachment and sale of certain properties other than the tenure in arrears. Thereupon, objections were raised by the judgment-debtor under S. 168A, Ben. Ten. Act, and the decree-holders sought to get round the objections by saying that the decree was not one for rent and, consequently, was not hit by S. 168A, Ben. Ten. Act. It was further contended that S. 168A was ultra vires of the Provincial Legislature. The trial Court by its judgment dated 28th February 1941, negatived the first ground urged by the decree-holders but gave effect to the second. The learned Subordinate Judge was of opinion that the provision of S. 168A, Ben. Ten. Act, being repugnant to that of an existing Indian law which was contained in S. 51, Civil P. C., was void to that extent under S. 107 (1), Government of India Act, and although it was one of the matters enumerated in the Concurrent List no assent of the Governor-General having been taken, sub-s. (2) of S. 107 had no application. It is against this judgment that the present appeal has been preferred.

Mr. Rama Prosad Mookerjee, who appears on behalf of the appellant, has contended before us that the Court below was wrong in holding that S. 168A, Ben. Ten. Act, was ultra vires of the Provincial Legislature or was void under S. 107, Government of India Act. Mr. Chakravarti, who appears on behalf of the respondents, besides attempting to answer the contention of the appellant tried to support the decision of the learned Subordinate Judge on the other ground which was decided against his client, namely, that the decree was not one for rent and, consequently, could not attract the operation of S. 168A, Ben. Ten. Act. We will have to consider both these points in the present appeal. So far as the first point is concerned, we are of opinion that the view taken by the Court below is wrong. The identical question recently came up for consideration before a Division Bench of this Court in F. M. A. No. 52 of 1941,[1] decided on 27th February 1942. It was held by Nasim Ali and Pal JJ., that S. 168A, Ben. Ten. Act, was a valid piece of legislation which was quite within the competency of the Provincial Legislature. We may say, that we are in entire agreement with that decision. It is difficult to say that there is any real conflict between S. 168A, Ben. Ten. Act, and S. 51, Civil P. C. Section 51 simply enumerates in general terms the various ways in which the Court may order execution of a decree. Obviously, all the modes are not open to an executing Court in every case. The jurisdiction has got to be exercised not only under the conditions and limitations prescribed by the Code, but the proper mode of execution would depend upon the nature of the decree and the circumstances of each individual case.

Section 51 (b) of the Code mentions attachment and sale of any property as one of the methods of executing a decree, and all that it means is that the executing Court in a proper case would be justified in ordering such form of execution. But the section, we think, presupposes that the property is saleable in law, and if by virtue of any provision of substantive law, a property cannot be sold. Section 51 of the Code does not, in our opinion, empower the Court to sell the same. Even if any conflict is found

1. *Reported in* ('42) 29 A. I. R. 1942 Cal. 429 : 201 I. C. 24 : 75 C. L. J. 190 : 46 C. W. N. 540, Satish Chandra v. Sudhir Krishna.

a to exist, it is avoided, by S. 4 of the Code under which the general provisions contained in the Code, have got to give way to a special procedure laid down by any law for the time being in force. Quite apart from this, the appellant, in our opinion, is right in contending that the matter dealt with in S. 168A, Ben. Ten. Act, does come under Items 2 and 21 taken together, of the Provincial List and it is thus within the competence of the Provincial Legislature. What the section purports to do is to give jurisdiction or power to Courts in this Province to proceed in a particular way with regard to collection of arrears of rent by landlords by institution of suits and hence it is intra vires of the Local Legislature even if it is assumed that it is in conflict with an existing Indian law.

Reference may be made in this connexion to the recent pronouncement by a Special Bench of this b Court in 46 C. W. N. 174,[2] and the reasons given by the learned Chief Justice with regard to S. 3, Non-Agricultural Tenancy (Temporary Provisions) Act, Bengal, are to a very large extent applicable in the present case. The appellant, therefore, is entitled to succeed on this point.

We have now to consider the other point raised by Mr. Chakravarti as to whether the decree in this case was a decree for rent which comes under the purview of section 168A, Bengal Tenancy Act. To invoke the provision of section 168A, it is necessary that the decree must be one for rent though it may not have the effect of a rent decree proper and can operate only as a money decree. "Rent" as defined in the Bengal Tenancy Act means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on c account of use and occupation of the land held by the tenant : *vide* S. 3, cl. (13). The two essential characteristics of rent which differentiate it from other forms of debt are : (1) that it is due for the use and occupation of the land and (2) that it is payable to the person under whom the land is held.

In the present case, the rent which is reserved by the ijara patta is certainly payable by the appellant for use and occupation of the land, so the first condition is thereby fulfilled. Mr. Chakravarti argues that the second element is lacking in this case as the munafa or rent was under the terms of the mortgage document payable to his clients who were not the landlords and under whom the ijaradars could not be said to hold the lands. We do not think that we can accept this contention as sound. The mortgage bond executed by Brajendra seems to us to be a mixed, simple and usufructuary mortd gage. There was indeed a personal covenant to pay the money and a right of sale as in the case of a simple mortgage ; but the mortgagor expressly assigned to the mortgagees, his right to recover rent from the ijaradars and empowered them to appropriate so much of it as was necessary to pay the interest due to them. The mortgage was only of the landlord's interest, and the document expressly recites that possession of the property was delivered to the mortgagee in the only way possible, namely by assigning over to him the right to realise rent.

It is true that the mortgagee was not given a right to the entire rent and he was bound to refund the balance, if any, that remained after deducting the costs of litigation and the interest due to him. But even then the mortgage would in our opinion be regarded as a usufructuary mortgage. The definition of a usufructuary mortgage, as given in S. 58 (d), T. P. Act, clearly shows that there may be a condition in such a transaction that the mortgagee was to receive only a part of the rents and profits which he was to appropriate in lieu of interest. As the respondents, in our opinion, were usufructuary mortgagees, it cannot be disputed that they occupied the same position as landlords and, consequently the munafa paid to them by the ijaradars would be rent in the proper sense of the word : *vide* the case in 18 C. W. N. 1016.[3] It cannot be said that the respondents were mere assignees of future rent ; they were in possession of the landlord's interest also as usufructuary mortgagees and, consequently the decree could not but be a decree for rent. The result therefore is that the appeal is allowed, the order of the lower Court is set aside, and the application of the decree-holders to execute the decree by attachment and sale of other properf ties is refused. We make no order as to costs in this appeal. The appellant will be entitled to his costs in the Court below.

G.N./R.K. *Appeal allowed.*

2. ('42) 29 A.I.R. 1942 Cal. 49 : 198 I. C. 136 : 74 C. L. J. 485 : 46 C. W. N. 174, Sukumari v. Rajdhari Panday.

3. ('14) 1 A.I.R. 1914 Cal. 910 : 23 I. C. 981 : 18 C. W. N. 1016, Brohamanda Nath v. Hem Chandra Mitra.

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B. K. MUKHERJEA AND SEN JJ.

Girish Chandra Das—Judgment-debtor — Appellant

v.

Siba Prasad Jana and another — Decree-holders — Opposite Party. g

Appeal No. 235 of 1941 and Rule No. 754 of 1941, Decided on 9th December 1941, from original order of Sub-Judge, 2nd Court, Midnapur, D/- 26th April 1941.

(a) Civil P. C. (1908), O. 17, R. 3 — Application by judgment-debtor under S. 35, Bengal Money-Lenders Act—On undertaking by judgment-debtor to pay Rs. 2000 within week case adjourned to 26th April 1941 for further orders—On 26th April 1941 judgment-debtor filing petition expressing inability to deposit amount and asking for time — Court rejecting judgment-debtor's prayer and also dismissing his application under S. 35, Bengal Money-Lenders Act, for default—26th April 1941 not being fixed for hearing petition under S. 35, Bengal Money-Lenders Act, dismissal of same held bad — Court should have fixed another date for hearing petition.

The judgment-debtor made an application under S. 35, Bengal Money-Lenders Act, on 19th April 1941 but on an undertaking being given by the judgment-debtor as a result of an agreement between the parties to pay Rs. 2000 within a week the matter was adjourned to 26th April 1941, for further orders and the case was directed to be taken off from the peremptory list. On 26th April 1941, the judgment-debtor filed a petition stating that he was unable to deposit the sum and asking for further time. The Court rejected the prayer of the judgment-debtor and by the same order dismissed his petition under S. 35, Bengal Money-Lenders Act, for default :

Held that the order dismissing the judgment-debtor's petition under S. 35, Bengal Money-Lenders Act, was bad, inasmuch as 26th April 1941 was not a date fixed for the hearing of the petition. The

Court should have fixed another date for hearing the petition. [P 473 C 1]

C. P. C. —

('40) Chitaley, O. 17, R. 1 N. 4 Pt. 1.

(b) Bengal Money-Lenders Act (10 of 1940), S. 35 — Scope — S. 35 deals with all decrees passed in respect of loans when sale is intended in execution of decree.

There is nothing in S. 35 which says or implies that the decree must be one which was passed after the Act or that the loan must be one advanced after the Act. The section deals with all decrees passed in respect of loans when a sale is intended in execution of the decree. There is no room for suggesting that the scope of the Act is limited to post Act decrees and post Act loans. [P 473 C 2]

(c) Bengal Money-Lenders Act (10 of 1940), S. 35 — Construction — Scope of restriction under S. 35 explained—S. 35 does not apply to sale proclamation drawn up before Act came into operation.

Section 35 merely directs what should be done when a sale proclamation is about to be drawn up and at a sale held pursuant to such proclamation. It nowhere says that a sale proclamation validly issued before the Act would cease to have effect after the Act nor does it say that such sale proclamation should be amended in accordance with its provisions. Section 35 contains no general prohibition against selling property at a price lower than the decretal amount. The prohibition therein is restricted to the sale of "property so specified", i. e., to the sale of property specified in a sale proclamation framed in accordance with the first part of S. 35. Section 35 has no application to a sale of property included in a sale proclamation drawn up before the Act came into operation. [P 473 C 2; P 474 C 1]

Rama Prosad Mookerjee and Mohit Kumar Chatterjee — for Appellant.

Sisir Kumar Das and Amiya Ranjan Roy Choudhury — for Opposite Party.

SEN J. — This is an appeal from an order dismissing an application under S. 35, Bengal Money-Lenders Act, for default. The application was made by the judgment-debtor. On 19th April 1941, the parties were ready. On that date, however, there seems to have been some sort of understanding between the parties and the judgment-debtor undertook to pay Rs. 2000 within week. Upon this undertaking being given, the matter was adjourned to 26th April 1941 for further orders, and the case was directed to be taken off from the peremptory list. On 26th April 1941 the judgment-debtor filed a petition stating that he was unable to deposit the sum owing to the fact that a boat containing merchandise belonging to him had sunk. He prayed for further time to deposit this amount. The learned Subordinate Judge rejected the prayer of the judgment-debtor and by the same order dismissed his petition under S. 35, Bengal Money-Lenders Act, for default.

It was argued on behalf of the appellant that this order of dismissal is bad, inasmuch as 26th April 1941 was not a date fixed for the hearing of the petition. We are of the opinion that this contention is sound. The learned Subordinate Judge should have fixed another date for hearing the petition. We would have been inclined to send the matter back for re-hearing but for the fact that we are of the opinion that the petition under S. 35, Bengal Money-Lenders Act, cannot succeed. The decree in this case was passed on 6th September 1937. The judgment-debtor took all possible steps for delaying the realisation of the decree. 18th August 1938 was fixed by the Court for fixing the valuation of the property to be sold. On that day the judgment-debtor put in no objection and the property was valued, we understand, at Rs. 19,000, and the sale proclamation was issued upon this valuation. Thereafter, the judgment-debtor obtained a stay order from the Debt Settlement Board and when the stay order exhausted itself he made an application under S. 36 (b), Bengal Money-Lenders Act. That application having failed, the present application under S. 35, Bengal Money-Lenders Act, was made. Section 35, Bengal Money-Lenders Act, runs thus:

"Notwithstanding anything contained in any other law for the time being in force, a proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the Court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified in such proclamation."

Then, there is a proviso with which we are not concerned. The contention on behalf of the appellant is that the sale proclamation should now be amended; the property should be re-valued and only so much of the property of the judgment-debtor should be sold as would be sufficient to satisfy the decree. On behalf of the decree-holder, it was contended that S. 35, Bengal Money-Lenders Act, had no application to a case where the loan was taken before the Act, or, at any rate, to a case where the decree was passed before the Act. We are not impressed by this argument. There is nothing in S. 35, Bengal Money-Lenders Act, which would justify us in holding that it is restricted to cases of loans taken after the Act or to decrees passed after the Act. The section states that when property is sought to be sold in execution of a decree passed in respect of a loan, the proclamation shall be drawn up in a certain way and the property specified therein shall not be sold below a certain price. There is nothing in the section which says or implies that the decree must be one which was passed after the Act or that the loan must be one advanced after the Act. The section deals with all decrees passed in respect of loans when a sale is intended in execution of the decree. There are many sections in the Act which affect decrees passed before the Act and loans taken before the Act. There is no room for suggesting that the scope of the Act is limited to post Act decrees and post Act loans. In my opinion, there would have been no difficulty in the way of the judgment-debtor getting the proclamation framed and the sale held in accordance with the provisions of S. 35 were it not for the fact that there has already been a proclamation issued. The section must be construed strictly. It lays down what should be done at the time of drawing up the sale proclamation and at a sale held pursuant to such proclamation. When the present sale proclamation was drawn up the Bengal Money-Lenders Act was not in force and S. 35 could not therefore affect such a proclamation.

The section nowhere says that a sale proclamation validly issued before the Act would cease to have effect after the Act nor does it say that such sale proclamation should be amended in accordance with its provisions. It merely directs what should be done when a sale proclamation is about to be drawn up and at a sale held pursuant to such pro-

clamation. Mr. Mookerjee for the appellant contends that there is a prohibition in the section against selling property at a price lower than the decretal amount and he argues that this provision should apply to the present sale. If the section be read carefully it will be found that it contains no such general prohibition. The relevant portion of the section says—"and the property so specified shall not be sold at a price which is less than the price specified in the sale proclamation." The prohibition is restricted to the sale of "property so specified," i. e., to the sale of property specified in a sale proclamation framed in accordance with Part 1 of S. 35. It has no application to a sale of property included in a sale proclamation drawn up before the Act came into operation. In my opinion, the section does not require the Court to set aside or amend a sale proclamation validly and duly drawn up. Section 35 has no application to this case. For these reasons the application of the judgment-debtor must fail. The appeal is dismissed. There will be no order for costs. No further order is necessary on the Rule.

B. K. MUKHERJEA J.—I agree.

G.N./R.K. *Appeal dismissed.*

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AMEER ALI J.

Foolcomari Dasi — Plaintiff

v.

Debendra Nath Seal — Defendant.

Suit No. 2242 of 1940, Decided on 5th August 1941.

Hindu law — Dayabhaga — Maintenance — Widowed daughter-in-law is entitled to maintenance from father-in-law's heir even to self-acquired property whether he takes upon intestacy or by will or gift.

In a Hindu family governed by the Dayabhaga School a widowed daughter-in-law is entitled to maintenance from her father-in-law's heir even in the case of his self-acquired property whether the heir takes up on intestacy or by will or gift: ('24) 11 A.I.R. 1924 Cal. 364, *Foll.*; ('29) 16 A.I.R. 1929 All. 751, *Rel. on* ; 22 Mad. 305 ; 25 Bom. 263 and ('38) 25 A.I.R. 1938 Mad. 914, *Ref.*; ('33) 20 A.I.R. 1933 Bom. 135, *Not foll.* [P 475 C 2]

Hindu law —

('40) Mulla, Page 583, Pt. (t); Page 596, Pt. (o).

('38) Gour, Page 327, Pts. 2 and 3.

S. M. Bose and H. K. Bose — for Plaintiff.

B. C. Ghose and S. P. Chowdhury— for Defendant.

JUDGMENT.—This suit turns upon a point of law. The facts may be very shortly stated. Kundanlal Seal (F)=Raj Lakhi (W), four sons, Jadu (S), second son Jyoti (S) died 1923=Ful Kumari (S.W.), third son Deben (S) fourth son Noren (S), Kundanlal died on 1st April 1939, leaving a will dated 1st December 1929. Under this will there is a provision for W (the widow), there is no provision for S. W. (son's widow) and the property goes, according to Hindu law, to the sons (S.S.S.), the heirs. The family is governed by the Bengal School of Hindu law, and the estate of Kundanlal was self-acquired.

The question of law is whether S.W. is entitled to claim maintenance by S.S.S., when S.S.S. take under a will and not by inheritance. There is no conflict of law where heirs take by inheritance. The leading case in Calcutta is 5 C.W.N. 549,[1] affirmed in 6 C.W.N. 530.[2] The theory of the matter has been expounded in detail in the judgment of Mahmood J. in 11 All. 194,[3] *see* especially pp. 202, 205, 208, 211, 217 and 218. The passage at p. 218 is adopted from Dr. Gurudas Bannerji's book. As regards devisees and donees there is a conflict of authority. I give the cases in tabular form :

For.	Against.
22 Mad. 305[4] at p. 307, the judgment of Subramaniya Iyer, certainly obiter and qualified by "perhaps," A. I. R. 1924 Cal. 364,[5] the judgment of the appellate side delivered by Ashutosh Mukherjee J., A. I. R. 1929 All. 751.[6] The two latter cases were of gifts by the father to his heir.	25 Bom. 263,[7] a case of will. I do not remember for the moment whether the devisee was the heir or not. 35 Bom. L. R. 44[8] gift to the heir, and, I.L.R. (1939) Mad. 242,[9] devisee or donee, I think in the circumstances the heir, although this matter was not discussed.

It is on the cases in the second column that both Mr. Chaudhuri and Mr. B. C. Ghose rely. So far as I am concerned, it would be sufficient for me to follow the decision of Sir Ashutosh Mookherjee in 1924. The matter was more fully argued before him than appears in the one report. It was a case of gift. Mr. Chaudhuri sought to make a distinction between "gift" and "will" but if any such distinction exists, in my opinion it would be unfavourable rather than favourable to his contention. For the purposes of this judgment "will" and "gift" have been treated upon the same footing, one being a transfer during life and the other being a transfer taking place at the date of death. Sir Ashutosh Mookherjee's decision is unqualified. It does not indicate any distinction between the obligations of a donee-heir and a donee-stranger. The case before me, as already indicated, is that of a donee-heir. There seem to be three positions, (1) heirship, intestate succession (no doubt as to the law), (2) donee or devisee, sub-divided into (a) heirs and (b) strangers. In order to see whether the legal liability which exists in case (1) attaches to (2) (a) and/or 2 (b), we have to examine the origin and nature of that liability. To this extent I agree with the arguments of Mr. Chaudhuri and Mr. B. C. Ghose. They contend on behalf of the sons that the liability is something peculiar to heirs; that it depends upon a certain ingredient in intestate succession, the ingredient of "spiritual benefit" or pinda. They contend that this element, (P. for short), where there exists absolute freedom to dispose of property, is eliminated by gift or will. The follow-

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1. ('01) 5 C.W.N. 549, Siddesury v. Janardan.
2. ('02) 29 Cal. 557 : 6 C. W. N. 530, Siddesury v. v. Janardan.
3. ('89) 11 All. 194 : 1889 A. W. N. 30 (F.B.), Janki v. Nand Ram.
4. ('99) 22 Mad. 305 : 9 M. L. J. 14, Rangammal v. Echammal.
5. ('24) 11 A. I. R. 1924 Cal. 364 : 73 I. C. 235, Gopal Chandra v. Kadambini Dasi.
6. ('29) 16 A.I.R. 1929 All. 751 : 119 I.C. 253, Jeot Ram v. Mt. Lanji.
7. ('01) 25 Bom. 263 : 2 Bom. L. R. 894, Bai Parvati v. Tarwadi Dolatram.
8. ('33) 20 A.I.R. 1933 Bom. 135 : 144 I. C. 4 : 35 Bom. L. R. 44, Bhagirathi Bai v. Dwarka Bai.
9. ('38) 25 A. I. R. 1938 Mad. 914 : 179 I. C. 121 : I. L. R. (1939) Mad. 242 : (1939) 1 M. L. J. 301, Sankaramurti v. Subbamma.

ing passage in the notes to S. 39, T. P. Act, by Sir Hari Singh Gour supports this view :

"Property acquired by a valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power of making such disposition is unrestricted, it is difficult to conceive any consistent grounds on which the devisee could be held bound by an obligation from which the testator had power to relieve him."

What is the origin, and nature of the liability of heirs? I concede that the matter, for a non-Hindu, is difficult. I do not admit that it is "startling," I. L. R. (1939) Mad. 242.[9] It is said in the cases that there is a "moral" liability on (F) and that this moral liability "ripens" or "matures" into a legal liability of S when he succeeds as heir. First of all I take it that "moral liability" means merely a liability recognized and enforced by religion or society, but not enforcible by the Courts.

The point for enquiry is : how does the "moral" liability of (F) "ripen" into a "legal" liability of S.S.S.? For my part, I would avoid the phrase "ripens." The process suggested is one of gradual and natural change. I prefer "transformed" (Gurudas Bannerjee): 11 All. 194[3] at p. 218. The question is, what transforms it, or is it really a liability of (F), transformed ; or is it a liability of S.S.S., newly arisen ? The phrasing of the cases seems to suggest a moral liability of (F), a moral liability of S.S.S., and then by a process either of addition, combination or reproduction the emergence of a legal liability. For me, this is either too mathematical, too chemical or too biological. I have exercised my mind such as it is, to try and discover the answer to this question, why, if there is only a moral liability on (F), should there be a legal liability on S.S.S.? I confess the cases do not seem to help. As I understand the matter, if at all, the reason for any obligation at all being put upon the heirs, is as follows : It is the duty of Hindu heirs to provide for the bodily, and mental or spiritual needs of their immediate, and nearer ancestors; to relieve them from bodily and mental discomfort, to protect their souls from the consequences of sin, e. g., the leaving of outstanding debts, and the leaving of dependants unprovided for, to protect them from the importunities of those who have been injured by neglect.

The question still remains, why should it be a moral duty on the father, and a legal duty on the son, that is to say, a duty enforcible in the Courts ? First of all, I take it that under the indigenous Hindu system, the pure Hindu system, of which I hear so much from Dr. Roy, there would be no rigid distinction between moral duty and legal duty, as there is in modern society. Bearing this in mind the explanation that occurs to me is as follows : The father (F) can perform the duty. As long as he lives there is the expectation that he will. He can perform it to the very moment of his death. It is assumed that he will. If he dies without performing it, he has committed a sin ; he has left something undone which he should have done. Once he dies, the thing has happened ; it cannot be remedied by him. Is it for this reason that the Court is ready to compel those to relieve the father from the consequences of sin whose status as heirs fits them, and whose possession of the property enables them, to do so ? Does not the Court say to the son, the sapinda, whoever he be, here is your duty under the Hindu system, here is the means of performing it, which you have got from your father ; now go and put it right ? That is the only explanation that appeals to me of this change from moral to legal duty, or as I would rather put it, the accrual of a legal duty, after the moral duty has failed to be performed.

If that view is at all near the mark, I can "conceive of grounds" upon which a will or gift to the heirs should not be deemed to eliminate (P) the "spiritual element"; of reasons for holding that a son or heir because he gets under a will or gift, is not relieved from the duty of relieving his father from the consequences of failing to perform his (the father's) moral duties. I see, therefore, no reason to differ from the decision of Sir Ashutosh Mookerjee, taking it as a decision that a gift or devise to an heir, does not prevent the legal liability from arising in the same manner as it arises in the case of intestate succession. I need go no further than that.

There remains the question of gift or devise to strangers. Mr. Ghose and Mr. Chowdhury both contended that the two positions must be dealt with upon the same footing. As indicated, I am not so sure. The matter of strangers is, however, much more difficult. This is what impressed the learned Judges in deciding the last Madras case. I also do concede that if strangers are to be affected the liability must be visualised as something which attaches to the property rather than to the person or capacity of the devisee or donee—something in the nature of charge or implied trust affecting transferees. The analogy of a Hindu widow at once occurs to one, and the question arises whether the moral right of the Hindu daughter-in-law should upon the death of the father be deemed to be of the same or of analogous quality to that of a Hindu widow at the same moment. In such case the principle, if not the actual provisions of S. 39, T. P. Act, would apply. It does seem to me that some such view was in the mind of Sir Ashutosh Mookherjee when deciding the case in A. I. R. 1924 Cal 364.[5] It is further to be noted that Sir Dinshaw Mulla treats these obligations for maintenance as "liabilities" dependant upon possession of property. It does not therefore seem to me so "startling," or, I forget the actual word used by Mr. Ghose, so preposterous to conceive of a state of law whereby volunteers or persons taking with notice should be affected by the claim to maintenance of a Hindu daughter-in-law. On this question I am not called upon to express any final view. It is a matter which no doubt will receive the attention of those who are now in the process of codifying this branch of the Hindu law.

My ruling is to the effect that the legal liability upon a Hindu heir for the maintenance of the daughter-in-law in a family governed by the Dayabhaga School exists whether the heir takes upon intestacy or by will or by gift. I decide the issue in favour of the plaintiff with costs. I suggest that the matter of the quantum of maintenance should stand over with liberty to bring it on two days notice by letter. I certify that the case is fit for the employment of two counsel.

G.N./R.K. *Suit decreed.*

A. I. R. (29) 1942 Calcutta 476

B. K. MUKHERJEA AND BLANK JJ.

Prafulla Kumar Das Gupta — Decree-holder — Petitioner

v.

Kamini Kumar Chakravarty — Judgment-debtor — Opposite Party.

Civil Rule No. 138 of 1942, Decided on 2nd April 1942, for setting aside order of Sub-Judge, Second Court, Tipperah (Comilla), D/- 5th November 1941.

(a) Bengal Money-Lenders Act (10 of 1940), S. 36 (5) — Whether assignment is bona fide is question of fact depending on circumstances of case.

Whether an assignment transaction is bona fide or not is a question of fact which has got to be decided on the circumstances of each individual case. [P 477 C 2]

(b) Interpretation of statutes — Literal construction can be departed from if it leads to inconsistency or manifest injustice.

A literal construction can be departed from if a strict and rigid adherence to it would frustrate the intention of the Legislature and lead to inconsistency or manifest injustice. [P 477 C 2]

C. P. C. —

('40) Chitaley, Preamble N. 7 Pt. 2a.

('41) Mulla, Page 2 Pt. (a).

(c) Bengal Money-Lenders Act (10 of 1940), S. 28 — Post-Act assignee — Service or non-service of notice under S. 28 (1) — Effect — In case of non-service damnified borrower can claim indemnity from assignor.

A post-Act assignee if he is given a notice under S. 28 (1) acts with his eyes open and cannot claim any protection and if on the other hand he does not receive any notice the borrower who is damnified can claim idemnity from the assignor who omitted to give such notice. [P 477 C 2]

(d) Bengal Money-Lenders Act (10 of 1940), Ss. 29 (2) and 28 — Object — S. 29 (2) contemplates pre-Act loan and contains general provisions as to assignment of debts—Assignee of pre-Act debt would be saddled with same disabilities as lender — But Act contemplates exceptions — Post-Act assignment of pre-Act debt — S. 28 applies.

The object of S. 29 (2) was apparently to make the provisions of the Act retrospective with regard to pre-Act loans and it might have been further intended that no lender should be allowed to defeat these provisions by making an assignment. There is no doubt that S. 29 (2) contemplates a pre-Act loan, but whether it contemplates a pre-Act assignment also is not very clear, though the words used are very general. The utmost that can be said is that S. 29 (2) contains the general provision relating to assignment of debts and ordinarily an assignee of a debt contracted prior to the Act will be saddled with the same disabilities as the lender himself. But though this is the general provision, the Act certainly contemplates exceptions to it. Thus in the case of a post-Act assignment of a pre-Act debt the provisions of S. 28 would undoubtedly be attracted. [P 478 C 1]

(e) Interpretation of statutes—It is not Court's business to find fault with Legislature — It has to see whether whole Act can be interpreted consistently.

It is not the Court's business to find fault with the Legislature. The Court has only to see whether the whole Act can be interpreted in a consistent way. [P 478 C 1]

C. P. C. —

('40) Chitaley, Preamble N. 7 Pt. 9.

(f) Bengal Money-Lenders Act (10 of 1940), Ss. 36 (5) and 29 (2) — S. 36 (5) is not inconsistent with S. 29 (2) — Pre-Act debt assigned after Act — S. 36 (5) applies even though case comes under S. 29 (2) — S. 36 (5) includes pre-Act assignment also.

The provision of S. 36 (5) is in no way inconsistent with that of S. 29 (2). The former may be an exception engrafted upon the latter but it is by no means repugnant to the same. When a pre-Act debt is assigned after the Act, S. 36 (5) would be applicable even though such cases come under S. 29 (2). There is nothing unreasonable to hold that a pre-Act assignment is also included in S. 36 (5). The post-Act assignee enjoys certain privileges under the Act. He is entitled to a notice regarding the character of the debt and if he receives no notice, the Act does not touch him at all. There is no justification to hold that the Legislature intended that the position of the pre-Act assignee should be worse, and therefore it would be quite consistent with reason to interpret S. 36 (5) in its plain grammatical sense which would bring a pre-Act assignee within the fold of its protection. Both the conditions necessary to attract the operation of S. 36 (5) namely that the Court must be satisfied that the assignment was bona fide and that the assignee had not received the notice under S. 28 (1) of the Act can be satisfied in the case of a pre-Act assignment : ('42) 29 A.I.R. 1942 Cal. 370 and 45 C. W. N. 1091 (Judgment of Chief Justice), *Approved*; 46 C.W.N. 388 and ('41) 28 A. I. R. 1941 Cal. 681, *Not foll.* [P 477 C 2; P 478 C 1]

(g) Bengal Money-Lenders Act (10 of 1940), S. 36 (5) and S. 36 (1) (d)—Object of S. 36 (5)—Assignee of debt after 1st January 1939 but before Act is protected under S. 36 (5) and is exempt from making refund under S. 36 (1) (d) proviso — S. 36 (5) applies even to cases to which S. 36 (1) (d) proviso applies.

The object of S. 36 (5) was to protect a post-Act assignee who but for this sub-section would be bound to make a refund under S. 36 (1) (d) even if he did not receive any notice under S. 28 (1) : 45 C. W. N. 1091, *Approved.* [P 478 C 2]

An assignee to whom the debt was transferred after 1st January 1939 and before the passing of the Act is also protected by S. 36 (5) and would be exempted from making proportionate refund, which he otherwise would be bound to make, under the proviso to S. 36 (1) (d). The opening words of S. 36 (5) are "Nothing in this section;" and S. 36 certainly includes its different clauses together with the provisos attached to them. Hence S. 36 (5) applies to cases where the proviso to S. 36 (1) (d) applies : 45 C. W. N. 1091, *Not approved.* [P 478 C 2]

Amarendra Nath Bose, Hemendra Kumar Das for Priya Nath Dutta and Satyendra Kishore Ghose — for Petitioner.

Ajit Kumar Dutta — for Opposite Party.

ORDER.—This rule is directed against an order of the Subordinate Judge, Second Court, Comilla, dated 5th November 1941, made on an application presented by the defendant opposite party under S. 36, Bengal Money-Lenders Act. The opposite

party borrowed a sum of Rs. 5437 from the Brahmanbaria Loan Co., on a promissory note dated 25th October 1930, agreeing to pay interest at the rate of 12 per cent. per annum. The petitioner before us was a depositor in the aforesaid loan company and had a deposit of Rs. 7000 to his credit with the latter. When this deposit matured, the loan company endorsed over to the petitioner the promissory note executed by the opposite party, in part payment of the deposit. The petitioner as assignee of the promissory note thereupon instituted a suit against the defendant opposite party and got a decree for a sum of Rs. 7390-9-0 together with costs on 10th May 1934. The decree was executed several times and a portion of the decretal dues was realised. The last execution case was started on 26th September 1940, and during the pendency of the same the opposite party made the application for reopening of the decree under S. 36, Bengal Money-Lenders Act. A preliminary point was raised as to whether the petitioner as an assignee of the debt prior to the passing of the Money-Lenders Act was entitled to protection under S. 36 (5) of the Act. The trial Court answered this question in the negative and by its order mentioned above held that the decree was liable to be reopened. It is the propriety of this decision that has been challenged in this rule.

Mr. Bose who appears for the petitioner has contended before us that the operation of S. 36 (5), Bengal Money-Lenders Act, is not confined to post-Act assignees merely and that a pre-Act assignee also comes within its protective provision. This identical point came up for consideration in several recent cases before this Court but unfortunately the decisions have not been at all uniform. The first pronouncement on the subject was made by Edgley J. in 45 C. W. N. 863[1] and it was held by the learned Judge that the Bengal Money-Lenders Act imposed the same disabilities upon an assignee of the debt, to whom the assignment was made prior to the Act, as upon the lender himself and such assignment was not protected by S. 36 (5) of the Act. The decision of Edgley J. was set aside on appeal by his Lordship the Chief Justice sitting with Nasim Ali J., *vide* 45 C. W. N. 1091,[2] but though they concurred in setting aside the judgment of Edgley J., they expressed divergent views so far as the present question is concerned. The learned Chief Justice was of opinion—though he expressly said that it was not necessary to decide the point for purposes of that case—that S. 36 (5), Bengal Money-Lenders Act covers a pre-Act assignee whereas Nasim Ali, J. agreed with Edgley J. in holding that the sub-section was confined to a post-Act assignee. The same divergence of opinion is noticeable in two recent cases which have since been reported. In 46 C.W.N. 368,[3] Sen J. took the view that S. 36 (5) was applicable to assignments made before the Act whereas a contrary decision was given by Roxburgh J. in 46 C. W. N. 388.[4]

It is not disputed that if the words of S. 36 (5), Bengal Money-Lenders Act are given their plain and literal meaning, there is nothing in them which would exclude from their scope a pre-Act assignee. To attract the operation of this sub-section, two conditions have to be fulfilled. The Court is to be satisfied first that the assignment was bona fide and (2) that the assignee had not received the notice referred to in cl. (a) of sub-s. (1) of S. 28 of the Act. Both these conditions can certainly be satisfied in a case of a pre-Act transfer. Whether the transaction is bona fide or not is a question of fact which has got to be decided on the circumstances of each individual case and in the case of a pre-Act transferee the second condition must necessarily be fulfilled as the question of notice under S. 28 (1) (a) would not arise, the section itself being not in existence at that time. But it may be argued that the intention of the Legislature was that S. 36 (5) would be applicable only in those cases where the notice contemplated in S. 28 (1) (a) could be given and consequently a pre-Act transfer is wholly outside the scope of the sub-section. A literal construction can indeed be departed from if a strict and rigid adherence to it would frustrate the intention of the Legislature and lead to inconsistency or manifest injustice. It is necessary, therefore, to consider whether the scheme of the enactment or the context in which these words are used, or the consequences to which the literal interpretation would lead, point to the conclusion that that interpretation does not express the real intention of the Legislature.

The main scheme of the Act is undoubtedly to make better provision for the control of money-lenders and for the regulation and control of money-lending. To find out how far the rights of an assignee of a loan are regulated by the provisions of the Act we will have to advert to Ch. 5 of the Act which purports to deal with assignments. That chapter comprises two sections, namely, Ss. 28 and 29. Section 28 deals with post-Act assignments and is almost a reproduction of S. 16, English Money-Lenders Act of 1927. Sub-section (1) of this section provides that when a debt in respect of a loan advanced by the lender whether before or after the commencement of the Act is assigned to any person, the assignor shall before the assignment is made, give to the assignee a notice in writing, that the debt, interest thereon, agreement or security is affected by the provisions of the Act. He has also to give certain informations which are prescribed in cl. (b) of the sub-section. Failure to comply with these provisions constitutes a punishable misdemeanour under sub-s. (2) which further provides that any person who acts in contravention of these provisions shall be liable to idemnify any person who is prejudiced by such contravention. The position, therefore, is that a post-Act assignee if he is given a notice under S. 28 (1) acts with his eyes open and cannot claim any protection and if, on the other hand, he does not receive any notice the borrower who is damnified can claim indemnity from the assignor who omitted to give such notice. We now come to S. 29 which consists of three parts. The third part is immaterial for our present purposes. The first part deals with assignment of debt due to a lender in respect of loans after the commencement of the Act, and ex hypothesi the assignment must also be after the Act. In such cases, the provisions of the Act are made applicable to the assignee of a debt subject to the exception in case of a bona fide assignee or holder for value without any notice of any defect due to the operation of the Act. Here again, there is reiteration of the indemnity clause and the borrower can claim indemnity from the lender for any loss that he suffers because of the omission on the part of the assignor to make the

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1. ('41) 28 A.I.R. 1941 Cal. 681 : 198 I. C. 71 : 45 C. W. N. 863, Manmatha v. Renula.
2. ('41) 45 C. W. N. 1091, Manmatha v. Renula.
3. ('42) 29 A.I.R. 1942 Cal. 370 : 46 C. W. N. 368, Bhupendra Nath Dutt v. Debendra Nath.
4. ('41) 46 C. W. N. 388, Krishnadhan v. Nalini Chandra.

assignee acquainted with the true position of the debt. Part (2) of the section lays down that:
"the provisions of this Act shall apply and be deemed always to have applied and shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him before the commencement of this Act, notwithstanding that the debt may have been assigned to any assignee; and except where the context otherwise requires, references in this Act to a lender or money-lender shall accordingly be construed as including any such assignee as aforesaid."

It may be mentioned here that whereas S. 29 (1) corresponds to S. 17, English Money-Lenders Act of 1927, there is no provision in the English Act corresponding to S. 29 (2). The object of the Legislature was apparently to make the provisions of the Act retrospective with regard to pre-Act loans and it might have been further intended that no lender should be allowed to defeat these provisions by making an assignment. There is no doubt that this sub-section contemplates a pre-Act loan, but whether it contemplates a pre-Act assignment also is not very clear, though the words used are very general. The utmost that can be said is that S. 29 (2) contains the general provision relating to assignment of debts and ordinarily an assignee of a debt contracted prior to the Act will be saddled with the same disabilities as the lender himself. But though this is the general provision, the Act certainly contemplates exceptions to it. Thus in the case of a post-Act assignment of a pre-Act debt, the provisions of S. 28 would undoubtedly be attracted.

As was pointed out by the learned Chief Justice in 45 C. W. N. 1091,[2] the Bengal Money-Lenders Act though conceived on a plan was altered a good deal in its passage through the Legislature. It may be that in course of its passage certain defects were noticed which were originally left unprovided for and they were sought to be removed by making additional provisions in other parts of the Act which look like so many patch works. But it is not our business to find fault with the Legislature. We are only to see whether the whole Act could be interpreted in a consistent way. We think that the provision of S. 36 (5) of the Act is in no way inconsistent with that of S. 29 (2). The former may be an exception engrafted upon the latter but it is by no means repugnant to the same. When a pre-Act debt is assigned after the Act, it is not disputed that S. 36 (5) would be applicable, even though such cases come under sub-s. (2) of S. 29. There is nothing unreasonable if we hold that a pre-Act assignment is also included in S. 36 (5). The post-Act assignee enjoys certain privileges under the Act. He is entitled to a notice regarding the character of the debt and if he receives no notice, the Act does not touch him at all. There is no justification to hold that the Legislature intended that the position of the pre-Act assignee should be worse, and in these circumstances it would be quite consistent with reason to interpret S. 36 (5) in its plain grammatical sense which would bring a pre-Act assignee within the fold of its protection.

Some doubt is sought to be thrown on this point by reason of the proviso to S. 36 (1) (d), Money-Lenders Act. Under S. 36 (1) (d), if anything has been paid or allowed in account on or after 1st January 1939, in excess of the limits laid down in S. 30, sub ss. (1) and (2), the lender may be directed to refund that amount. The proviso attached to it lays down that in case of assignment of such loan the assignee or assignees may be directed only to make pro rata payment together with the lender in such manner as the Court considers proper. The proviso may certainly include the case of an assignment made between 1st January 1939, and the date of the commencement of the Act, and it is said that the adjustment between the assignor and the assignee which the proviso contemplates would be meaningless if a pre-Act assignee is protected by S. 36 (5). We are not much impressed by this argument. It was pointed out by Nasim Ali J. in his judgment referred to above: *vide* 45 C. W. N. 1091[2] that the object of S. 36 (5), Bengal Money-Lenders Act was to protect a post-Act assignee who but for this sub-section would be bound to make a refund under S. (36) (1) (d) even if he did not receive any notice under S. 28 (1). It would not be unreasonable, in our opinion, to hold that an assignee to whom the debt was transferred after 1st January 1939, and before the passing of the Act would also be protected by S. 36 (5) and would be exempted from making proportionate refund, which he otherwise would be bound to make, under the proviso to S. 36 (1) (d). It is common knowledge that legislation on these lines was long expected before the Money-Lenders Act was actually passed and a question of bona fides would certainly arise in case of transactions after 1st January 1939, even though they were prior to the Act. We do not agree with the Chief Justice that S. 36 (5) would not be applicable to cases where the proviso to S. 36 (1) (d) applies. The opening words of S. 36 (5) are "Nothing in this section;" and S. 36 certainly includes its different clauses together with the provisos attached to them.

Our conclusion, therefore, is that there are no sufficient reasons to depart from a literal construction of the words used in S. 36 (5), Money-Lenders Act and we are not justified in putting a narrow interpretation upon the sub-section upon a speculative view of the possible intentions of the Legislature. As there is no pronouncement of a Division Bench on this point as yet, it is not necessary for us to refer the matter for decision by a Full Bench. The result, therefore, is that this rule is made absolute, and the order of the Court below is set aside. As it is not disputed that the petitioner is a bona fide assignee, we hold that he is protected under S. 36 (5), Bengal Money-Lenders Act and that the decree cannot be reopened. The petitioner is entitled to his costs of this rule. We assess the hearing-fee at two gold mohurs.

G.N./R. K. *Rule made absolute.*

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B. K. MUKHERJEA AND BLANK JJ.

Atul Chandra Chakravarti and others — Judgment-debtors — Appellants

v.

Upendra Narayan Mukhopadhyaya — Decree-holder — Respondent.

Appeal No. 98 of 1941, Decided on 23rd April 1942, from original order of Sub-Judge, Second Court, Midnapore, D/- 7th March 1941.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1) (a) proviso — Words "term of tenancy" mean "tenure or holding" and are not limited to tenancy for particular period — Modes of extinction of tenancy within S. 168A (1) (a) proviso indicated.

The words "term of the tenancy" in S. 168A (1) (a) proviso mean the same thing as "tenure or holding" which occur just before them and are not

limited to a tenancy for a particular period only. The proviso contemplates the extinction of the tenancy by some method which the law considers valid and the fact that "surrender" is excluded definitely shows that efflux of the period is not the only mode of extinction under S. 168A (1) (a) proviso. The proviso contemplates that the tenancy must terminate or cease to exist, and it is not enough that it has merely changed hands and passed on to some person other than the judgment-debtor. Hence 'merger' of the tenancy in the superior interest of the landlord may be one of the methods by which a tenancy can expire within the meaning of S. 168A (1) (a) proviso. [P 479 C 2]

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (1) (a) proviso — Proviso contemplates case where defaulting tenure did not exist at initial stage when decree was first sought to be executed—Tenure sold in execution of decree — Proviso does not apply to subsequent execution for balance.

The proviso to S. 168A (1) (a) contemplates a case where the defaulting tenure did not exist at the initial stage when the decree was first sought to be executed. It does not apply where the tenure was sold in execution of the very decree, for the balance due under which the subsequent execution case was started. The words "before an application is made for execution of such a decree" in the proviso refer to the first or initial application for execution and not to the subsequent proceeding which is started by the landlord after the defaulting tenure is purchased by him in execution of the same decree.

[P 479 C 2, P 480 C 1]

(c) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A (2) — S. 168A applies to pending proceedings — Landlord putting defaulting tenure to sale before S. 168A and attaching other property — Property not sold when S. 168A came into force — Case falls under S. 168A (2).

No doubt the rights of the litigants are to be governed by the law as it existed at the date when the suit or proceeding was commenced unless the Legislature alters the rights of parties in express terms. The language of S. 168A (2) is, however, perfectly clear and goes to show that pending proceedings are not outside the scope of S. 168A. [P 480 C 1]

Section 168A (2) is wide enough to include a case where the landlord having put up to sale the defaulting tenure before the section is introduced proceeds against other properties of the judgment-debtor which are attached but not sold when the section comes into force, and the expression "shall not be executed" occurring in S. 168A (2) imposes limitations upon all proceedings in execution commenced or continued after the new section comes into force. When the landlord is himself the purchaser there is not much difference as to whether the defaulting tenure was sold under the old Act or the new. But a case of hardship may arise when the purchaser is a stranger. In such a case the landlord would lose the benefit of S. 168 (1) (b) and at the same time would be incapable of proceeding against other properties of the judgment-debtor. [P 480 C 1]

Amarendra N. Bose, Satkaripati Roy and Bireswar Chatterji — for Appellants.

Hiralal Chakravarty and Hemanta Kr. Bose— for Respondent.

JUDGMENT. — This is an appeal on behalf of the judgment-debtors and it is directed against an order made by the Subordinate Judge, Second Court, Midnapore, dated 7th March 1941, rejecting an application of the appellants under S. 168A, cl. (2), Ben. Ten. Act. The material facts are not disputed and may be shortly stated as follows : The respondent decree-holder obtained a rent decree against the appellants for a sum of Rs. 12,626 odd annas on 4th January 1932. It was put into execution in Execution Case No. 5 of 1932 and the tenure in arrears was put up to sale and purchased by the decree-holder on 23rd August 1932. The sale of the tenure wiped off only a portion of the decretal amount and the decree-holder had to take out successive executions after that for realisation of the balance. In Execution Case No. 16 of 1937, several other immovable properties belonging to the judgment-debtors were attached and sold and as that even did not satisfy the entire decree the present application for execution was started on 17th November 1939. In course of the present execution proceedings, the residential house of the judgment-debtors was attached but before the sale took place the new S. 168A, Ben. Ten. Act, came into force and the judgment-debtors made an application under sub-s. (2) of that section for release of the property attached on payment of costs. This application was rejected by the trial Court on the ground that the present case came under the proviso to S. 168A (1) (a), Ben. Ten. Act, and was consequently exempted from the operation of the main provision. It is the propriety of this decision that has been challenged on behalf of the appellants in this appeal.

The view taken by the Court below was that as soon as the landlord purchased the defaulting tenure on 23rd August 1932 the tenure itself ceased to exist being merged in the superior interest of the landlord, and as the tenancy expired before the present execution proceedings were commenced, by some means, other than surrender by the tenant, the proviso to S. 168A (1) (a) was attracted. Mr. Bose who appears in support of the appeal has contended before us that the proviso has no application except where the tenancy is for a definite period and comes to an end by efflux of time. We do not think that we can accept this contention as sound. The words "term of the tenancy" as used in the proviso are no doubt not very happy but in our opinion they mean the same thing as "tenure or holding" which occur just before them, and there is no justification for interpreting the words in a restricted sense and limiting them to a tenancy for a particular period only. The proviso contemplates the extinction of the tenancy by some method which the law considers valid and the fact that "surrender" is excluded, definitely shows that efflux of the period is not the only mode of extinction which the Legislature contemplates. What the Legislature contemplates is that the tenancy must terminate or cease to exist, and it is not enough that it has merely changed hands and passed on to some person other than the judgment-debtor. In this view we have no doubt that "merger" may be one of the methods by which a tenancy can expire within the meaning of the proviso to S. 168A (1) (a), Ben. Ten. Act. But though we do not agree with Mr. Bose on this point we think that for another reason the present case does not come within the exception embodied in the proviso to cl. (a) of the sub-section. In our opinion the proviso contemplates a case where the defaulting tenure did not exist at the initial stage when the decree was first sought to be executed. It does not apply where the tenure was sold in execution of the very decree, for the balance due under which the subsequent execution case was started.

a It is conceded by Mr. Chakravarty that if the tenure had been purchased by a stranger in the execution case of 1932 the landlord would have been incapable of proceeding against any other property of the judgment-debtor inasmuch as the defaulting tenure could not in that event be deemed to have ceased to exist. It would be extremely unfair and anomalous if the landlord, if he himself purchased the defaulting tenure in the first execution proceeding, could be allowed to proceed subsequently against other properties of the judgment-debtors although he would have no such right if the purchaser was some other person. In our opinion, the words "before an application is made for execution of such a decree" as used in the proviso refer to the first or initial application for execution and not to the subsequent proceeding which is started by the landlord after the defaulting tenure is purchased by him in execu-
b tion of the same decree. Mr. Chakravarti argues that this would be a perfectly sound proposition if the tenure itself was sold after the new S. 168A came into force but if it is extended to a case where the tenure was sold under the old law it would amount to giving retrospective operation to the section. It is true that the rights of the litigants are to be governed by the law as it existed at the date when the suit or proceeding was commenced unless the Legislature alters the rights of parties in express terms. The language of sub-s. (2) of S. 168A is however perfectly clear and goes to show that pending proceedings are not outside the scope of the section. If the sale of any property other than the defaulting tenure was completed before the section came into force the sale would certainly stand but if the property was attached and not sold, the judgment-debtor
c is given the right to apply for release of the property on payment of costs. The words of the sub-section are wide enough to include a case where the landlord having put up to sale the defaulting tenure before the section is introduced proceeds against other properties of the judgment-debtor which are attached but not sold when the section comes into force. Such cases would, in our opinion, be governed by sub-s. (1), cl. (a) and the expression "shall not be executed" occurring in that clause would impose limitations upon all proceedings in execution commenced or continued after the new section comes into force.

When the landlord is himself the purchaser there is not much difference as to whether the defaulting tenure was sold under the old Act or the new. Even in a case of sale after the new Act the provision of
d cl. (b) of sub-s. (1) would mean no real benefit to the landlord and he would have to take the tenancy in full satisfaction of his dues though the sale proceeds fell far short of the decretal amount. A case of hardship may indeed arise when the purchaser is a stranger. In such a case the landlord would lose the benefit of cl. (b) of sub-s. (1) and at the same time would be incapable of proceeding against other properties of the judgment-debtor. This may, however, be a matter for the Legislature to consider. We, on our part will not be justified on this ground alone in departing from the plain and literal interpretation of the words used in the section. The result is that we hold that the properties of the judgment-debtors which are under attachment should be released under S. 168A (2), Ben. Ten. Act. The appeal is accordingly allowed and the order of the lower Court is set aside. We make no order as to costs in this appeal.

G.N./R.K. *Appeal allowed.*

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DERBYSHIRE C. J. AND SEN J.

Nirendra Nath Banerjee —
Judgment-debtor—Petitioner

v.

Birendra Nath Chatterjee —
Decree-holder — Opposite Party.

Civil Rule No. 57 of 1942, Decided on 26th May 1942, issued in application for setting aside order of Sub-Judge, Second Court, Howrah.

*** Civil P. C. (1908), O. 21, R. 92, S. 115 and O. 43, R. 1 (j)—Application under O. 21, R. 90 not disposed of — Order confirming sale is invalid — Court acts with material irregularity in confirming sale—Revision lies—Order confirming sale does not fall under O. 43, R. 1 (j).** f

Where an application has been made under O. 21, R. 90 the Court cannot confirm the sale without disallowing that application. In confirming the sale without disposing of the application under O. 21, R. 90 the Court acts with material irregularity in the exercise of its jurisdiction and hence the order confirming the sale is open to revision under S. 115. [P 481 C 1]

The order confirming the sale without in any way dealing with the application under O. 21, R. 90 does not come within the purview of O. 43, R. 1 (j) under which it is the refusal to set aside the sale that is made appealable and not a mere order confirming the sale : ('26) 13 A. I. R. 1926 Cal. 773; ('29) 16 A. I. R. 1929 Cal. 407 and ('31) 18 A. I. R. 1931 P. C. 33, *Disting.* [P 481 C 1]

C. P. C. — g

('40) Chitley, S. 115, Note 24; O. 21, R. 90 Note 2 Pts. 1, 16; Note 13; Note 16 Pt. 1; O. 43, R. 1 Note 5, Pt. 1.

('41) Mulla, Page 423 Note "What is illegality or material irregularity"; Page 897 Notes "Appeal", "Revision."

Radhika Charan Chatterjee and Sushil Kumar Biswas — for Petitioner.

Ranjit Kumar Banerjee — for Opposite Party.

SEN J. — The petitioner and another person were judgment-debtors. The decree passed against them was put into execution and some property was sold. The other judgment-debtor put in an application for setting aside the sale and also an application for relief under the Bengal Money-Lenders Act. These matters were the subject-matters of Miscel-
h laneous Case No. 19 and Miscellaneous Case No. 42 of 1941 before the learned second Subordinate Judge at Howrah. The petitioner also filed an application under O. 21, R. 90, Civil P. C., praying that the sale be set aside on the usual grounds. The applications of the other judgment-debtors were withdrawn and thereupon the Subordinate Judge passed an order confirming the sale and dismissing the execution case on full satisfaction without dealing with the petitioner's application under O. 21, R. 90. The petitioner moved the Subordinate Judge and asked that his application may be dealt with and that the order confirming the same may be set aside. The learned Subordinate Judge refused the application and the petitioner has moved this Court in its revisional jurisdiction for relief.

The petitioner points out that the Court below acted with material irregularity in the exercise of its jurisdiction by confirming the sale without disposing of his application under O. 21, R. 90. He

refers us to the provisions of O. 21, R. 92 which says this :

"Where no application is made under R. 89, R. 90 or R. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

He points out, and in our opinion he points out rightly, that where there is an application made under O. 21, R. 90 the Court cannot confirm the sale without disallowing that application. In the present case, the Court has confirmed the sale without in any way disposing of that application. There can be no doubt that the Court has acted with material irregularity in the exercise of its jurisdiction and indeed the learned advocate on behalf of the opposite party does not seriously contest this. He says, however, that no application under S. 115, Civil P. C., lies to this Court inasmuch as the order of the learned Subordinate Judge confirming the sale is one passed under O. 21, R. 92, Civil P. C., and is appealable. He refers us to the provisions of O. 43, R. 1 (j) and argues that as the order is appealable this Court cannot deal with it in its revisional jurisdiction. Now, O. 43, R. 1 (j) says this : "An appeal shall lie from an order under R. 72 or R. 92 of O. 21 setting aside or refusing to set aside a sale." In the present case the Court has not refused to set aside the sale. It has merely confirmed the sale without in any way dealing with the application to have the sale set aside. Indeed, the Court when it passed the order confirming the sale was oblivious of the fact that there was such an application pending. Refusal is something positive; it is not a mere abstention. The refusal by a Court to do a thing presupposes that the Court has taken cognizance of a prayer made to it to do that thing. Here there was no such refusal but a mere confirmation. It is the refusal to set aside the sale that is made appealable and not a mere order confirming the sale. The order passed in this case is therefore not one which falls within the purview of O. 43, R. 1 (j).

We have been referred by the learned advocate for the opposite party to a number of cases amongst which are 56 Cal. 969,[1] 30 C. W. N. 570[2] and 35 C.W.N. 381.[3] All we have to say regarding these cases is that they dealt with facts which are entirely different from those of the present one and there is nothing laid down in these cases which would compel us to hold that the present order is one with which this Court cannot deal in the exercise of its revisional jurisdiction. We are therefore of opinion that this rule must be made absolute. The order confirming the sale is set aside and the learned Subordinate Judge is directed to deal with the application of the petitioner under O. 21, R. 90 in accordance with law. The costs of this rule shall abide the result of the application under O. 21, R. 90—the hearing-fee in this Court being assessed at two gold mohurs. Let the counter affidavit filed in Court at the hearing be kept on the record.

DERBYSHIRE C. J. — I agree.

G.N./R.K. *Rule made absolute.*

1. ('29) 16 A.I.R. 1929 Cal. 407 : 119 I. C. 374 : 56 Cal. 969 : 33 C. W. N. 392, Ansarali v. Bhim Sankar Dutta Tewari.
2. ('26) 13 A.I.R. 1926 Cal. 773 : 96 I. C. 705 : 53 Cal. 679 : 30 C. W. N. 570, Basaratulla Mean v. Reazuddin Mean.
3. ('31) 18 A.I.R. 1931 P. C. 33 : 130 I.C. 686 : 27 N.L.R. 95 : 58 I. A. 50 : 35 C. W. N. 381 (P. C.), Nanhelal v. Umrao Singh.

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BISWAS AND ROXBURGH JJ.

Bibhuti Bhusan Das — Petitioner

v.

Shebait of Sri Sri Radha Ballav Jiu Thakur Maharajadhiraj Sir Bejoy Chand Mahatap of Burdwan — Opposite Party.

Civil Revn. Petn. No. 1061 of 1941, Decided on 19th August 1941, for setting aside order of Sub-Judge, Birbhum (Suri), D/- 17th and 18th July 1941.

(a) Bengal Tenancy Act (8 of 1885), S. 163 — Judgment-debtor can move High Court in revision if procedure conducting sale is illegal — That he is not substantially concerned in matter may be reason for refusing interference in revision.

A judgment-debtor who is a party to the execution proceedings is entitled to see that they are conducted correctly according to law and the Court conducting the sale should certainly hear and decide any objections the judgment-debtor may make as to the procedure being adopted. It follows that prima facie the judgment-debtor may move the High Court in revision to interfere if the procedure is illegal. In view of the discretionary nature of the power given in S. 115, Civil P. C., the High Court might well take into consideration the fact that a person not substantially concerned as to the particular point was moving it, and might make that a reason for refusing to interfere. [P 482 C 1, 2]

C. P. C. —

('40) Chitaley, S. 115, Notes 2 and 3.

('41) Mulla, Page 408. N. "Exercise of revisional jurisdiction is discretionary."

(b) Bengal Tenancy Act (8 of 1885), Ss. 163, 165 — Tenure put up to sale subject to encumbrance — Sale adjourned as sufficient price not fetched and proclamation for sale with power to avoid encumbrances ordered — Proceedings stayed by order under S. 34, Bengal Agricultural Debtors Act — Stay order vacated and issue of fresh proclamation fixing 21st day from such date for auction and sale with power to avoid encumbrances ordered—Procedure held correct.

A tenure was put up in auction for sale subject to encumbrances. As it failed to fetch a price sufficient to liquidate the amount of the decree and costs, the sale was adjourned at the instance of the decree-holder and fresh proclamation was ordered for auction and sale with power to avoid all encumbrances. In the mean time, the judgment-debtor had approached a Debt Settlement Board and notice was issued under S. 34, Bengal Agricultural Debtors Act, staying further proceedings. Accordingly the sale was not held. The order of stay was vacated subsequently and the Court then ordered issue of a fresh proclamation fixing the 21st day from such date for auction and sale of the tenure again with power to avoid all encumbrances. It was contended that the legal procedure for the Court to follow would be to go back and begin afresh with a proclamation for sale of the tenure subject to encumbrances and that then only, if on such new sale taking place the bids are inadequate to liquidate the amount of the decree and costs, could the property be put up for sale with power to avoid encumbrances:

Held that O. 21, R. 69, Civil P. C., applied and that the proclamation to be issued was a fresh one

of the kind leading to the part of the sale which was being adjourned, namely a proclamation under S. 165 (1), Ben. Ten. Act, for sale with power to annul encumbrances. The words "under R. 67" in R. 69 are to be interpreted to mean R. 67 as varied by S. 165 (1), Ben. Ten. Act, read with S. 163 (3). So the proclamation must be for a sale with power to annul encumbrances and fixed for a date "not less than fifteen or more than thirty days from the date of the postponement," which date of postponement must be the date on which fresh proclamation was ordered. Therefore the procedure was proper.

[P 483 C 1]

Bankim Chandra Mukherji and Hari Prasanna Mukherji — for Petitioner.

Atul Chandra Gupta and Purusottam Chatterji — for Opposite Party.

ROXBURGH J.—This rule has been issued at the instance of the judgment-debtor in connexion with a proceeding in execution of a rent decree relating to a tenure. On 28th May 1941, the tenure was put up in auction for sale subject to encumbrances; as it failed to fetch a price sufficient to liquidate the amount of the decree and costs, the sale was adjourned at the instance of the decree-holder, in accordance with the procedure laid down in S. 165 (1), Bengal Tenancy Act, and fresh proclamation was ordered fixing 17th June following for auction and sale with power to avoid all encumbrances. In the meantime the judgment-debtor had approached a debt settlement board and a notice was issued under S. 34, Bengal Agricultural Debtors Act, (7 of 1936) staying further proceedings. Accordingly the sale was not held. The order of stay was vacated subsequently and the Court, on 18th July, then ordered issue of a fresh proclamation fixing 8th August for auction and sale of the tenure again with power to avoid all encumbrances. It is this order which the judgment-debtor wishes to challenge in these proceedings; it is contended that the legal procedure for the Court to follow now would be to go back and begin afresh with a proclamation under S. 163 (2), Bengal Tenancy Act, for sale of the tenure subject to encumbrances, and that then only, if on such new sale taking place the bids are inadequate to liquidate the amount of the decree and costs, can the property be put up for sale with power to avoid encumbrances. The point for decision involves an interpretation of the terms of the Bengal Tenancy Act in Ss. 163 and 165 read with the provisions of the Civil Procedure Code, and in particular Rr. 67, 68 and 69 of O. 21 in relation to the conduct of sales. In our opinion the procedure followed by the lower Court is correct.

Before considering this, we may briefly deal with two objections raised by Mr. Gupta for the decree-holder. His first objection is that the judgment-debtor should not be heard at all in this matter, that the question really arises between the decree-holder, the encumbrancers and whoever may be the purchaser, and that a present decision will not bind them. We think that a judgment-debtor who is a party to the execution proceedings is entitled to see that they are conducted correctly according to law. The decree-holder is purporting to follow the procedure laid down in Ch. 14, Bengal Tenancy Act, and the Court conducting the sale should certainly hear and decide any objections the judgment-debtor may make as to the procedure being adopted. It follows that prima facie the judgment-debtor may move this Court in revision to interfere if the procedure is illegal. In view of the discretionary nature of the power given in S. 115 of the Code the Court might well take into consideration the fact that a person not substantially concerned as to the particular point was moving it, and might make that a reason for refusing to interfere. As we hold that the procedure followed by the lower Court is correct, it is a purely academic question whether, if we were to hold otherwise, we should consider it a fit case or not for interference at the instance of the judgment-debtor. The next objection taken by Mr. Gupta is that as there was a statutory stay of proceedings by operation of S. 34, Bengal Agricultural Debtors Act, and as that Act does not itself provide for what is to be done when the stay is removed, and as, further, the Court's proceedings must be allowed to continue, it is for the Court by its inherent powers to make suitable provision for this, and that correct provision has been made. But even accepting this as a general proposition the position here is that the law has made provision for what is to be done in regard to adjournment of sales, and what has happened in this case is that there has been an adjournment forced on the Court by operation of law. This dispute then is merely as to what is the correct procedure in relation to adjournments.

In virtue of the provisions of S. 148 (a), Bengal Tenancy Act, the whole of O. 21, Civil P. C., with the exception of R. 83 is applicable to suits for the recovery of rent, and this must mean applicable to execution of decrees in such suits. Nevertheless Ch. 14, Bengal Tenancy Act, engrafts some special provisions of its own on to these provisions of the Code. The sale is to be made in parts; there is first to be a proclamation issued in the form, and published in the manner, provided in S. 163 for sale of the tenure subject to encumbrances. We may note sub-s. (4) of S. 163 which makes a variation of the provisions of O. 21, Rule 68 in that the period of thirty days within which the sale cannot take place is to be calculated from the date on which the copy of the proclamation has been fixed upon the land comprised in the tenure to be sold, and not, as in R. 68, from the date on which it was fixed on the Court house of the Judge conducting the sale. It is not disputed that so far as regards adjournments at this stage of the sale, R. 69 of O. 21 would apply, namely that the Court would have discretion to adjourn, and that if the adjournments were for a longer period than one calendar month a fresh proclamation would be necessary. Rule 69 itself speaks of a fresh proclamation 'under R. 67;' clearly the fresh proclamation in a proceeding under Chap. 14 at this stage would be one under that rule as varied by sub-ss. (2), (3) and (4) of S. 163. The second stage of a sale under chap. 14 is reached when the bids at the sale of the tenure subject to encumbrances fail to cover the specified amount; thereupon S. 165 (1) requires adjournment of the sale and a fresh proclamation published in accordance with the procedure provided in sub-s. (3) of S. 163 to be issued announcing that the tenure "will be put up to auction and sold with power to avoid all encumbrances upon a future day specified therein, not less than fifteen or more than thirty days from the date of the postponement; and upon that day the tenure or holding shall be put up to auction and sold with power to avoid all encumbrances." Mr. Mukherjee appearing for the judgment-debtor when placing his argument in its most rigid form contended that in view of this wording the sale must take place on the day specified and on no other, and in cases of failure, then the decree-holder must go back and start afresh under S. 163. When pressed with the untenability of this view he conceded that there might be adjournments if, say, the

sale had been fixed for the sixteenth day, to any day up to the thirtieth day from the date of the postponement. We are however unable to see that the wording of the sections requires this interpretation nor to accept the view that the terms of this special provision for early sale prohibit the operation of R. 69 to allow for any adjournments necessitated by circumstances. It follows also that if adjournments take the proceedings beyond the period of one month from the date fixed for the sale, R. 69 will operate to require a fresh proclamation to be issued.

The only difficulty of interpretation is as to which proclamation is required to be issued, whether a fresh proclamation under S. 163 for sale free from encumbrances, or a fresh proclamation under Section 165 (1) for sale with power to annul encumbrances.. In our opinion, the reasonable and correct interpretation is that the proclamation to be issued is a fresh one of the kind leading to the part of the sale which is being adjourned, namely a proclamation under S. 165 (1) for sale with power to annul encumbrances, and that at this stage the words "under Rule 67" in R. 69 are to be interpreted to mean R. 67 as varied by S. 165 (1), Ben. Ten. Act, read with S. 163 (3). It follows that the proclamation must be for a sale with power to annul encumbrances, and fixed for a date "not less than fifteen or more than thirty days from the date of the postponement," which date of postponement must be the date on which fresh proclamation is ordered. This is the procedure which has been followed by the lower Court in the present case, proclamation having been ordered on 18th July for sale on 8th August, that is to say, for the twenty first day after the date on which proclamation was ordered; the order was correct and calls for no interference. The rule is therefore discharged with costs two gold mohurs. Let the records be sent down at once.

BISWAS J. — I agree.

K.S./R.K. *Rule discharged.*

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R. C. MITTER AND KHUNDKAR JJ.

Ram Chandra Banerjee — Defendant — Appellant

v.

Baidyanath Roy Chaudhury and others — Plaintiffs — Respondents.

Appeal No. 51 of 1938, Decided on 18th December 1941, from original decree of Sub-Judge, 1st Court, Bakarganj at Barisal, D/- 30th September 1937.

(a) Civil P. C. (1908), O. 40, R. 1 — Receiver appointed under O. 40, R. 1 — Position of, explained—Right to take account from receiver or to take account of his management is primarily in Court appointing him — Right of individual to sue him for account or in matters respecting his management is derived from Court by reason of leave given to him by Court to sue.

The estate does not vest in a receiver appointed under O. 40. While functioning he is not a trustee, much less a trustee for a specific purpose. His position is that of an officer of the Court appointing him and his official duty is to preserve and manage the subject-matter of the litigation. He is not the agent of the parties to the litigation in which he is appointed or of any one of them. He acts for the benefit of the party who ultimately becomes successful. The property is in *custodia legis* and through him the Court discharges its functions of preserving the subject-matter of the litigation. He is only accountable to the Court which appointed him in his capacity as its officer. The right to take account from him or to take account of his management is primarily in the Court which appointed him and the right of an individual to sue him for account or in matters respecting his management is a right derived from the Court by reason of the leave given to him by the Court to sue. [P 485 C 1, 2]

C. P. C. —

('40) Chitaley, O. 40 R. 1 N. 37 Pts. 1, 10.

('41) Mulla, Page 1148 N. "Receiver's liability to account."

(b) Limitation Act (1908), Arts. 120, 36 and 115 — Conditions requisite for applicability of Art. 36 explained — Receiver appointed under O. 40, Civil P. C.—Suit for account against, is governed by Art. 120 — Neither S. 10 nor Arts. 36, 115 or 89 apply.

Article 36 applies to torts only. The malfeasance, misfeasance or non-feasance complained of must be "independent of contract" in order to attract Art. 36. Article 36 applies to suit which has for its basis the commission by the defendant of some act which is in itself unlawful or the improper performance of some lawful act, e. g., with negligence or some illegal omission, but the breach must be of a duty imposed by general law of the land and not a duty created by or resting upon a special engagement, in which case Art. 36 would not apply. A receiver appointed under O. 40, Civil P. C., engages to collect and account for the rents and profits and to perform his duties well. One of his important duties for which he had engaged with the Court is to manage like a prudent owner. Even in matters of management he has not the same amount of discretion as an owner has. Such being his position if any loss occurs by reason of his misfeasance, malfeasance or non-feasance in respect of the property committed to his care or if loss results from his management or neglect of duties he is to make good the loss not by reason of any provision of the general law of the land but because of the breach of the duties he had agreed to discharge. The misfeasance, malfeasance or non-feasance, as the case may be on his part would not be "independent of contract," and hence Art. 36 is not applicable to a suit against the receiver which is not for compensation but is in essence a suit for account of his management. [P 485 C 2]

The fact that if the receiver is found guilty of negligence in the management of the property committed to his charge the plaintiff would be entitled also to sums other than those specified in plaint which are found to have been lost by the receiver's default or negligent management is an additional reason for the inapplicability of Art. 36 to suit for account against receiver. For the same additional reason Art. 115 also does not apply. Nor has S. 10 or Art. 89 any application. No specific article being applicable Art. 120 must apply. [P 485 C 2]

Limitation Act —

('42) Chitaley, Art. 36 N. 1 Pts. 1 to 3 ; Art. 120 N. 2 Pt. 1 ; Art. 120 N. 15.

('38) Rustomji, Page 657 Pt. 1 ; Page 1038 Note "Suit for accounts."

(c) Civil P. C. (1908), O. 40, R. 1 — Receiver appointed under O. 40, R. 1 — Suit for account

a **of management against receiver — Receiver found guilty of negligent management — Preliminary decree must direct him to give account of management for whole period of his receivership and not merely of terms specified in plaint —Plaintiff is entitled to items not specified in plaint but found to have been lost by receiver's default or negligent management.**

If in a suit for account of his management against the receiver appointed under O. 40, the receiver is found guilty of negligence in the management of the property committed to his charge the correct form of the preliminary decree would be to call upon him to give an account of his management for the whole period of his receivership. Neither the commissioner appointed to take accounts nor the Court at the final stage of the suit would be limited to an
b enquiry in regard to those items only which are specified in the plaint and the plaintiff would be entitled to have a decree for other sums of money not specified therein but which on enquiry at the final stage are found to have been lost by his default or negligent management. [P 485 C 2]

C. P. C. —

('40) Chitaley, O. 40 R. 1 N. 36; O. 40 R. 3 N. 3.

('41) Mulla, Page 1148 N. "Receiver's liability to account"; Page 1152 N. "Submit his accounts."

(d) Civil P. C. (1908), O. 40, R. 1 — Receiver appointed under O. 40, R. 1 — Exceptions to accounts submitted by receiver — Court as matter of convenience and practice confines itself to question whether Receiver had shown in his accounts credits and debits correctly and
c leaves question of Receiver's negligence and consequent loss to be gone into in separate suit though it has jurisdiction to go into that question.

At any time before the Receiver appointed under O. 40, R. 1 is finally and unconditionally discharged the Court which had appointed him can require him to give an account of the management of the property committed to his care. That Court has full jurisdiction to enquire not only into the question whether he has shown in his accounts the credits and debits correctly but can enquire into the question as to whether he had been negligent in his management, and if so, what loss he had caused thereby. It is only as a matter of convenience and practice that the Court generally confines itself to the first mentioned question in exceptions to the Receiver's account and leaves the other question to
d be gone into in a suit, on the footing that the investigation in the suit would be thorough and more satisfactory and fair to all, the parties and the Receiver, for there would be opportunity afforded to them to appeal to a higher tribunal from the decree passed in the suit. [P 486 C 1]

C. P. C. —

('40) Chitaley, O. 40, R. 1, N. 37, Pts. 2, 4, 5, 6; O. 40, R. 3, N. 3, Pt. 4.

('41) Mulla, Page 1148 N. "Receiver's liability to account;" Page 1152 N. "Submit his accounts."

(e) Limitation Act (1908), Art. 120—Receiver appointed under O. 40, Civil P. C., submitting accounts—Exceptions to—Court coming to conclusion that enquiry into Receiver's management should be conducted not by itself but in separate suit—Leave to sue given to named individual—Right to sue accrues to plaintiff when leave to sue Receiver is given by Court appointing him —Such leave is essentially different from leave to sue Receiver given to person who could have
e **sued any one or all parties to litigation in which receiver was appointed in respect of any item committed to charge of Receiver — Cause of action in such case when arises.**

Where the Court comes to the conclusion in a particular case that an enquiry into the management by the Receiver appointed under O. 40, Civil P. C., should be conducted not by itself in the proceedings started on exceptions to the accounts submitted by the Receiver but in a separate suit, leave to sue to a named individual or to a group of named individuals is and must be given, for the Court not being a juridical person cannot sue in its name: ('19) 6 A.I.R. 1919 P. C. 55, *Rel. on.* [P 486 C 1]

The right to sue accrues within Art. 120 when the leave to sue the Receiver or the ex-receiver is given by the Court which had appointed the Receiver. The leave to sue in such cases stands on a different
f footing from the leave to sue the Receiver given to a person who could have sued any one or all the parties to the litigation in which the receiver had been appointed in respect of any of the items of property committed to the charge of the Receiver. In such cases the cause of action was already there and the leave to sue the Receiver only obviates contempt proceedings to which the plaintiff in that suit would have been otherwise liable to, but it does not add to, modify or become a part of the cause of action.

[P 486 C 1]

Limitation Act —

('42) Chitaley, Art. 120 N. 3, Pt. 5.

('38) Rustomji, Page 1026, N. "Commencement of Limitation;" Page 1027 N. '"When the Right to Sue Accrues;" as interpreted by the Privy Council.'

(f) Limitation Act (1908), Art. 120—Right to
g sue when accrues.

The right to sue accrues only when a person becomes clothed with a legal character entitling him to a relief which a Court of law is competent to grant: ('21) 8 A. I. R. 1921 Pat. 166, *Rel. on.* [P 486 C 1]

Limitation Act —

('42) Chitaley, Art. 120, N. 3 Pts. 1 to 6.

('38) Rustomji, Page 1027, N. '"When the Right to Sue Accrues," as interpreted by the Privy Council.'

A. N. Bose, Jitendra Nath Guha, Satya Pria Ghose and Sailendra N. Banerjee —
for Appellant.

Dr. Basak and Bankim Chandra Banerjee —
for Respondents.

JUDGMENT. — The Madhabpashwa estate of
h which the respondents are the proprietors was involved in debts. One of their creditors, a mortgagee, had instituted in 1927 a suit against them to recover his dues which was a heavy one (Suit No. 40 of 1927 of the first Court of the Subordinate Judge, Barisal). Two other creditors had started two execution proceedings (Nos. 4 and 10 of 1927) in that Court. In that suit and in those execution proceedings the appellant, a retired judicial officer, was appointed receiver on 3rd September 1927, on his furnishing security for Rs. 10,000 and on executing a security bond. The Court of Wards assumed charge of the Madhabpashwa estate in the early part of 1929 and the appellant was discharged from his office as receiver on 20th January 1929. He submitted his accounts to the Court which had appointed him, but instead of directing a ministerial officer of the Court to check his accounts the learned Subordinate Judge appointed the manager of the Court of Wards to check the same and directed him

to report. The said officer submitted two reports — one on 7th February and the other on 2nd May 1930. The said reports came up for consideration on 5th January 1931. By an order made on that date the learned Subordinate Judge following the rule of practice indicated in 5 C. W. N. 223[1] held that all the matters dealt with in those two reports could not be properly dealt with in proceedings arising out of exceptions to a receiver's accounts. He accordingly dealt with some of the matters referred to in the reports and some of the objections of the proprietors of the Madhabpashwa estate to the receiver's account and gave the latter leave to sue the receiver in respect of other matters which concerned the management of the estate by the said receiver. The receiver was finally discharged by an order dated 21st January 1932, which, however, expressly reserved the right of the Court of Wards and the proprietors of the Madhabpashwa estate "to establish any claim they may make against him in a suit properly framed for the purpose."

On 28th November 1931, the manager of the Court of Wards acting on behalf of the proprietors gave a notice under S. 80, Civil P. C., to the appellant, and on 21st March 1932, instituted this suit against him. In the suit the appellant is sought to be made liable for his negligence in the management of the estate which had been committed to him as receiver. In the plaint the details of the claim have been set out in two schedules B and C. The substance of the charge against him is that he negligently allowed rents due from the tenants to be barred by time, that he made large advances to his subordinate officers and failed to recover them, that he paid money without the sanction of the Court and that he allowed the teshildars to incur expenditure not sanctioned by the Court and which the Court ultimately refused to sanction. The learned Subordinate Judge in his preliminary judgment dated 30th September 1937 found that the appellant was "guilty of wilful neglect and gross negligence in managing the estate." He held the receiver liable to render account of his management from 3rd September 1927 to 19th January 1929, that is to say, for the period during which he had acted as receiver. This appeal is directed against that decree. While this appeal was pending the final decree was passed on the basis of the Commissioner's report by which the appellant has been directed to pay the respondents the sum of Rs. 5168-11-6 and costs. The appellant does not challenge the Commissioner's report or the correctness of the amount mentioned in the final decree. Nor does he challenge the finding against him in the preliminary decree to the effect that he had been guilty of wilful neglect and gross negligence in the management of the estate. The only point raised by his advocate is the question of limitation. On that question the learned Subordinate Judge held that Art. 120, Limitation Act, was applicable and so the suit was in time.

In our judgment neither S. 10 nor Art. 89, Limitation Act, is applicable to this suit. The estate does not vest in a receiver appointed under the provisions of O. 40, Civil P. C. While functioning he is not a trustee, much less a trustee for a specific purpose. His position is that of an officer of the Court appointing him and his official duty is to preserve and manage the subject-matter of the litigation. He is not the agent of the parties to the litigation in which he is appointed or of any one of them. He acts for the benefit of the party who ultimately becomes successful. The property is in *custodia legis* and through him the Court discharges its functions of preserving the subject-matter of the litigation. He is only accountable to the Court which appointed him in his capacity as its officer. The right to take account from him or to take account of his management is primarily in the Court which appointed him and the right of an individual to sue him for accounts or in matters respecting his management is a right derived from the Court by reason of the leave given to him by the Court to sue. The real competition is between Art. 36 and Art. 120, Limitation Act. If the case comes within Art. 36, Art. 120 cannot apply.

Article 36 is a residuary article in respect of one class of suits. It is a general article for suits for compensation for acts and omissions amounting to torts which are not provided for elsewhere in the first division of Sch. 1, Limitation Act. That that article is applicable to torts only is indicated in col. 1. The malfeasance, misfeasance or non-feasance complained of must be "independent of contract" in order to attract that article. That article applies to suit which has for its basis the commission by the defendant of some act which is in itself unlawful or the improper performance of some lawful act, e. g., with negligence or some illegal omission, but the breach must be of a duty imposed by general law of the land and not a duty created by or resting upon a special engagement, in which case Art. 36 would not apply, but some other article of the Limitation Act would. A receiver appointed under O. 40 of the Code engages to collect and account for the rents and profits. He engages to perform his duties well. One of his important duties for which he had engaged with the Court is to manage like a prudent owner. Even in matters of management he has not the same amount of discretion as an owner has, for in many matters he must seek direction from the Court and act under its sanction. Such being his position, if any loss occurs by reason of his misfeasance, malfeasance or non-feasance in respect of the property committed to his care or if loss results from his management or neglect of duties he is to make good the loss not by reason of any provision of the general law of the land but because of the breach of the duties he had agreed to discharge. The misfeasance, malfeasance or non-feasance, as the case may be, on his part would not be "independent of contract."

We accordingly hold that Art. 36 is not applicable to a suit of this description. Moreover, this is not a suit for compensation but in essence a suit for account against him. He is asked to give an account of his management. To establish a prima facie case against him the two schedules give details about monies lost on account of his negligence. If the Court found him guilty of negligence in the management of the property committed to his charge the correct form of the preliminary decree would have been to call upon him to give an account of his management for the whole period of his receivership. Neither the Commissioner appointed to take accounts nor the Court at the final stage of the suit would have been limited to an enquiry in regard to those items only which are specified in the two schedules, and the plaintiff would have been entitled to have a decree for other sums of money not specified therein but which on enquiry at the final stage would have been found to have been lost by his default or negligent management. This is an additional reason on which we hold that Art. 36 is inapplicable. This additional reason leads us to hold that Art. 115, Limitation Act, is not also applica-

1. ('01) 5 C. W. N. 223, Coomar Sattya Sankar Ghosal v. Rani Golapmoni Debi.

ble. There being thus no specific article of the Limitation Act applicable to this suit, the residuary article, namely, Art. 120 must apply. It is unnecessary to consider in this case col. 3 of that article, for the suit has been instituted within six years even of the date of the appointment of the defendant. Even if the right to sue had accrued the day after his appointment this suit would be in time. But as the question is of some importance we would express our views on the point.

We have already said that one of the important duties of the receiver is to give an account of his management to the Court which appointed him. At any time before he is finally and unconditionally discharged the Court which had appointed him can require him to give such account. That Court had full jurisdiction to enquire not only into the question whether he had showed in his accounts the credits and debits correctly but could have enquired into the question as to whether he had been negligent in his management, and if so, what loss he had caused thereby. It is only as a matter of convenience and practice that the Court generally confines itself to the first mentioned question in exceptions to the receiver's account and leaves the other question to be gone into in a suit, on the footing that the investigation in the suit would be thorough and more satisfactory and fair to all, the parties and the receiver, for there would be the opportunity afforded to them to appeal to a higher tribunal from the decree passed in the suit. There would thus be no occasion or necessity to sue the receiver till that Court had come to the conclusion in a particular case that an enquiry into the receiver's management should be conducted not by itself in the proceedings started on exceptions but in a suit. In the latter case leave to sue to a named individual or to a group of named individuals is and must be given, for the Court not being a juridical person cannot sue in its name : 46 I. A. 228.[2] The leave to sue in such cases gives the plaintiff "the right to sue" and "the right to sue" does not arise till the Court which had appointed the receiver has determined that it would not itself proceed to make any enquiry into the alleged mismanagement of the receiver but would leave that enquiry to be conducted in a properly constituted suit to be filed by the person to whom it gives the leave to sue.

The leave to sue in such cases in our opinion stands on a different footing from the leave to sue the receiver given to a person who could have sued any one or all the parties to the litigation in which the receiver had been appointed in respect of any of the items of property committed to the charge of the receiver. In such cases the cause of action was already there and the leave to sue the receiver only obviates contempt proceedings to which the plaintiff in that suit would have been otherwise liable to, but it does not add to, modify or become a part of the cause of action. The "right to sue" accrues only when a person becomes clothed with a legal character entitling him to a relief which a Court of law is competent to grant: 6 Pat. L. J. 273=A. I. R. 1921 Pat. 166.[3] We accordingly hold that the "right to sue accrues" in this class of suits which we have before us, when the leave to sue the receiver or the ex-receiver is given to a person by the Court which had appointed the receiver. This suit is accordingly not barred by time. The result is that this appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

2. ('19) 6 A. I. R. 1919 P. C. 55 : 55 I. C. 550 : 42 All. 158 : 46 I. A. 228 : 22 O. C. 212 (P. C.), Raj Raghubir Singh v. Jai Indra Bahadur Singh.
3. ('21) 8 A. I. R. 1921 Pat. 166 : 61 I. C. 807 : 6 Pat. L. J. 273 : 2 P. L. T. 556, Abdul Rahim v. Mt. Barira.

A. I. R. (29) 1942 Calcutta 486

BISWAS J.

Dwarkadas Marwari and others — Defendants — Appellants

v.

Sm. Parbati Dassi w/o Nepal Chandra Nag Modak, Plaintiff and others — Respondents.

Appeal No. 1484 of 1939, Decided on 22nd May 1942, from appellate decree of Sub-Judge, Bankura, D/- 30th June 1939.

(a) Civil P. C. (1908), S. 100—Finding that dar mokurari potta and kobala were valid and genuine and that disputed land was covered by both documents cannot be questioned in second appeal.

A finding that the dar mokurari potta and a kobala were valid and genuine documents and that the land in dispute was covered by both the documents cannot be questioned in second appeal. [P 487 C 2]

C. P. C.—
('40) Chitaley, Ss. 100 & 101 N. 52 Pt. 1.
('41) Mulla, Page 366 N. "No Second appeal lies on the ground of an erroneous finding of fact."

(b) Landlord and tenant — No written lease creating tenancy — Nature of tenancy how determined.

In the absence of a written lease creating a tenancy the nature of the tenancy must be determined from surrounding circumstances, and, in particular from the course of dealings by the parties concerned. [P 487 C 2]

(c) Evidence Act (1872), S. 13 — Case not governed by S. 18-A, Ben. Ten. Act — Subleases by lessee—Kabuliyats describing lessee as mokurari tenant being evidence of assertion of mokurari title by lessee are admissible under S. 13 against landlord even though he was not party to same—Even if S. 18-A applied kabuliats would be admissible as evidence of assertion of claim as to tenancy being of particular description—Effect of S. 18-A, Ben. Ten. Act, indicated.

In a case not governed by S. 18-A, Ben. Ten. Act, kabuliyats evidencing sub-leases granted by the lessee and describing the interest of the lessee as that of a mokurari tenant are evidence of the assertion of mokurari title on the part of the lessee and as such they are good evidence under S. 13, Evidence Act, against the landlord even though he was not a party to the same. Even if S. 18-A, Ben. Ten. Act, were applicable to the case that would simply exclude the kabuliyats as evidence against the landlord of the incidents of the tenancy as described therein, not as evidence of the assertion of a claim as to the tenancy being of a particular description. The distinction is much too refined, and, for all practical purposes, it may not amount to any thing. All the same S. 18-A, Ben. Ten. Act, cannot be said to necessarily preclude the applicability of S. 13, Evidence Act, to transactions in which the incidents of any tenure or holding are

asserted or denied merely on the ground that the landlord is not a party to the same. [P 487 C 2; P 488 C 1]

(d) Civil P. C. (1908), S. 11 — *D* Party to partition suit amongst cosharer landlords — Question arising in suit whether *D*'s tenancy was bar to partition of land comprised in tenancy — *D* claiming to be mokurari tenant — Specific issue raised as to character of tenancy —Appellate Court reversing trial Court's judgment and holding that *D* proved his tenancy right but had not established his mokurari interest—*D* not appealing—Finding that *D* was not mokurari tenant not being material and being obiter decision could not operate as res judicata in subsequent suit for determination of nature of *D*'s tenancy.

In the suit for partition amongst the cosharer landlords to which *D* was a party a question arose as to whether the fact of *D*'s tenancy was a bar to a partition of the lands in which the tenancy was comprised among the cosharers. *D* filed a written statement, claiming the status of a mokurari tenant, and a specific issue was raised as to the character of his tenancy. The trial Court gave effect to *D*'s claim of mourashi mokurari tenancy. On appeal, the District Judge merely held that *D* had successfully proved his tenancy right, but had not established the mourashi mokurari interest which he had claimed. *D* did not appeal from that decision.

Held that a party may, in certain circumstances, prefer an appeal against an adverse finding by the Court, though the ultimate decree in the suit may be in his favour. All the same, the question as to whether a party should or should not appeal to avoid the risk of the adjudication being final against him would depend upon the facts of each particular case. Having regard to the fact that the finding that really mattered was to the effect that *D* was a tenant of the land, the finding as to the nature of the tenancy was only obiter and was not material and hence the decision could not operate as res judicata in subsequent suit involving determination of the nature of tenancy.

[P 488 C 1, 2]

C. P. C. —

('40) Chitaley, S. 11, N. 100 Pt. 1; N. 101 Pt. 2;
('41) Mulla, Page 79 Pt. (m).

Rama Prosad Mookerji, Jajneswar Majumdar and Manindra Nath Palit — for Appellants.

Purushottam Chatterji and Nityaranjan Biswas — for Respondents.

JUDGMENT. — This is an appeal on behalf of defendants 1 to 4, and arises out of a suit for recovery of possession on declaration of the plaintiff's title. The subject-matter of the suit is a strip of land described in schedule kha of the plaint and forms the western half of a portion of the southern bank of a tank called Jinasini tank in the town of Bankura. The tank with its bank is dag No. 2804 of Khatian No. 1781, and has been described in schedule ka to the plaint. The plaintiff's case, shortly stated, is this. The whole of the land in schedule ka is said to have been held by one Dulal Keot in mokurari tenancy right from before the commencement of the Transfer of Property Act. On 7th February 1933, Dulal granted a dar mokurari settlement of this land to pro forma defendant 5, Bibhuti Bhusan Das, by a registered lease, Ex. 3. Then on 17th March 1933, Bibhuti transferred a portion of the land on the southern bank of the tank to the plaintiff by a kobala, Ex. 1, retaining the remaining portion for himself. Schedule kha comprises the portion so transferred, and, as already stated, this is the land which is the subject-matter of the present dispute. The plaintiff's case is that she was dispossessed from this land by defendants 1 to 4 who admittedly held some land immediately to the south. Hence the present suit.

The defence is a denial of the plaintiff's title and possession, and an assertion of title and possession in and by defendants 1 to 4 themselves. It is said that by virtue of some amicable arrangement among the cosharer landlords, the land in dispute was in the exclusive possession of one Hari Sadhan Panja, an one anna cosharer, from whom the defendants acquired it by purchase on 8th Chaitra 1326, B. S. Both the Courts below held in favour of the plaintiff on all points, and gave her a decree. On the findings, it is not open to the defendants now to challenge the validity or genuineness of the dar mokurari potta which was granted by Dulal to Bibhuti (Ex. 3), or of the kobala executed by Bibhuti in favour of the plaintiff (Ex. 1) nor can they question the fact that the disputed land is covered by both the documents. The appellants, however, have strenuously contested the concurrent finding as to the title of Dulal from whom the plaintiff seeks to derive her own title. The Courts below found that Dulal was a mokurari tenant of the land of schedule kha, and that he had a transferable interest in it, which he could pass to Bibhuti, and Bibhuti, in turn, could pass to the plaintiff.

Mr. Mookerji has sought to assail this finding mainly on two grounds. In the first place, he says that in coming to this finding, the learned Judge in the Court of appeal below as well as the trial Court had acted on evidence which was inadmissible, and, secondly, it is contended that the question as to Dulal's tenancy is res judicata by reason of the decision in a previous suit to which both the present plaintiff and defendants 1 to 4 were parties. So far as the first ground is concerned, it is admitted that there was no written lease creating Dulal's tenancy. The Courts below were accordingly obliged to determine the nature of the tenancy from surrounding circumstances, and, in particular, from the course of dealings by the parties concerned. It appears that Dulal had leased out several portions of the demised land by way of sub-leases, and these sub-leases were evidenced by kabuliyats which were all put in on behalf of the plaintiff. In all these kabuliyats, Dulal's interest was described as that of a mokurari tenant. There were also proceedings in suits for recovery of rent against Dulal by some of the cosharer landlords, not, however including Hari Sadhan Panja, the vendor of defendants 1 to 4. In all these proceedings, again, Dulal was admitted to be a mokurari tenant. Mr. Mookerji argues that neither the kabuliyats nor the plaints or decrees in the rent suits were admissible in evidence against his clients, as they were not parties to the same. Reliance is placed on the principle underlying S.18A, Ben. Ten. Act, although it is conceded that this section in terms does not apply to the present case.

In my opinion, however, as the learned Subordinate Judge correctly points out in his judgment, the argument is without force. The kabuliyats were undoubtedly evidence of the assertion of mokurari title on the part of Dulal, and, as such, there is no reason why they should not be held to be good evidence under S. 13, Evidence Act. Even if S. 18A, Ben. Ten. Act, be held to apply to this case, that would simply exclude these documents as evidence against the landlord of the incidents of the tenancy as described therein, not as evidence of the assertion

of a claim as to the tenancy being of a particular description. The distinction, it may be said, is much too refined, and, for all practical purposes, it may not amount to anything. All the same, I am not prepared to hold that S. 18A, Ben. Ten. Act, necessarily precludes the applicability of S. 13, Evidence Act, to transactions in which the incidents of any tenure or holding are asserted or denied merely on the ground that the landlord is not a party to the same. It is not necessary, however, to press this point further in this case, seeing that the case is admittedly not governed by the Bengal Tenacy Act. The first ground urged on behalf of the appellants must therefore be overruled.

As regards the question of res judicata, the previous suit was a suit for partition amongst the cosharer landlords to which Dulal was a party. A question arose in that suit as to whether the fact of Dulal's tenancy was a bar to a partition of the lands in which the tenancy was comprised among the cosharers. Dulal appeared in the suit and filed a written statement, claiming the status of a mokurari tenant, and a specific issue was raised as to the character of his tenancy. The trial Court gave effect to Dulal's claim of mourashi mokurari tenancy. On appeal, the learned District Judge was not prepared to go so far. He merely held that Dulal had successfully proved his tenancy right, and was not satisfied that he had been able to establish the mourashi mokurari interest which he had claimed. Mr. Mookerji's contention is that this amounts to a definite finding that Dulal was not a mourashi mokurari tenant, and that this operates as res judicata in the present suit. I do not think that I can accept the argument. The finding that really mattered in that suit was to the effect that Dulal was a tenant of the land. As to whether his interest was that of a mourashi mokurari tenant was not material.

It is quite true that the learned Judge did say that on the evidence adduced, it was not possible to hold that Dulal had successfully established the mourashi mokurari interest he had claimed, but, obviously, he did not intend this to be a final decision on the question, because, rightly or wrongly, in his opinion, it was sufficient to hold that Dulal was in possession in the right of a tenant, irrespective of the character of his tenancy. Mr. Mookerji tried to make the point that although that suit was decided by the Court of appeal below in favour of the defendant Dulal, it was still open to Dulal to appeal against the finding in so far as it went against him on the question of the nature of his tenancy, and that inasmuch as he had not done so, that finding must be deemed to have been final and conclusive. It may be conceded that a party may, in certain circumstances, prefer an appeal against an adverse finding by the Court, though the ultimate decree in that suit may be in his favour. All the same, the question as to whether a party should or should not appeal to avoid the risk of the adjudication being final against him will depend upon the facts of each particular case. I do not think that, in this particular case, having regard to the views expressed by the learned District Judge in the appeal, it can be said that Dulal was required to file an appeal against the so-called finding regarding the nature of the tenancy right, on pain of the question being finally concluded against him for all time to come. In my opinion, the learned Subordinate Judge here took the correct view in the matter, and I hold that it was open to him to come to an independent finding regarding the nature of Dulal's tenancy irrespective of what the District Judge might have said in the previous suit,—what he said in the suit being no more than mere obiter. The second ground urged in support of the appeal therefore also fails. The result is that this appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 488

R. C. MITTER AND KHUNDKAR JJ.

Ramendra Narayan Roy and another— *Petitioners*

v.

Smt. Bibhabati Debi and others — *Opposite Party.*

Application in appeal from original Decree No. 1 of 1937, Decided on 16th July 1941, from decision of Additional District Judge, Dacca.

Civil P. C. (1908), S. 151 and O. 45, R. 13 — Plaintiff executing decree for possession of one third share in estate under Court of Wards — Defendant appealing to High Court and applying for stay of execution—High Court allowing execution to proceed on conditions—Manager of Court of Wards to hold plaintiff's share as manager of plaintiff and to deposit income into Court until decision of appeal—Plaintiff not to withdraw same without furnishing security — Appeal dismissed—Application by plaintiff for withdrawing amount lying in Court without furnishing security — Affidavit by defendant stating her intention to appeal to His Majesty in Council—O. 45, R. 13 held not applicable — High Court under S. 151 held had power to pass interim order maintaining status quo and to put parties to terms until application for leave to His Majesty in Council was presented or limitation therefor expired — Plaintiff held entitled to withdraw amount deposited in Court by manager after dismissal of appeal—Court granting application for leave to appeal to His Majesty in Council held would have ample jurisdiction to give such directions with regard to monies lying in Court as it thought fit under O. 45, R. 13 (2) (d).

The decree gave the plaintiff a one third share in the estate which was under the management of the Court of Wards. When the plaintiff had already started execution of his decree the defendant appealed to the High Court and applied for stay of the execution proceedings in the lower Court. The High Court allowed the execution to proceed upon certain conditions in consequence whereof the decretal property was to be held by the Manager of the Court of Wards as the plaintiff's manageron the plaintiff's behalf. But the future income of the decretal property was not to be paid to the plaintiff unconditionally but was to be paid into Court, and the plaintiff was permitted to withdraw it only upon furnishing security. This state of affairs was to continue until the disposal of the appeal. The appeal was however, dismissed. On plaintiff's application to withdraw the money lying in Court the defendant filed an affidavit in which she stated that she intended to appeal to His Majesty in Council. The question before the High Court was whether it had the power to make an order detaining the monies until an application for leave to appeal was presented, or until the period of limitation prescribed for that purpose expired :

Held that even after the dismissal of the defendant's appeal, the High Court had lawful custody of

the monies lying in Court and although O. 45, R. 13 did not in terms apply as no application for leave to appeal to His Majesty in Council had actually been preferred, the High Court apart from the provisions of O. 45, R. 13, had inherent power under S. 151 to make an interim order, in aid of the order which may eventually be passed by the Court dealing with the application for leave to appeal to His Majesty in Council, maintaining the status quo and to put parties to terms until an application for leave to appeal to His Majesty in Council was presented or until the period of limitation prescribed therefor had expired, and to direct that the plaintiff should not withdraw the sum lying in Court for the aforesaid period without furnishing security. But that direction could not affect the monies paid in by the plaintiff's manager after the dismissal of the appeal by the High Court as they were not covered by any order of the High Court and hence the plaintiff was at liberty to withdraw the same : ('39) 26 A. I. R. 1939 Cal. 308. *Applied*; *Case law referred.* [P 491 C 1, 2]

Held further that the monies lying in Court that is the income of the decretal property accruing after the passing of the decree would form part of the subject-matter of an appeal to His Majesty in Council within O. 45, R. 13 (2) (d) and hence the Court granting leave to appeal would have ample jurisdiction to make such orders as it considered necessary with reference to those monies : ('39) 26 A.I.R. 1939 Mad. 50, *Rel. on.* [P 491 C 2 ; P 493 C 1]

C. P. C. —

('40) Chitaley, S. 151 N. 2 Pt. 46; O. 45 R. 13, N. 6 Pt. 1.

('41) Mulla, Page 478 Pt. (m) ; Page 1218 N. "Alterations in the rule."

B. C. Chatterjee, B. C. Mukherjee, Nagendra Nath Bose and Arabinda Guha —

for Petitioners.

Phani Bhusan Chakravartty —

for Opposite Party.

R. C. MITTER J.—Raja Rajendra Narayan Roy of Bhowal died leaving three sons as his heirs, Kumar Ranendra Narayan, Ramendra Narayan and Rabindra Narayan. Ranendra Narayan and Rabindra Narayan died childless leaving widows, who inherited their respective shares. It was alleged that the second son, Ramendra Narayan, had also died childless in 1909 leaving his wife Srimati Bibhabati Debi as his heir. In 1911-1912 the Court of Wards took over the management of the whole of the Bhowal Raj estate on behalf of the widows of Ranendra and Rabindra and also on behalf of Srimati Bibhabati Debi. The plaintiff, who is the applicant before us, instituted a suit in the Court of the Subordinate Judge at Dacca for a declaration that he was Ramendra Narayan Roy, the second son of Raja Rajendra Narayan, and was so entitled to an undivided third share of the Bhowal Raj estate and for possession of the said share. Srimati Bibhabati Debi was the principal defendant in that suit. That suit, which was later on transferred to the Court of the Additional District Judge, Dacca, was decreed in his favour on 24th August 1936. Before filing an appeal to this Court Srimati Bibhabati Debi obtained an order from the Court which had passed the decree by which execution of the decree was stayed till 21st November 1936. Srimati Bibhabati Debi filed her appeal against the said decree, being First Appeal No. 1 of 1937, on 5th October, 1936. Thereafter, at her instance a rule was issued by this Court on the plaintiff to show cause why the execution of the decree should not be stayed till the disposal of the said first appeal. That rule came on for final hearing before S. K. Ghose and Mc'Nair JJ. Their order, which was passed on 13th December 1936, is reported in 41 C. W. N. 374.[1] The execution started by the plaintiff was allowed to proceed on terms. Those terms were : (1) That the manager of the Court of Wards was to remain in charge of the properties in suit but as manager of the plaintiff ; (2) that the plaintiff was to execute in favour of the said persons a power of attorney on terms indicated in that order ; and (3) that the plaintiff was to furnish security for rupees two lacs.

The amount of the security was fixed on an estimate that the net annual income of the properties in suit was rupees one lac and that the first appeal would be pending for two years only. It was expressly stated in the order that if the appeal was not disposed of in two years the appellant would have the liberty to apply for reconsideration of the amount of the security. The plaintiff executed the power of attorney in favour of Rai Saheb U. N. Ghosh, who was at that time the manager of the Court of Wards and gave security for rupees two lacs. His application for execution therefore was proceeded with. Srimati Bibhabati Debi filed an objection to that application under S. 47, Civil P. C. Her objection was that the decree of the learned Additional District Judge had allowed the plaintiff to take joint possession of an undivided third share not of the whole of the Bhowal Raj estate but only of that share in a number of specified properties which did not exhaust the properties of the Bhowal Raj estate. The said objection was overruled by the executing Court by an order dated 22nd December 1937. The learned Judge held that the plaintiff was entitled to get possession of an undivided third share of the whole of the Bhowal Raj estate. Miscellaneous Appeal No. 1 of 1938 was preferred in this Court by Srimati Bibhabati Debi against that order. While the proceedings in execution were pending in the executing Court formal delivery of possession of the share in those properties, which Srimati Bibhabati had admitted to be included in the decree under execution, was given by the executing Court in December 1937 to the plaintiff through his manager, who was the then Manager of the Court of Wards in respect of the remaining two-thirds share of the Bhowal Raj not in suit.

Srimati Bibhabati Debi filed an application in the said Miscellaneous Appeal No. 1 of 1938 for stay of delivery of possession to the plaintiff of the properties which according to her were not comprised within the decree. That application was disposed of on terms which are not now material. The said Miscellaneous Appeal No. 1 of 1938 was dismissed in February 1941. The result is that it has now been finally held that the plaintiff is entitled to get possession of an undivided third share of the whole Bhowal Raj estate in terms of the decree of the Additional District Judge of Dacca which has been confirmed by this Court on 25th November 1940, when final orders were made in regard to First Appeal No. 1 of 1937. In may 1941 the plaintiff was given formal possession through his manager of the remainder of the properties included in the Bhowal Raj estate. On the basis of the security furnished by the plaintiff in terms of the order of S. K. Ghose and McNair JJ. the plaintiff was paid Rs. 2,00,000 by the Manager of the Court of Wards

1. ('37) 65 C. L. J. 127 : 41 C. W. N. 374, Bibhabati Debi v. Ramendra Narayan Roy.

before August 1938. He had still a surplus amount in his hands. At that stage, Srimati Bibhabati Debi made an application to this Court in First Appeal No. 1 of 1937 on 24th August 1938 in which she pointed out that the plaintiff had already taken rupees two lacs from out of the income of the properties in suit. She asked the Court to make an order on the Manager not to pay the plaintiff any further sum until the latter had furnished additional security. That application was disposed of by an order dated 7th November 1938. The order runs thus :

"We direct the Manager to deposit the surplus amount in his hands which is payable to the plaintiff in terms of the orders of the Court and go on depositing every month further amounts as they became available in this Court till the disposal of the appeal. (First Appeal No. 1 of 1937).

The amount so deposited can only be withdrawn by the plaintiff-respondent on his furnishing additional security to the satisfaction of the registrar, Original Side, of this Court."

In terms of this order, the Manager went on depositing in this Court the net income of the properties in suit. The total amount so deposited by him is Rs. 2,98,489-1-8. Of this sum Rs. 2,78,489-1-8 was deposited before 25th November 1940, when the First Appeal No. 1 of 1937 was finally disposed of by this Court and Rs. 20,000 was deposited by him thereafter. The plaintiff did not furnish additional security in terms of the order dated 7th November 1938 and so the sum is lying in this Court. By his application made before us he wants to withdraw the whole amount without giving any security. His contention is that as the decree of this Court had declared him to be the owner of the suit properties and as there is no appeal yet against that decree he is entitled to withdraw the said sum of money unconditionally, as it represents the net income of his properties. This application is opposed by Srimati Bibhabati Debi. She has filed an affidavit on 4th April 1941 in which she has stated that she intends to file an appeal to His Majesty in Council, but has not been able to prepare the grounds of appeal, and to file the application for leave to appeal to His Majesty in Council as she has not been able to obtain the certified copies of the judgment and decree of this Court passed in First Appeal No. 1 of 1937, although she had applied for the same immediately after the judgment was delivered. After the said affidavit had been filed certified copies of the judgment and decree have been delivered to her by the office on 13th June 1941. The learned advocate appearing for her makes a statement that he has been instructed to prepare the grounds of appeal but as the judgments of the three learned Judges who heard the appeal are voluminous it would not be possible for him to draw up the grounds of appeal before the last week of August even with the greatest amount of application. The last date for filing the application for leave to appeal to His Majesty in Council, we are told by Mr. Chakravarti, would be the reopening date after the long vacation, i. e., 10th November 1941.

We do not think that Srimati Bibhabati Devi can at this stage object to the withdrawal by the plaintiff of the sum of Rs. 20,000 which was deposited by the Manager of the Court of Wards after the disposal of First Appeal No. 1 of 1937 by this Court. That sum was not deposited in this Court in pursuance of any order passed by it, for, the direction of this Court was that the surplus income of the properties in suit was to be deposited as long as the said appeal would be pending in this Court. The Manager of the Court of Wards is the plaintiff's manager and as the orders passed by S. K. Ghose and McNair JJ., and the order passed by us on 7th November 1938 had spent their force as soon as the final order was made in the said First Appeal on 25th November 1940, it was the duty of the said Manager to pay after 25th November 1940 all the income of the disputed properties to the plaintiff directly. He was under no obligation to deposit the same in this Court. We must accordingly proceed on the footing as if the said Manager had done with regard to those sums of money what he ought to have done. The mere fact that he has deposited the same in this Court on mistaken notions cannot in our judgment place the plaintiff in a worse position. In any event, even if we had the power to prevent the withdrawal by the plaintiff of the said sum of Rs. 20,000 or prevent him from taking the profits of the properties in suit that have accrued due after 25th November 1940 or is now accruing, we think that we should not in our discretion exercise that power. He has taken possession through Court by executing his decree and the imposition of an obstacle against him in respect of those sums of money would be reducing his possession to a barren one. We would, however, make it clear that should the Division Bench, which would be in charge of Privy Council matters at the time when the leave to appeal to His Majesty in Council will be made, be of opinion that it has the power to demand security from the plaintiff for the profits that he may receive or may have received from the properties in suit and that that power should be exercised, the order which we are making in respect of the said sum of Rs. 20,000 or the observations which we have made bearing on the question of the exercise of discretion shall not be taken to fetter the hands of that Bench in any way. With regard to the said sum of Rs. 20,000 which has been deposited in this Court after 25th November 1940 our order is that the same may be withdrawn by the plaintiff without furnishing any security.

With regard to the remaining sum in deposit in this Court, namely Rs. 2,78,489.1-8, the position is different. It has been brought into this Court by its orders. No doubt the plaintiff is now the owner of this sum of money and would be owner unless the decree of this Court passed in First Appeal No. 1 of 1937 is reversed by His Majesty in Council, but this Court has still the custody. We cannot accept Mr. Chatterjee's contention that by reason of the decree having been executed his client has in law the possession of the said sum of money and this Court is "only mechanically in control"—a phrase which he used very often in the course of his argument. The sum was not the subject-matter of the execution proceedings started by his client. In those proceedings he prayed for and was granted possession of the immovable properties. In those execution proceedings he could not have asked for possession of this sum of money, for, it was not mentioned and could not have been mentioned in the decree of the learned Additional District Judge and is not mentioned in the decree of this Court passed in the said first appeal. It is therefore still in the lawful custody of this Court. We think that this Court should be careful with regard to moneys in its lawful custody especially as the sum is a heavy one and should not part with this sum of money unconditionally or make any order by reason of which Srimati Bibhabati Debi may lose the money if her appeal to His Majesty in Council succeeds. The plaintiff has admittedly nothing in this world save and except the proper-

ties in suit which have been decreed to him. If this sum be allowed to be withdrawn by him without security there would be no chance of recovering the same from him if Srimati Bibhabati Devi ultimately wins her case. In these circumstances we think that if we have the power to demand adequate security from the plaintiff we should exercise that power in this case.

The provisions of O. 45, R. 13 deal with the powers of this Court when an appeal to His Majesty in Council has been filed. In 33 I.A. 132[2] Lord Macnaghten pointed out that Courts in India are better fitted to exercise those powers than the Judicial Committee of the Privy Council. The first question is whether this Court would have the power to give directions with regard to this sum of money after the application for leave to appeal to His Majesty in Council has been filed. For a consideration of this question, O. 45, R. 13, sub-r. 2, cl. (d) only is material. This Court can at that stage give directions respecting the subject-matter of the appeal to His Majesty in Council. That clause indicates at any rate that this Court can at that stage make an order for the preservation of the subject-matter of the appeal. In a sense, this sum of money can be regarded as the subject-matter of the appeal, for, it is the income of the immovable properties in suit. An adjudication of title in respect of those immovable properties one way or the other would directly affect the ownership of this sum of money. Prima facie, therefore, this Court would have the power under that clause to make an order touching this sum of money. Whether it would in the exercise of its discretion make an order in respect thereto as asked for by Srimati Bibhabati Devi is a different question. Even if clause (d) does not cover this case this Court at that stage would have the inherent power to make an order concerning this sum of money. That this Court has powers outside those defined in O. 45, R. 13 has been laid down in 34 C.W.N. 631[3] and 38 C.W.N. 795[4] in which the decision in 13 C.W.N. 690[5] was noticed and distinguished.

In the course of the argument we expressed these views on the powers of this Court, when an application for leave to His Majesty in Council has been presented, at least after the grant of the certificate. On this part of the case we proceed on the aforesaid view which we have expressed leaving it open to the parties to re-argue the matter relating to the construction of O. 45, R. 13, sub-r. 2, cl. (d) as also the matter as to whether apart from that rule the Court has inherent power to make an order relating to the said sum of Rs. 2,78,489-1-8 before the Bench dealing with Privy Council matters, if they so desire, after the application for leave to appeal to His Majesty in Council has been filed. If that Court has at that stage that power we are of opinion that we have the auxiliary power, the inherent power to make an interim order in aid of the order that may eventually be made by that Court. This in our judgment is the principle underlying the decision in 40 Cal. 955.[6] In that case leave to appeal against a decree of this Court passed in favour of the mortgagee had been refused by this Court. No application for special leave had then been filed before His Majesty in Council, but an affidavit was filed in which it was stated that mortgagor intended to file an application for special leave. He made an application in this Court for stay of execution of the mortgage decree till such time as would enable him to file the application for special leave and obtain a stay order from His Majesty in Council. Two questions were raised, namely, (1) whether this Court had the power to grant the limited stay and (2) whether in its discretion it should. On the first point Mookerjee J. gave an elaborate judgment holding that this Court had the power. Holmwood J. did not discuss this question but he was not prepared to dissent from that view. He disagreed with Mookerjee J. on the second question only.

Since then a Division Bench of this Court has agreed with the judgment of Mookerjee J. on the first point, A. I. R. 1939 Cal 308.[7] No doubt the question of interim stay of proceedings in execution of the decree was the subject-matter of consideration in those cases but that was a fortuitous matter. The underlying principle of those cases was what we have stated above, namely that this Court has the inherent power to make an interim order maintaining the status quo till such time within which the application for leave to appeal to His Majesty in Council may be made and for such further period as within which an order may be obtained from the proper Court. In this case, the time for filing the application for leave to His Majesty in Council according to Mr. Chakravarty's statement would expire on 10th November 1941. The judgments of this Court are heavy. Srimati Bibhabati Debi applied for certified copies of the judgments and decree of this Court shortly after the judgments were delivered. She obtained those copies on 13th June 1941. In these circumstances the order that we make in respect of the said sum of Rs. 2,78,489-1-8 is that it will lie in this Court till 26th November 1941, unless in the meantime the plaintiff gives security to the satisfaction of the lower Court. If no application for leave to appeal to His Majesty in Council is filed, the plaintiff will be entitled to withdraw the same without furnishing security. If the application for leave is filed, the said sum of money would be subject to such orders as the Bench in charge of Privy Council matters may deem fit to make. Srimati Bibhabati Debi at whose instance we are directing the detention of the said sum of Rs. 2,78,489-1-8 subject to the terms stated above must give a written undertaking and file it in this Court to the effect that if the plaintiff finally succeeds in the suit she would pay interest to the plaintiff at the rate of 6 per cent. per annum on the said sum from the date when the plaintiff filed his application (i. e. 25th March 1941) till 26th November 1941 or such earlier date on which the money may be withdrawn by the plaintiff on giving security. She must also give security to the satisfaction of the lower Court for the payment of the said interest or deposit in this Court Government Promissory Notes of the requisite value as security within three weeks from this date. If she does not file the said undertaking or give the said security

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2. ('06) 29 Mad. 379 : 33 I.A. 132 : 16 M.L.J. 299 (P.C.), Vasudeva Mudaliar v. Sadagopa Mudaliar.
3. ('31) 18 A.I.R. 1931 Cal. 79 : 129 I.C. 833 : 34 C. W. N. 631, Sarat Kumar Roy v. Official Assignee of Calcutta.
4. ('34) 21 A.I.R. 1934 Cal. 823 : 153 I.C. 272 : 59 C.L.J. 440; 38 C.W.N. 795, Sailendra Nath v. Saroj Kumar.
5. ('09) 13 C.W.N. 690 : 1 I.C. 812 : 9 C.L.J. 561, Laliteswar Singh v. Bhaveswar Singh.
6. ('13) 40 Cal. 955 : 18 I. C. 207 : 16 C. L. J. 508, Nand Kishore Singh v. Ram Golam Sahu.
7. ('39) 26 A. I. R. 1939 Cal. 308 : 183 I. C. 565, Jewan Ram Ganga Ram & Co. v. Commissioners of the Port of Calcutta.

within three weeks from today the plaintiff will be at liberty to withdraw the said sum of rupees 2,78,489-1-8 without furnishing security. As we are making a discretionary order in favour of Srimati Bibhabati Debi she must pay the costs of this application to the plaintiff. Hearing fee assessed at 20 gold mohurs.

KHUNDKAR J.—I agree. The position presented to us in these proceedings is somewhat unusual, and there is no provision of the Code of Civil Procedure, and no judicial authority which precisely covers the facts. There is before us no application for stay of execution for the simple reason that the decree in question has been executed. The order of a Bench of this Court (S. K. Ghose and McNair JJ.) dated 13th December 1936 (reported in 41 C. W. N. 374[1] at p. 381) upon a rule for stay of execution was in the following terms :

"The plaintiff decree-holder has already applied to the lower Court for execution of the decree and a conditional order has been made by the learned Subordinate Judge as I have already mentioned. Therefore execution will proceed, but subject to the following conditions : As regards the amount of security it is not disputed that the annual income of the one-third share in dispute is one lac of rupees and it is suggested that the appeal may last two years. Therefore the amount of two lacs of rupees would be the proper amount of security. Plaintiff will furnish security for this amount to the satisfaction of the Registrar of the Appellate Side in this Court. Next the Manager, Court of Wards, will be appointed manager of the one-third share in dispute on the same terms as in the case of the one-third share possessed by Srimati Ananda Kumari Debi, defendant-petitioner 3. Should the appeal be not disposed of within two years, the applicants will have liberty to apply to have the question of security re-considered."

Thereafter, on 7th November 1938, my learned brother and I made an order upon the application of the appellant Srimati Bibhabati Debi by which we directed the Manager to continue depositing in Court the income as it came into his hands. We further directed that the plaintiff-respondent would withdraw these monies only upon furnishing additional security. This order continued and partly implemented the order of 13th December 1936. It cannot be disputed that those two orders spent themselves on 25th November 1940 when the appeal (F. A. 1 of 1937) was dismissed. Moreover, the decree has been executed, and possession has been delivered of the property which was the subject-matter of the suit, and of the appeal to this Court. In these circumstances we now have an application by the decree-holder for payment to him of the monies at present lying in this Court by virtue of the two orders just referred to. It is contended that these monies are the property of the applicant, and that this Court has no power to refuse to make an order releasing them from custody. Order 45, R. 13, Civil P. C., does not in terms apply because no application for leave to appeal to His Majesty in Council has yet been preferred. Indeed, on behalf of the petitioner it has been contended that even if leave to appeal had been granted, this Court would have no jurisdiction to make an order detaining the monies in question, since these were not embraced in the decree, and would form no part of the subject-matter of the appeal to His Majesty in Council. As regards this contention, I have little doubt that the Court granting leave to appeal would have ample jurisdiction to make such orders as it considered necessary with reference to these monies. Order 45, R. 13, sub-r. (2) cl. (d) is in these terms :

"The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court . . . . place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise."

Obviously these monies were not mentioned in the decree because they represent the fruits and profits of the decretal property accruing after the decree was passed. But to say that they would form no part of the subject-matter of an appeal to His Majesty in Council would be incorrect, for the renewal of the decree would deprive the respondent of his right to these monies, just as indubitably as its affirmance would confirm his title to them. On behalf of the opposite party, Srimati Bibhabati Debi, the unsuccessful appellant in First Appeal No. 1 of 1937, an affidavit has been filed in which it is affirmed that she intends to appeal to His Majesty in Council. The question which we have to decide therefore is whether we have the power to make an order detaining the monies until an application for leave to appeal is presented, or until the period of limitation prescribed for that purpose expires. The sum in question is large, and the petitioner has no means other than the property which he has obtained by his decree. If he were allowed to withdraw the money, the opposite party would in all probability be unable to recover it in the event of her appeal succeeding. On the other hand, I can see little prospect of any injury to the petitioner if the detention of the money in this Court were to be prolonged for a strictly limited period. In the latter event we would be leaving the Bench which will deal with the application for leave to appeal free to make such order, if any, as it might think fit in regard to these monies, whereas in the former we would be depriving that Bench of the power to make what it might consider to be a very necessary disposition of these monies pending the disposal of the appeal to His Majesty in Council.

Reference has been made by my learned brother to the inherent powers of this Court under S. 151 of the Code, and to a number of cases not essentially dissimilar to the present case, in which a power under that section was invoked. In applying the principle of those decisions I feel prompted to say that some analogy is discernible between the situation with which we are here dealing and cases which arise out of applications for stay of execution. Although the order made by this Court on 13th December 1936, stated that execution would proceed, conditions were imposed, the effect of which was to deprive the decree-holders of the full fruits of his decree for the time being. The decree gave the plaintiff a one-third share in the Bhowal estate. The decretal property was to be held by the Manager of the Court of Wards as the plaintiff's manager on the plaintiff's behalf. But the future income of the decretal property was not to be paid to the plaintiff unconditionally but was to be paid into Court, and the plaintiff was permitted to withdraw it only upon furnishing security. This state of affairs was to continue until the disposal of the appeal. Had such a condition not been imposed, the plaintiff would have come into immediate and unfettered possession not only of the corpus, but also of the income as and when it accrued. In a sense it is the trammels imposed by the orders of 13th December 1936 and 7th November 1938, which have prevented the plaintiff from taking all in execution, and it is in

consequence of those orders that these monies are now in the custody of the Court. To make an order that these monies are to remain in the custody of the Court unless security is furnished would be to prolong this situation.

In 40 Cal. 955,[6] the facts were as follows : Defendants against whom a mortgage suit had been decreed by the High Court on appeal, applied for leave to appeal to His Majesty in Council but their application was refused. Meanwhile, the plaintiffs had applied for execution of their decree. Defendants eventually applied to the High Court for stay of execution and filed an affidavit stating that they had taken steps to apply to the Judicial Committee for special leave to appeal to His Majesty in Council. Mookerjee J. observed in his judgment that the assumption that the Court has authority to grant a stay, only when an appeal or an application for leave to appeal is pending was groundless, and was negatived by O. 41, R. 5 (2) of the Code of 1908 which expressly recognises the position that an original Court may, for a limited time, stay proceedings in execution of its own decree, in view of a possible appeal to a superior tribunal. He held that a Court ought to act in aid of a possible order for stay that might thereafter be made.

In 38 C. W. N. 795[4] this Court held that apart from the powers under O. 45, R. 13 to stay further proceedings in a suit under appeal to the Privy Council, the High Court has abundant inherent powers to stay such proceedings in a suitable case. Guidance is furnished by the following passage in that judgment : "And indeed from what the Judicial Committee have said on more occasions than one as regards the advisability on the part of this Court to deal with matters of this description, at least in the first instance, it would seem that such power has been assumed." In A.I.R. 1939 Cal. 308[7] it was laid down, following 40 Cal. 955[6] and 38 C.W.N. 795,[4] that pending the filing of an application for special leave to appeal against an order refusing to stay execution the High Court had inherent power under S. 151 of the Code to stay the execution of a decree although the matter might not be strictly within the terms of O. 45, R. 13. Clause (d) of O. 45, R. 13 (2) was recently considered in I. L. R. 1939 Mad. 135[8] in which it was held, that the High Court has power in a proper case even though no appeal had been filed against a final decree, and the appeal pending before the Privy Council was only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of an applicant who asks for stay of execution of the final decree. With regard to cl. (d) it was observed that under this clause the Court has power to give whatever direction it thinks necessary respecting the subject-matter of the appeal whereas cls. (b) and (c) contemplate action by the Court with reference to the decree appealed from. Under cl. (d) directions may be issued by the Court with reference to the subject-matter of the appeal.

This Court would have the power to make an order respecting the monies in question when an application for leave to appeal had been filed. Of this we have little doubt. And I am not prepared to say that we, at this stage, have no jurisdiction to give directions in aid of such a possible order if the circumstances call for it as urgently as they do in the present case. To hold otherwise would be to deny that this Court has an inherent power such as S. 151 of the Code recognises, to control the subject-matter of an appeal to His Majesty in Council, which if not regulated, might in a certain eventuality involve a party in irreparable injury. The direction which we are making that the sum now in Court is for the period indicated not to be withdrawn without security, does not affect the monies paid in by the plaintiff's manager after 25th November 1940, because these should have been remitted to the plaintiff as they were not covered by any order of this Court, and payment into Court was entirely unauthorised.

G.N./R.K. *Order accordingly.*

8. ('39) 26 A. I. R. 1939 Mad. 50 : 180 I. C. 85 : I. L. R. (1939) Mad. 135 : (1938) 2 M. L. J. 764, Ramanathan v. Viswanathan.

A. I. R. (29) 1942 Calcutta 493

MOHAMAD AKRAM AND PAL JJ.

Sheikh Jaru Bepari — Plaintiff — Appellant

v.

A. G. Peters and others — Respondents.

Appeal No. 87 of 1939, Decided on 10th December 1941, from appellate decree of Addl. Dist. Judge, Mymensingh, Second Court, D/- 11th June 1938.

(a) Fraud — *A* purchasing receipt benami in name of *B* and taking from *B* sham handnote only by way of security—Fact of *A* transferring handnote to *C* enabling *C* to obtain decree thereon against *A* constitutes fraud—*B* can sue *A* for damages — *B's* cause of action is not premature merely because decree has not been executed — Principle governing claim for contribution arising out of joint promises does not apply to claim such as *B's* against wrong doer — Injury to *B* need not amount to actual pecuniary loss — Pecuniary loss would only help to determine measure of damages.

Where *A* purchases a receipt benami in the name of *B* and takes from *B* a sham handnote only by way of security then the very fact that *A* transferred the handnote to *C* thus enabling *C* to obtain a decree against *B* on that handnote would constitute a fraud which itself is sufficient to sustain the claim of *B* for damages against *A*. The claim of *B* cannot be said to be premature merely because the decree has not been executed against him inasmuch as he is already placed under a legal liability by that decree and damage is not caused to a person only by causing actual pecuniary loss to him. The obtaining of a decree against *B* is sufficient damage caused to him and hence his claim cannot be said to be premature. The principle governing a claim for contribution arising out of joint promises, cannot have any application to cases such as the claim of *B* where the relief claimed is based on the right to a satisfaction for wrongful injury or liability suffered by the claimant on account of the act of the defendant. A claim to contribution arising out of joint promises is not a claim against a wrongdoer. *B's* claim is one by a party injured by the wrongful act of another. The injury complained of need not amount to any actual pecuniary loss. The pecuniary loss comes into consideration only to help the determination of the measure of damages to be awarded in such a case.

[P 495 C 1]

(b) Fraud—Damages — Damages need not be proportionate to actual pecuniary loss — They can be vindictive or exemplary,

In cases where the elements of fraud, oppression, malice or the like are found, the law does not confine its remedy to the payment of compensation

merely proportionate to any pecuniary loss actually suffered by the injured person. It can grant vindictive or exemplary damages by way of punishment to the wrongdoer. [P 495 C 1]

Sarat Ch. Janah and Hiran Kumar Roy — for Appellant.

Nirmal Ch. Nandi and Himaja Sankar Majumdar — for Respondents.

JUDGMENT. — This appeal by the plaintiff arises out of a suit for the recovery of Rs. 3500 from defendant 1 under a receipt dated 7th March 1932 or in the alternative from defendant 2 as damages. The plaintiff's case shortly stated was : That defendants 1 and 2 were partners in a jute business, that for constructing some structures in connexion with the business they purchased timber from defendant 3 and for the price thereof amounting to Rs. 3700, defendant 1 alone executed a receipt in favour of defendant 3. That defendants 1 and 2 then fell out with each other and in order to harass defendant 1 and teach him a lesson on 21st November 1932, defendant 2 purchased for Rs. 3000 the receipt in the benami of the plaintiff (Ex. 1) and took from him on the same day a promissory note for Rs. 3000 by way of security : That subsequently defendants 1 and 2 made up their differences and defendant 2 then assigned the promissory note to defendant 1 and defendant 1 on the strength of it instituted Money Suit No. 126/35 and secured a decree against the plaintiff for Rs. 3500 notwithstanding his contention that no consideration was paid for the promissory note and it was executed merely as security for the receipt purchased in his benami, Ex. 1: That defendant 2 did not appear in order to contest the suit but on the contrary colluded with defendant 1: That the plaintiff thus suffered loss and injury not being able to sue upon Ex. 1 and also being made liable on account of the promissory note in Suit No. 126/35 by the fraudulent conduct of the defendants: That consequently the plaintiff instituted the present suit in September 1936 for the recovery of the amount due on the basis of Ex. 1 and in case this claim was found to be barred by limitation for damages to the extent of the amount decreed against him in Suit No. 126/35.

The defence inter alia was that the plaintiff was not the benamdar of defendant 2 in respect of Ex. 1, that in fact he paid the consideration money for Ex. 1 with the money borrowed from defendant 2 upon the handnote: that the suit was barred by limitation and res judicata; that there was no fraud on the part of the defendants. In the trial Court, it was conceded by the plaintiff that the suit was barred by limitation as well as by res judicata so far as defendant 1 was concerned but it was contended that so far as defendant 2 was concerned there was no question of limitation in respect of his fraud in connexion with the decree in Suit No. 126/35 nor was there any bar of res judicata as the question of the benami of Ex. 1 and the security given by the handnote in connexion therewith were not relevant to that suit having regard to the nature and the scope of the suit and the provisions of S. 43, Negotiable Instruments Act. The trial Court accepted these contentions and passed a decree as against defendant 2 only, dismissing the claim as against defendant 1. From the decision defendant 2 appealed and the lower appellate Court while agreeing with the trial Court as regards the liability of defendant 1, dismissed the claim as against defendant 2 as well holding that there was no fraud in connexion with Suit No. 126/35 in respect of the handnote. The plaintiff thereupon preferred the present appeal. It is urged by the learned advocate on behalf of the appellant that the Court of appeal below misapprehended the plaintiff's case and that the findings recorded were insufficient for the disposal of the appeal inasmuch as the Court below had omitted to consider the question of the benami of Ex. 1 and the security given by the hand-note which were specifically raised in issue 3, which ran as follows :

"Did defendant 2 purchase a receipt from Mona Sheik (D-3) in the benami of the plaintiff and take a hand-note from the plaintiff by way of security?"

On this issue, the Court of first instance came to the conclusion that defendant 2 purchased the receipt in the benami of the plaintiff and that he took the hand-note from the plaintiff by way of security. A finding on this point is essential for the purpose of disposal of this case; but unfortunately, the Court of appeal below did not advert to this matter at all. If defendant 2 purchased the receipt in the benami of the plaintiff and if the hand-note from the plaintiff was taken by defendant 2 only by way of security, then the very fact that defendant 2 transferred this hand-note to defendant 1, thus entitling the latter to have a decree against the plaintiff on that hand-note, would be a fraud which will sustain the claim of the plaintiff for damages in the present suit. Further, if this was the real nature of the transaction, then it is difficult to see why the plaintiff would think of suing defendant 1 on the strength of the receipt. He was a mere benamidar and there is nothing on the record to show that he had any reason to suspect that defendant 2 was thinking of putting him to trouble by transferring the sham hand-note to defendant 1. The learned Additional District Judge disposes of the plaintiff's claim on two alternate suppositions. He seems to reason that either the plaintiff was a benamidar in respect of the purchase of the receipt or he was the real owner. If a benamidar, then he had no right to realise the amount due under that receipt and, therefore, by not realising the hand-note he did not suffer any loss. If the real purchaser, he should have sued defendant 1 on this receipt in due time. If he did not do that, he was to blame for it and consequently even if he has suffered any loss on this account, that loss was caused to him by his own fault. The learned Judge failed to see that if the transaction was benami one, the plaintiff suffered loss not by non-realization of the amount due under the receipt, but by a decree having been made against him on the sham hand-note which was a part of the same benami transaction.

As regards the fraud of defendant 2, which caused loss to the plaintiff, the learned Judge says "There is no direct evidence to show that the plaintiff in that suit and Peters colluded to obtain a decree against Jharu the present plaintiff. . . . . No active contrivance of Peters to constitute fraud could be proved and it is significant to notice that Peters has left the district long ago." Unfortunately, the learned Additional District Judge failed to see that if the transaction was a benami one, then the very act by which Peters placed the sham hand-note in the hands of defendant 1, thus enabling defendant 1 to get a decree against the plaintiff, would constitute a fraud and that fraud itself will be sufficient to sustain the cause of action against Peters. The learned advocate appearing on behalf of the respondent contended that in any case as the decree against the plaintiff has not as yet been executed, he has suffered no damages and consequently his present suit for damages is premature. We are unable to accept this contention. The plaintiff has already been placed under a legal liability and damage is

not caused to a person only by causing actual pecuniary loss to him. Defendant 1 has succeeded in obtaining a decree against the plaintiff and that decree can be executed at any moment, and, in our opinion, this is sufficient damage caused to him. We are therefore of opinion that the present suit is not premature. In support of his contention that the suit is premature, the learned advocate appearing for the respondent relied on 26 Mad. 322,[1] but that was a case relating to a claim for contribution arising out of joint promises. The rule of law relating to such a claim as indicated from the illustrations to S. 43, Contract Act, appears to be that when the claimant performs the whole of the joint promise, or at least, in excess of his share of the promise, his right to contribution arises. This principle therefore cannot have any application to cases of the present type where the relief claimed is based on the right to a satisfaction for wrongful injury or liability suffered by the claimant on account of the act of the defendant.

A claim to contribution arising out of joint promises is not a claim against a wrongdoer. But the present case is one by a party injured by the wrongful act of another. The injury complained of need not amount to any actual pecuniary loss. The pecuniary loss comes into consideration only to help the determination of the measure of damages to be awarded in such a case. In cases where the elements of fraud, oppression, malice or the like are found, the law does not confine its remedy to the payment of compensation merely proportionate to any pecuniary loss actually suffered by the injured person. It can grant vindictive or exemplary damages by way of punishment to the wrongdoer. We accordingly set aside the judgment and decree of the lower appellate Court and remit the case for rehearing and disposing of the appeal in accordance with law. Costs to abide the result.

G.N./R.K. *Case remanded.*

1. ('03) 26 Mad. 322, Putti Narayana Murthi Ayyar v. Marimuthu Pillai.

A. I. R. (29) 1942 Calcutta 495

DERBYSHIRE C. J. AND GENTLE J.

Sital Chandra Dutta — Appellant

v.

Emperor.

Criminal Appeal No. 608 of 1941, Decided on 23rd March 1942.

Criminal P. C. (1898), Ss. 297, 161 and 162—Ss. 161 and 162 are mandatory — Statement under Ss. 161 and 162 is inadmissible though it can be used for purposes indicated in S. 162 —Charge under Ss. 326 and 324, Penal Code—Jury trial — Sessions Judge in summing up to jury pointing out that witness for prosecution had deposed against prosecution — That his statement before jury was different from that made by him to investigating officer under S. 161—Judge also referring to statement made by witness to doctor — Summing up held infringed Ss. 161 and 162 and amounted to misdirection sufficient in itself to justify setting aside conviction.

The language of Ss. 161 and 162, Criminal P. C., is mandatory and the statement falling within those provisions cannot be admitted in evidence although it can or parts of it can be used for the purposes indicated in S. 162, Criminal P. C.

[P 496 C 1]

In a charge under Ss. 326 and 324, Penal Code, in the course of the summing up to the jury the Sessions Judge referred to the evidence of *B* a prosecution witness in this way. "He has deposed entirely against the prosecution and it is necessary for us to see how far his deposition is true and how far it affects the case of the prosecution. The investigating officer has told us that not merely did he examine *B* but he actually took down the statement under the provision of S. 161, Criminal P. C. This statement would not go in as evidence. Had *B* then made a statement before the investigating officer which was so entirely contrary to the prosecution case as the one he has made before you, do you think it likely that the prosecution would have put him in the witness box? Then again this *B* told the doctor who examined him that the accused had rushed at him and dealt him a stroke with a sword":

Held that in pointing out to the jury that the evidence given by *B* to the jury was contrary to what *B* had previously stated to the investigating officer, the Judge was in effect telling the jury what was in the statement and that the evidence of the witness was different from what he had stated when the facts were being dealt with on another occasion. The summing up in this respect was a misdirection infringing in a somewhat serious way the mandatory provisions of Ss. 161 and 162, Criminal P. C., sufficient to justify setting aside the conviction. Further, the effect of the evidence of the doctor was put to the jury as an established fact and was inaccurate in its detail and in addition there was no reference in the summing up to the denial of *B* of having made any such statement. The Judge misdirected the jury in such a way as to justify the conviction being set aside.

[P 496 C 1]

Cr. P. C.—

('41) Chitaley, S. 162, N. 11, N. 19; S. 297 N. 11 Pt. 28.

('41) Mitra, Page 507, N. 504A; Page 1018 N. 915.

Amiya Lal Chatterjee and Hemanta Krishna Mitra — for Appellant.

Tafazzal Ali — for the Crown.

GENTLE J.—The accused was convicted before the learned Additional Sessions Judge of Midnapore of offences under Ss. 326 and 324, Penal Code, for causing grievous hurt with a deadly weapon to two persons—Sarat Dutta and Bhaskar Pal—and for causing hurt to a third man named Nibaran Adhya. Objection is taken to the convictions on a number of grounds, but in the light of the conclusion at which I have arrived it is necessary to consider one ground only, namely, misdirection of the learned Additional Sessions Judge to the jury in regard to the evidence of Bhaskar Pal who gave evidence as prosecution witness 5 and who was one of the persons alleged to have been injured by the accused. It is not necessary to consider the whole of the evidence. Suffice it to say that the allegation was that the accused inflicted the injuries to the three persons mentioned above by means of a sword. In the course of the summing up to the jury the learned Additional Sessions Judge referred to the evidence of Bhaskar Pal in this way. He said :

"He has deposed entirely against the prosecution and it is necessary for us to see how far his deposition is true and how far it affects the case of the prosecution."

A little later :

"P. W. 17 M. A. Aziz, the investigating officer has told us that not merely did he examine Bhaskar

Pal, but he actually took down the statement under the provision of S. 161, Criminal P. C. This statement would not go in as evidence. Had Bhaskar Pal then made a statement before the investigating officer which was so entirely contrary to the prosecution case as the one he has made before you, do you think it likely that the prosecution would have put him in the witness box ? Then again this Bhaskar Pal told the doctor who examined him that Shital Dutta had rushed at him and dealt him a stroke with a sword."

The statement to which reference is made in the summing up is covered by and is made in accordance with the provisions of Ss. 161 and 162, Criminal P. C. The language of the above statutory provision is mandatory and the statement cannot be admitted in evidence although it can or parts of it can be used for the purposes which are indicated in S. 162, Criminal P. C. The statement which Bhaskar Pal apparently made to the investigating officer was undoubtedly covered by S. 162 and it was not admitted in evidence and it could not be admitted. Nevertheless although the learned Judge pointed out to the jury that the statement could not go in in evidence, he added, in effect, that had the statement of that witness not been favourable to the prosecution it was unlikely that the witness would have been called. Bhaskar Pal, although one of the injured in respect of whom a conviction was recorded against the accused, nevertheless testified in favour of the accused. The learned advocate who appears on behalf of the Crown in this appeal has conceded that if the evidence of that witness had been believed and accepted the verdict must have been one of not guilty. In his observations to the jury the learned Judge, in effect, directed that the evidence given to the jury was contrary to what he had previously stated to the investigating officer. He was, therefore, in effect telling the jury what was in the statement and that the evidence of the witness was different from what he had stated when the facts were being dealt with on another occasion.

The summing up in this respect in my view was a bad misdirection infringing in a somewhat serious way the mandatory provisions of Ss. 161 and 162, Criminal P. C. He was putting to the jury matters for their consideration which in my view should not have been given to them. This misdirection in itself is sufficient to justify setting aside the conviction. I desire to add one further matter in regard to the last portion of the summing up which has been cited earlier, namely, the statement which Bhaskar Pal is said to have made to a doctor who gave evidence. In summing up the learned Sessions Judge told the jury that Bhaskar Pal had informed the doctor that the accused had rushed at him (Bhaskar Pal) and dealt him a stroke with a sword. When Bhaskar Pal was cross-examined he denied that he told the doctor that the accused was armed with a sword, and the doctor when dealing with that matter confined his evidence to stating that Bhaskar Pal had said that the accused had struck them meaning Bhaskar Pal and one other person. No reference was made to the sword in the evidence of the medical witness. Further, the effect of the evidence of the doctor was put to the jury as an established fact and was inaccurate in its detail and in addition there is no reference in the summing up to the denial of Bhaskar Pal of having made any such statement. In my view the learned Judge misdirected the jury in respects which I have mentioned earlier and the misdirection is such as to justify the convictions recorded against the accused being set aside. The result is that these convictions will be quashed. Under the provisions of S. 423 (1) (a), Criminal P. C., the matter will be remitted to another Sessions Judge for a trial of the accused to be held in accordance with law.

DERBYSHIRE C. J. — I agree.

G.N./R.K. *Retrial ordered.*

A. I. R. (29) 1942 Calcutta 496

SEN J.

Bepin Behary Law—Applicant

v.

Mohit Kumar Pal and others —

Respondents.

Application in Suit No. 1513 of 1936, Decided on 22nd July 1941.

(a) Letters Patent (Calcutta), Cl. 12—Suit on mortgage — Part of mortgaged property outside jurisdiction — No leave under Cl. 12 obtained—Decree is nullity—Executing Court must refuse to execute it.

The High Court has no jurisdiction to entertain a mortgage suit where part of the mortgage property is outside its original jurisdiction unless leave under Cl. 12 has been obtained previous to the institution of the suit. The failure to obtain leave under Cl. 12 is not a mere irregularity. The absence of leave goes to the root of the Court's jurisdiction over the subject-matter of the suit. When no such leave was obtained, the entire decree in the mortgage suit is without jurisdiction and, therefore, a nullity. The Court has no jurisdiction to pass a decree only with respect to the properties within its jurisdiction as such a course would disturb the rights of third parties who may have purchased the equity of redemption or taken a mortgage on some portion of the property already mortgaged, and would disturb the course of marshalling and contribution laid down in S. 81, T. P. Act : ('30) 17 A.I.R. 1930 Cal. 258 and ('31) 18 A.I.R. 1931 Cal. 651, *Rel. on*; ('29) 16 A. I. R. 1929 Cal. 358 and 14 Cal. 835, *Expl.*

[P 497 C 1, 2; P 498 C 1]

The decree having been passed by a Court without territorial jurisdiction the executing Court must refuse to execute it as it is a nullity: **('25) 12 A.I.R.** 1925 Cal. 907 (F.B.), *Rel. on* ; ('33) 20 A.I.R. 1933 Cal. 85, *Ref.* [P 497 C 2]

C. P. C. —

('40) Chitaley, Let. Pat. Cl. 12, N. 9. Pt. 1.

('41) Mulla, Page 1394 Pts. (p), (w).

(b) Execution—Decree whether without jurisdiction—Executing Court can refer to plaint.

A decree must be read with the connected documents. In order to see whether the decree is without jurisdiction and a nullity the executing Court can refer to the plaint : ('32) 19 A. I. R. 1932 Cal. 380, *Rel. on.* [P 497 C 2]

C. P. C. —

('40) Chitaley, S. 38, N. 8 Pt. 15; S. 47, N. 30 Pt. 1.

('41) Mulla, Page 164 Pts. (f), (g).

(c) Jurisdiction — Consent or waiver by party cannot confer jurisdiction not possessed by Court—Absence of leave under Cl. 12, Letters Patent (Calcutta), goes to root of Court's jurisdiction over subject-matter of suit—No consent or waiver by defendant can cure defect.

Where there is no jurisdiction the Court cannot be invested with jurisdiction either by waiver or by

consent. When a Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process, but where a Judge is competent to try a cause and the parties join issue and go to trial on the merits, the defendant cannot subsequently dispute his jurisdiction upon grounds that there were irregularities in the initial procedure, which if objected to at the time would have led to the dismissal of the suit. The absence of leave under Cl. 12, Letters Patent (Calcutta), goes to the root of the Court's jurisdiction over the subject-matter of the suit and no consent or waiver on the defendant's part can cure the defect: ('30) 17 A. I. R. 1930 Cal. 258; 9 All. 191(P.C.) and ('31) 18 A.I.R. 1931 Cal. 651, *Rel. on*; 35 Cal. 394 and 17 C.W.N. 512, *Dissent*.

[P 497 C 1; P 498 C 1]

C. P. C. —

('40) Chitaley, S. 9, N. 5 Pts. 1 and 2 ; Let. Pat. Cl. 12, N. 9 Pt. 1.

('41) Mulla, Page 128 Pt. (n); Page 129 Pt. (q).

S. R. Das — for Applicant.

B. C. Ghose — for Respondents.

ORDER.—The present application raises a pure question of law and it seems to me that the question must be answered in favour of the petitioner. The plaintiff instituted a suit upon two mortgages and obtained a preliminary decree and thereafter a final decree. In execution of the decrees the mortgaged properties are sought to be put to sale and a reference is proceeding before the Registrar. The judgment-debtor contends that the decrees are nullities inasmuch as a portion of the mortgaged properties comprised in each of the mortgages is outside the original jurisdiction of this Court and inasmuch as leave under Cl. 12, Letters Patent, to institute the suit in this Court has not been obtained. On this ground execution is resisted. It is admitted by learned counsel for the opposite parties that some of the properties comprised in each of the mortgages are outside jurisdiction and that leave under Cl. 12 had not been taken, but it is said that the decrees are nevertheless executable.

Two questions arise for consideration. Firstly, what is the value and effect of a decree passed in circumstances like these? And secondly, is the executing Court entitled to refuse to execute such a decree? Whatever may have been the view taken in certain earlier decisions it is now well established that this Court has no jurisdiction to entertain a suit for land where part of it is outside its original jurisdiction unless leave of the Court has been obtained previous to the institution of the suit: 56 Cal. 979[1] and 58 Cal. 768.[2] It was argued on behalf of the opposite parties that the decrees may be without jurisdiction so far as they relate to the land outside the jurisdiction of this Court but that the Court had jurisdiction to pass a decree with respect to the land within jurisdiction and that, therefore, the decrees so far as they relate to such land are perfectly valid. In support of this view, my attention was drawn to the decision of Trevelyan J. in 14 Cal. 835[3] where he held in a suit for the partition of properties partly within and partly outside the jurisdiction of this Court that although leave under Cl. 12 had not been taken the Court could entertain the suit so far as it related to the properties within jurisdiction and partition them if the plaintiff submits to this course. In this view he passed a decree for partition. I was also referred to the case in 56 Cal. 940.[4] This suit related to land in the moffussil and also to some land within the original jurisdiction of this Court. Leave under Cl. 12, Letters Patent, had not been taken. The matter was not noticed in the Court of first instance. On appeal the question of jurisdiction was raised. Rankin C. J. held that so far as the moffussil properties were concerned the Court had no jurisdiction to entertain the suit and that objection could be taken for the first time in appeal. As regards the Calcutta properties he expressed no opinion on the question of jurisdiction, but refused to give the declaration prayed for in respect thereto on the ground that it would be idle to do so having regard to the particular circumstances of the case. He did not decide that the Court would have jurisdiction to entertain the suit with respect to the Calcutta property. This case, therefore, is really not of assistance to the opposite parties.

The decision of Trevelyan J. in 14 Cal. 835[3] is certainly authority for the proposition that in a partition suit where part of the property is outside jurisdiction and part within, the Court may in certain circumstances proceed to partition the property within jurisdiction when the plaintiff submits to such a course. The position here is quite different. The Court has disposed of the whole suit. The plaintiff did not give up his claim so far as the property outside jurisdiction is concerned. He cannot now say that a new decree should be fashioned out of the old one by the executing Court. The decree which is sought to be executed is the decree passed in the suit and the executing Court has merely to execute or refuse to execute that decree. It is not to pass a new decree for the purposes of execution. The decree makes all the properties liable for the payment of the mortgage dues. The executing Court cannot vary it and make only a portion of the properties so liable. Even in the suit the plaintiff could not have asked for a decree regarding part only of the mortgaged property. The entire property both outside and within jurisdiction was burdened with the mortgage debts. The Court could not have imposed the entire burden on only part of the property. I know of no procedure which would permit the Court to increase the burden on a portion of the property in this way. If this were done it would disturb the rights of third parties who may have purchased the equity of redemption or taken a mortgage on some portion of the property already mortgaged. It would disturb the course of marshalling and contribution laid down in S. 81, T. P. Act. I hold, therefore, that the decree cannot be split up and that the entire decree passed is without jurisdiction. The decree is therefore a nullity. This answers the first question.

The next question is whether the executing Court can refuse to execute such a decree. That question has been answered by the Full Bench in 53 Cal. 166.[5] The decree has been passed by a Court without territorial jurisdiction and the executing Court must refuse to execute it as it is a nullity. It was argued that there is nothing on the face of the decree itself to show that it was passed without jurisdiction and that therefore this case did not fall

1. ('30) 17 A.I.R. 1930 Cal. 258: 122 I.C. 197: 56 Cal. 979, Provas Chandra Sinha v. Ashutosh Mukherjee.
2. ('31) 18 A.I.R. 1931 Cal. 651 : 134 I.C. 436 : 58 Cal. 768, Sewdayal v. Official Trustee of Bengal.
3. ('87) 14 Cal. 835, Punchanun Mullick v. Srish Chandra Mullick.
4. ('29) 16 A.I.R. 1929 Cal. 358 : 120 I.C. 577 : 56 Cal. 940 : 49 C. L. J. 212, Manindra Chandra v. Lal Mohun.
5. ('25) 12 A. I. R. 1925 Cal. 907 : 89 I. C. 685: 53 Cal. 166 : 42 C. L. J. 1 : 29 C. W. N. 948 (F. B.), Gorachand Haldar v. Prafulla Kumar.

within the rule laid down in 53 Cal. 166[5] which stipulates that it must be apparent from the decree that the Court had no jurisdiction. A decree, however, must be read together with the connected documents one of which is the plaint. This was laid down in 54 C. L. J. 593.[6] If that is done then the want of jurisdiction is apparent on the face of the decree and the case falls within the operation of the rule laid down by the Full Bench. My attention was drawn to certain remarks by Costello J. in 60 Cal. 191[7] expressing dissent from the view taken by the Full Bench in 53 Cal. 166.[5] I do not feel called upon to say anything about the view taken by Costello J. inasmuch as I am bound to follow the law as laid down by the Full Bench. Lastly, it was argued that the petitioner by his conduct in participating in the reference and taking adjournments therein has waived his right to object to the jurisdiction of the Court. This argument finds support in the judgment of Fletcher J. in 35 Cal. 394[8] which was followed by Imam J. in 17 C. W. N. 512.[9] This view has not been adopted in the later decisions of this Court where it has been laid down that where there is no jurisdiction the Court cannot be invested with jurisdiction either by waiver or by consent. In 56 Cal. 979[1] Page J. noticed the decision of Fletcher J. and dissented from it. I respectfully agree with the view of Page J. which is based on the principle laid down by Lord Watson in 13 I. A. 134.[10] The principle is this : When a Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process, but where a Judge is competent to try a cause and the parties join issue and go to trial on the merits, the defendant cannot subsequently dispute his jurisdiction upon grounds that there were irregularities in the initial procedure, which if objected to at the time would have led to the dismissal of the suit. Under Cl. 12 of the charter as interpreted by all the High Courts, this Court has no jurisdiction to try a suit for land which is partly outside the Court's original jurisdiction unless leave has been previously obtained. The failure to obtain leave is not an irregularity. The absence of leave goes to the root of the Court's jurisdiction over the subject-matter of the suit. This view was taken by Panckridge J. in 58 Cal. 768[2] at p. 777. He says :

"It is elementary that if the Court has no jurisdiction having regard to the subject-matter of the suit and the failure of the plaintiff to obtain the necessary leave of the Court, no consent express or implied on the part of the defendants can cure the defect."

In these circumstances I am bound to hold, much against my sympathies, which are with the decree-holders, that the decrees are nullities, and thus incapable of execution. The execution proceedings are set aside. In the circumstances of this case the parties shall bear their own costs of this application.

G.N./R.K. *Application allowed.*

6. ('32) 19 A.I.R. 1932 Cal. 380 : 137 I.C. 375 : 54 C. L. J. 593, Amala Bala Dassi v. Sarat Kumari Dassi.
7. ('33) 20 A. I. R. 1933 Cal. 85 : 142 I. C. 60 : 60 Cal. 191 : 57 C. L. J. 390 : 36 C.W.N. 1120, Kalicharan Singha v. Bibhuti Bhusan Singha.
8. ('08) 35 Cal. 394 : 7 C.L.J. 441 : 12 C.W.N. 705, A. J. King v. Secretary of State.
9. ('13) 17 C. W. N. 512 : 18 I. C. 898, Saraswati Dassi v. Biraj Mohini Dassi.
10. ('87) 9 All. 191 : 13 I.A. 134 : 4 Sar. 741 (P.C.), Ledgard v. Bull.

* A. I. R. (29) 1942 Calcutta 498

SPECIAL BENCH

R. C. MITTER, KHUNDKAR AND PAL JJ.

Sm. Bibhabati Devi w/o Kumar Ramendra Narayan Roy — Petitioner

v.

Kumar Ramendra Narayan Roy and others — Opposite Party.

Privy Council Matter No. 18 of 1941, Decided on 30th June 1942, for leave to appeal to His Majesty in Council.

***(a) Civil P. C. (1908), S. 110 — Question of law — Judges differing — Discussions and exchange of views are necessary—They need not however confer till last — What amounts to sufficient deliberations is question of fact and not of law.**

Where Judges happen to differ they need not confer with each other till the last moment with a view to bring unanimity amongst them. Even if they do not, the separate judgments which they deliver can be regarded as judgments. It is quite true that there must be discussions and exchange of views amongst Judges composing a Division Bench before the judgments are prepared and delivered. But if there are consultations amongst them, it is for them and them only to judge if further discussions would be fruitful and for them only to say at what stage the discussions amongst them should cease. There cannot be an absolute rule of law as to what will amount to a sufficient conference for the purpose. The question whether or not the conferences or discussions amount to a sufficient deliberation by which the Judges composing the Division Bench mutually assist each other in arriving at a decision is at most a question of degree, and as such, a question of fact (and not a question of law) to be determined with reference to the facts and circumstances of each particular case : 6 W.R. 269 ; 9 W.R. 1 (F.B.) and 8 Cal. 597 (F.B.), *Disting.* (Deliberations held sufficient.) [P 501 C 2]

C. P. C. —

('40) Chitaley, Ss. 100 & 101 N. 28 Pt. 3; S. 110 N. 17 Pt. 2.

('41) Mulla, Page 367 N. "No second appeal lies on the ground of an erroneous finding of fact." Page 403 N. "Substantial question of law."

***(b) Government of India Act (1935), Section 222 (2) — Judgment composed by Judge while on leave, is not invalid.**

Sub-section (2) of S. 222 deals with conditions under which a temporary Judge can be appointed. But from that provision no intention can be imputed to the Legislature to the effect that a Judge on leave cannot think about a case which he had previously heard or utilise the period of his leave in preparing a judgment which he had reserved just before going on leave. On no principle can a judgment be declared invalid simply because it was composed by him while on leave. [P 502 C 1]

(c) Practice — Judgment — Provisional judgment can be subsequently modified.

Where a Judge has passed a judgment which is a provisional one and is understood to be so by all concerned, he can subsequently modify the same. [P 502 C 1]

C. P. C. —

('40) Chitaley, O. 20 R. 3 N. 3.

(d) Civil P. C. (1908), O. 49, R. 4 (Cal)—R. 4 is not ultra vires.

Order 49, Rule 4 (Calcutta) of the Code is not ultra vires. Hence the judgment of a Judge of the High Court on leave or during his absence can be delivered by his colleague who sat with him on the Division Bench: ('18) 5 A.I.R. 1918 Cal. 360 and ('25) 12 A.I.R. 1925 Mad. 58, *Rel. on.* [P 502 C 2]

(e) Evidence Act (1872), S. 60—Evidence of persons recognising particular person on his appearance as son of so and so cannot be excluded.

The evidence given by persons who say that they recognised after some time a particular person as the son of so and so cannot be excluded. That evidence really relates to their own perception when they saw that particular person after his appearance and the recollection of their past perception of the said person before his disappearance. [P 503 C 1]

(f) Civil P. C. (1908), O. 41, R. 27 — Documents not taken in—Formal order giving reasons is not necessary.

No formal order giving reasons be recorded by the appellate Court for not taking certain documents. The law requires such an order only when documents rejected by the trial Court are received in evidence by the appellate Court. [P 503 C 2]

C. P. C. —
('40) Chitaley, O. 41 R. 27 N. 10.
('41) Mulla, Page 1194 N. "Recording of reason for admission of additional evidence."

(g) Civil P. C. (1908), O. 41, R. 27—Acceptance is discretionary — Spurious documents produced on behalf of party—His agents found tampering with evidence—Documents not accepted — Discretion cannot be said to be not rightly exercised.

The acceptance of the documents under R. 27 of O. 41 is a matter of discretion. Where a large number of spurious documents have been produced on behalf of a party and that party's agents had no scruples in tampering with the evidence, it cannot be said that the discretion has not been rightly exercised by the appellate Court in not accepting them in evidence. [P 503 C 2]

C. P. C. —
('40) Chitaley, O. 41 R. 27 N. 1 Pt. 4.
('41) Mulla, Page 1191 N. "When additional evidence may be admitted."

(h) Practice — Duty of appellate Court laid down.

Where the law gives a right of appeal from a judgment of a trial Court on questions of fact as well as on questions of law, the Court of appeal has to consider and weigh the judgment appealed against. It has to examine the materials on the record and to come to its own conclusions. [P 504 C 1]

[Judges held did not shirk their duty to weigh the evidence and to arrive at their own independent conclusions] : ('41) 28 A. I. R. 1941 P. C. 16 ; 31 S. L. R. 213 (P.C.) and (1936) A. C. 206, *Ref.* [P 504 C 1]

C. P. C.—
('40) Chitaley, O. 41 R. 2 N. 7.
('41) Mulla, Page 1157 Pt. (h).

(i) Adverse possession — Exclusiveness and continuity held destroyed.

A person was in possession till 8th May 1909 when he disappeared and after his reappearance he began to collect rent and nazar on or before 5th May 1921, that is within twelve years. The suit was instituted in 1930, i.e., within 12 years from the time when he first began to collect rent :

Held, that those acts of possession on his part destroyed the adequacy and interrupted that exclusiveness and continuity which is demanded from any person challenging by possession the title of a rightful owner. [P 504 C 2]

Limitation Act—
('42) Chitaley, Art. 142 & 144 N. 63 ; N. 64.
('38) Rustomji, Page 1369 Pt. 2.

(j) Limitation Act (1908), Art. 144 — Hindu lady on disappearance of her husband coming in possession of his property — Her possession is not adverse to her husband but is on his behalf.

The nature of title which a person acquires by prescription depends upon the nature of his assertion, and where a Hindu lady acquires by prescription title to immovable property on the assertion that she had been possessing it as a Hindu widow, that is, as heir to her husband, that property becomes a part of her husband's estate. It does not become her stridhan, and on her death it would be inherited not by her heirs but by the heirs of her husband : ('24) 11 A.I.R. 1924 P. C. 121, *Rel. on.* [P 505 C 1]

She, in claiming the widow's estate, does not cherish any animus to exclude her husband, on the other hand her animus is one of recognition of her husband's title. The wife's possession on disappearance of her husband is accordingly possession not adverse to her husband. It is necessarily on his behalf. [P 505 C 1]

Limitation Act—
('42) Chitaley, Arts. 142 & 144 N. 19.
('38) Rustomji, Page 1288 N. "Adverse possession having no title"; Page 1485 N. "Relatives . . ."

(k) Civil P. C. (1908), S. 110 — Substantial question of law.

The question of limitation or of adverse possession on which all the Judges are agreed held not to be a substantial question of law. [P 505 C 1]

C. P. C.—
('40) Chitaley, S. 110 N. 17 Pt. 2.
('41) Mulla, Page 403 N. "Substantial question of law."

(l) Civil P. C. (1908), S. 109—No question of great public importance—Suit for property only — Case does not come under S. 109 (c).

Where there is no question of great public importance and the suit is one for property only and so definable in money value, the case does not come within the principles of S. 109 (c) as laid down in 23 All. 227 (P.C.) and ('21) 8 A.I.R. 1921 P. C. 25. [P 505 C 1]

C. P. C.—
('40) Chitaley, S. 109 N. 10 Pt. 9.
('41) Mulla, Page 391 N. "Clause (c) Certificate as to fitness."

Phani Bhusan Chakerbutty and Jyotis Ch. Pal — for Petitioner.

B. C. Chatterjee, J. C. Gupta, Bankim Ch. Mookerjee, Nagendra Nath Bose and Arabinda Guha — for Opposite Party.

ORDER. — Raja Rajendra Narayan Roy of Bhowal died leaving him surviving three sons, Ranendra Narayan, Ramendra Narayan and Rabindra Narayan, who inherited his properties, known as the Bhowal estate, in equal shares. His second son, Ramendra Narayan, married Bibhabati Debi, the petitioner before us. There is no issue of that

marriage. In April 1909 Ramendra Narayan went to Darjeeling accompanied by his wife, Bibhabati Debi, and other relations. There he fell ill and to all appearances died on 8th May 1909. Whether he actually died or not is the most important point in the case. On the assumption that he was dead his wife Bibhabati took possession of his one-third share in the Bhowal Estate as his heir and continued to be in possession, when in the year 1911 she was declared a disqualified proprietor and the Court of Wards assumed charge on her behalf.

On 24th April 1930 opposite party No. 1 instituted the suit in the first Court of the Subordinate Judge at Dacca, being Title Suit No. 70 of 1930, which on transfer became Title Suit No. 35 of 1935 of the Court of the Additional District Judge of that place. The principal defendant was Bibhabati Debi, who was made defendant 1. The other defendants, namely 2 to 4, were the widows of Ranendra Narayan and Rabindra Narayan and one Ram Narayan who was alleged to be the adopted son of Rabindra Narayan. The case of opposite party No. 1 was that on the night of 8th May 1909 while lying unconscious as a result of administration of poison in the course of his treatment he was taken for dead and carried to the cremation ground, but before he could be put on the funeral pyre a severe rain storm came on with the result that the funeral party left him unattended and took shelter elsewhere. After the storm was over the said party returned but found the body missing. In fact during the interval he had been removed in an unconscious state by some Naga Sannyasis, for on his regaining consciousness he found himself in their company. His memory of the past was effaced for years and he wandered in their company from place to place as one of their party till he came to Dacca in 1921. There he was recognised by many persons as Kumar Ramendra Narayan Roy, the second son of late Raja Rajendra Narayan and thereafter he revealed his identity on 4th May 1921. The tenants of the Bhowal estate began to pay him rent and Nazar in large numbers with the result that on 3rd June 1921 the Collector of Dacca representing the Court of Wards in conspiracy with Bibhabati Debi and her brother Satyendra Nath Banerjee issued a notice on the tenants of the Bhowal estate in which he was described as an imposter and the tenants were warned of the consequences of payment of rent and Nazar to him. He accordingly prayed for a declaration that he was Kumar Ramendra Narayan Roy, the second son of late Raja Rajendra Narayan Roy of Bhowal, and for a permanent injunction restraining Bibhabati Debi represented by the Manager of the Court of Wards, from causing obstruction to his possession of one-third share of the Bhowal estate. By an amendment of the plaint a prayer for confirmation of possession or, in the event of his possession not being established, for recovery of possession was added.

The learned Additional District Judge accepted the allegations made in the plaint to be true. He held that the plaintiff was Kumar Ramendra Narayan Roy of Bhowal. By his decree dated 24th August 1936 he directed him to be put in possession of one-third share of the properties in suit jointly with the other defendants, namely defendants 2 to 4. Against this decree Bibhabati Debi and defendants 3 and 4 filed an appeal in this Court being appeal from Original Decree No. 1 of 1937. This appeal was heard by a Division Bench of three learned Judges, Costello, Biswas and Lodge JJ. The hearing commenced on 14th November 1938 and continued from day to day till 14th August 1939, when the hearing was concluded and judgment reserved. The hearing spread over 164 sittings of the Court. The Court closed for the long vacation on 31st August and re-opened on 16th November. Costello J. proceeded on leave. He left for England during the long vacation and never returned to India. He retired on 15th March 1941. In England he prepared his judgment and signed it on 25th June 1940. It was sent to India duly authenticated and under the authority of O. 49, R. 4, Civil P. C., was read in open Court by Biswas J. on 29th August 1940. During his absence on leave Akram J. acted in his place, except for two periods of time, namely for some days in August 1940, when the judgments of the said learned Judges were delivered in open Court, and for some days in February 1941, when Costello J. signed the decree in London. Costello and Biswas JJ. agreed in dismissing the appeal but Lodge J. was for allowing the appeal. As the majority of the Judges composing the Division Bench was of opinion that the appeal ought to be dismissed, the decree, which was signed by all the three learned Judges, has dismissed the appeal. It is against this decree that Bibhabati Debi has filed this application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit and of the proposed appeal is over Rs. 10,000 but in as much as the decree of this Court has affirmed the decision of the learned Additional District Judge the petitioner has to satisfy us that the proposed appeal involves some substantial question of law. With that object in view the learned advocate appearing for the petitioner has urged the following points before us : I. That the judgment of Costello J. is not a valid judgment and the other two judgments are also invalid ; II. That assuming the judgments to be valid judgments the final order dismissing the appeal is not a valid order ; III. That in any event the judgment of Costello J. was not validly delivered, in as much as (a) R. 4 of O. 49, Civil P. C., is ultra vires, and (b) even if intra vires, this case does not come within that rule. On the assumption that the judgments of all three Judges were valid judgments and the final order was a valid one, and that Costello J.'s judgment was validly delivered the decision of this Court is vitiated. IV. By the illegality of procedure adopted by the judges in calling up documents and papers not produced or exhibited in the Court of first instance without passing any order for production in open Court ; V. By reason of the fact that the majority of the learned Judges relied upon evidence which is not admissible in law ; VI. By reason of the learned Judges not receiving in evidence documents produced by petitioner which the lower Court had wrongly excluded ; VII. By reason of the fact that both Costello and Biswas JJ. misconceived the functions of an appellate Court and by reason of that misconception did not weigh the evidence in the case independently as they ought to have done,—Costello J. on the "Darjeeling Chapter" and Biswas J. on the "Identity Chapter;" VIII. That the questions of limitation and of prescription have been wrongly decided by all the three learned Judges.

After giving our anxious consideration to the arguments of the learned advocates we cannot say on the facts of this case that any one of the aforesaid questions are substantial questions of law. We will shortly state our reasons for arriving at that conclusion. We will first take up the first three points as indicated above. The learned advocate for the petitioner places those points principally on

two grounds, namely : (1) that the decision arrived at by this Court was not the result of such discussions and conferences between the three learned Judges, who constituted the Division Bench, as the law, requires, and (2) that Costello J. ceased to be a Judge of this Court at the material points of time, in particular on 25th June 1940, when he signed his judgment in London, or that at least he could not perform the duties of a Judge during the period of his leave. In support of his first ground he places reliance on three reported decisions of this Court, namely, 6 W. R. 269,[1] 9 W. R. 1[2] and 8 Cal. 597.[3] For supporting his second ground he relies upon Cls. 15 and 36, Letters Patent and S. 222 (2), Government of India Act, 1935. The principle laid down in the aforesaid cases is that where the Court which has to decide a case consists of more than one Judge all acts of a judicial nature must be performed not by each Judge acting individually and without reference to the other or others but in consultation with each other. They must bring their minds together on all the essential points of the case. If there is no discussion among them and no exchange of views, or if there are only preliminary discussions among them and they part with the understanding that they would meet again for the final discussion, but without meeting again prepare what they call separate judgments, their so-called judgments would not be regarded as judgments of the Court but only as records of their individual opinions or separate notes of their arguments. It is not necessary for us to say whether the principles have not been widely stated in those cases; but, for the purpose of the case we have before us, we would assume that those are the correct principles.

In 6 W. R. 269[1] the two learned Judges of the Division Court, who had differed with each other, (Morgan and Pundit JJ.) had not finally come to a conclusion as to what was the decision to be pronounced by the Court and they had not decided after consultation with each other what were the points upon which they had differed and of which there was no clear indication in the judgments they delivered. It was a case where there was total absence of consultation and exchange of views between the two Judges of the Division Bench. That seems to have been the case also with regard to the case to which Prinsep J. refers at p. 600 of his judgment in 8 Cal. 597.[3] In 9 W. R. 1[2] the nine Judges constituting the Full Bench who had heard the case could not agree with each other at the conclusion of the hearing. They met again but even then they could not agree as to the answer to be given to the point of law which had been referred to the Full Bench. At that meeting the point was not finally discussed and they parted with the understanding that they would meet again for discussion; but, in the meantime, such of the Judges as might wish could put their opinions in writing and those opinions were to be circulated. The Judges, however, never met again and three of the Judges, Trevor, Campbell and Pundit JJ., who ceased to be Judges of the Court either by reason of retirement or death, left their written opinions with the Registrar. The question was whether those opinions could be treated as their judgments. The Court held that they could not be regarded as judgments at all. The salient fact which transpires from the statement as made by the learned Chief Justice is that though there were discussions among the Judges composing the Full Bench, all the Judges were of opinion that those discussions were not sufficient, that the requirements of the case needed further discussion among them and that there was possibility of some of them changing at the further proposed conference the tentative views they had then formed. It is in those circumstances that it was held that what three of the Judges had left with the Registrar of the Court were not judgments but were in effect only notes of argument of those three Judges. We are to see whether the general observations made in those cases apply to the facts of the case which we have before us. The material facts bearing upon this question appear in the two sets of supplementary judgments of Biswas and Lodge JJ.

During the course of the hearing of the appeal, which occupied 164 working days, there were very frequent discussions among the three learned Judges. In the course of those discussions, and as a result thereof one of the Judges, Lodge J., had made up his mind on all points. He did not require any further discussion. Biswas J. had also formed an opinion, tentative though it was, as to the result. Costello J. had also made up his mind with regard to some of the points and on those points he seemed to have agreed with Biswas J. On some points, however, he was still undecided. In this state of things, both Biswas and Lodge JJ. communicated their views to Costello J. Biswas J. had the impression that Costello J. was inclined to agree with his views. It may be that Biswas J. had formed a wrong impression, but this shows that the discussions among the Judges were ample. When they parted company neither Biswas J., nor Lodge J. expressed the desire of having further consultations with Costello J., nor is there anything to indicate that Costello J. required any further consultation with his colleagues to assist him in forming his opinion on the points on which he was still undecided. When in England he had before him the whole of the judgment of Lodge J. and a good portion of the judgment of Biswas J. ending with the most important chapter of the case, namely, the Darjeeling Chapter. We cannot accept the contention that where Judges happen to differ they must confer with each other till the last moment with a view to bring unanimity amongst them, and if they do not, the separate judgments which they deliver would not be regarded as judgments. It is quite true that there must be discussions and exchange of views amongst Judges composing a Division Bench before the judgments are prepared and delivered. But if there are consultations amongst them, it is for them and them only to judge if further discussions would be fruitful and for them only to say at what stage the discussions amongst them should cease. There cannot, in our judgment, be an absolute rule of law as to what will amount to a sufficient conference for the purpose. The question whether or not the conferences or discussions amount to a sufficient deliberation by which the Judges composing the Division Bench mutually assist each other in arriving at a decision is at most a question of degree, and as such, a question of fact to be determined with reference to the facts and circumstances of each particular case. The point raised is not a question of law, much less a substantial question of law.

We are not much impressed by the argument that Costello J. had ceased to be a Judge at the material points of time. That contention cannot stand in the face of S. 220, Government of India

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1. ('66) 6 W. R. 269, Khelut Chunder Ghose v. Tarachurn Koondoo Chowdhury.
2. ('68) 9 W.R. 1: Beng. L.R. Sup Vol. 774 (F.B.), Mohamed Akil v. Assadan-nissa Bibee.
3. ('82) 8 Cal. 597: 10 C. L. R. 241 (F. B.), Narain Chunder v. Dataram Roy.

Act, 1935. He had not attained the age of sixty, nor had he resigned. In fact he retired from service on 15th March 1941 after he had signed the decree on 5th February 1941. The learned advocate for the petitioner further contends that as Akram J. was acting in his place at the time when he composed his judgment in England and signed it on 25th June 1940, his judgment is not a valid judgment, as he was then, to use the expression of the learned advocate "statutorily" unable to perform the duties of his office. For substantiating his contention that Costello J. was "statutorily" unable to perform the duties of his office he has drawn our attention to S. 222, sub-s. (2), Government of India Act, 1935. We are not impressed by this argument. That subsection deals with conditions under which a temporary Judge can be appointed. We fail to see how from that provision an intention can be imputed to the Legislature to the effect that a Judge on leave cannot think about a case which he had previously heard or utilize the period of his leave in preparing a judgment which he had reserved just before going on leave. On no principle can a judgment be declared invalid simply because it was composed by him while on leave.

II. The next question that has been argued before us is that the final order that has been passed, namely, the dismissal of the appeal, is not a valid order. Two reasons are assigned for this contention. The first is that Biswas J. could not in law modify the order which he made just after delivery of his first supplementary judgment on 27th August 1940. In that judgment he considered the question as to whether the judgment of Costello J., which had not then been delivered and the contents of which were then unknown, would be a valid judgment or not. He expressed the opinion that it would not be a valid judgment in a certain contingency, and further indicated definitely what in his opinion ought to be done in the case, as Lodge J. had differed from him. The ordering portion of his judgment as then dictated by him was that there should be a reference to a third Judge under Cl. 36, Letters Patent, on the points on which he and Lodge J. had differed, namely, issues 4 and 5 of the suit. Neither this supplementary judgment nor the order was signed by the learned Judge at that time but a copy of the unsigned order as then made was given to the petitioner by the special order of Biswas J. at the request of her advocate. It is annexure A to the petition for leave. But that copy was given after the advocate for the petitioner had requested the Court to hear submissions on the matter and that request had been granted verbally. It was on the express understanding that the matter would be open for argument that the copy of the unsigned order was given to the petitioner. This has been made clear in para. 66 of the counter affidavit sworn to by Mon Mohan Ray on 23rd February 1942, and by the order which Biswas and Lodge JJ. recorded on 29th August 1940, which expressly stated that arguments would be heard after the long vacation. The matter was in fact argued on 22nd and 25th November 1940. The first supplementary judgment and the order of Biswas J. as passed on 27th August 1940 was therefore a provisional one, and was understood to be so by all concerned. Biswas J. could therefore modify the said order. We do not accordingly see the force of the first reason.

The second reason given by the petitioner's advocate is that the final order for dismissal of the appeal was not passed by the three learned Judges after conference with each other. If Costello J.'s judgment was a valid one, and prima facie it was, no discussion or conference amongst the judges was at all necessary for determining what was to be the final order. Two of the learned Judges had agreed in dismissing the appeal and in his signed judgment sent from England Costello J. had stated that the appeal is to be dismissed as Biswas J. had agreed with him. Under Cl. 36, Letters Patent, the final order of the Court was to be an order for dismissal of the appeal, an order which was in fact passed by all the three learned Judges, and a decree to that effect was in fact signed by all of them.

III (a). We do not see any reason why O. 49, R. 4, Civil P. C., is ultra vires. It is a rule made in accordance with the procedure laid down in Part 10, Civil P. C. It is not inconsistent with any of the provisions contained in the body of the Code. We also fail to see how this rule is inconsistent with any provision of the Government of India Act or the Letters Patent. But even apart from that rule there is a considerable body of judicial opinion in India that the judgment of a Judge of the High Court on leave or during his absence can be delivered by his colleague who sat with him on the Division Bench : *see* for instance 22 C.W.N. 263[4] and 47 M.L.J. 397.[5]

III (b). The case before us clearly comes within the terms of that rule. Costello J. was at the time when his judgment was delivered by Biswas J. a Judge of this Court and what he had sent out to be read was his judgment.

IV. This ground depends on the statements made in the paras. 85 to 93 of the application for leave to appeal and on paras. 56 to 60 of the aforesaid counter-affidavit sworn to by Mon Mohan Roy. It appears that the Registrar of this Court under the instructions of the Court sent a requisition to the Commissioner of the Dacca Division to send a mass of papers. When that fact was known the matter was mentioned in open Court by the learned advocate of the petitioner on 24th July 1939. What transpired in Court on that date is set out in para. 92 of the petition for leave, and what finally happened is set out in para. 59 of the counter affidavit, where the proceedings of 8th August 1939 are set out. It appears from the proceedings of 24th July and 8th August 1939 that although the Registrar had asked the Commissioner of Dacca Division to send the papers to this Court the Judges did not intend those papers to be sent to this Court, but only desired that they should be kept ready at hand by the appellant but before that desire could be communicated to the Board of Revenue, the papers were actually sent to this Court. The Judges, however, never looked into them. Only one document, a letter of 10th May 1921 which was sent with those papers was produced in Court on written orders of the Judges passed in open Court in the presence of the parties and was looked into and marked as exhibit with the consent of both sides.

V. The evidence which is challenged as inadmissible in law falls into two groups : (i) the evidence given by witnesses of the "Maitra group" and (ii) evidence of the persons who deposed that they had recognised the plaintiff as the Second Kumar of Bhowal.

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4. ('18) 5 A.I.R. 1918 Cal. 360 : 43 I.C. 781 : 27 C.L.J. 257 : 22 C.W.N. 263, Saraj Ranjan v. Premchand.
5. ('25) 12 A.I.R. 1925 Mad. 58 : 83 I.C. 91 : 47 M.L.J. 397, Meyappa Chettiar v. Chidambaram Chettiar.

The evidence of the "Maitra group" is attacked on the ground that it is hearsay, and the evidence of the persons of the second group is challenged on the ground that what those witnesses stated were their opinions only. We have read the evidence of the witnesses of both the groups. The evidence given by the witnesses of the "Maitra group", e.g. Mr. S. N. Maitra, Prof. Radha Kumud Mukerjee, Prof. Hiralal Roy and Mr. Nagendra Nath Rakshit relate to facts which were within their knowledge. They deposed to the fact that they were invited at about 8 O'clock at night on 8th May 1909 to help in the cremation of Kumar Ramendra Narayan. That evidence, if believed, would lead to the inference that the Kumar died in the evening of 8th May 1909, as is the plaintiff's case, and not at about midnight, as is the defendant's case but we do not see how that evidence can be classed as hearsay evidence of the Kumar's death in the evening. We do not also see how the evidence given by persons who said that they had recognised after some time the plaintiff as the second Kumar of Bhowal can be excluded. That evidence really relates to their own perception when they saw the plaintiff after his appearance at Dacca in 1921 and the recollection of their past perception of the Kumar before his disappearance in 1909.

The third ground of attack is that Biswas J. has relied upon the report of Scotland Yard in coming to the conclusion that a certain relevant entry in the Rainfall Register kept by the Darjeeling Municipality had been tampered with at the instance of, or in the interest of defendant 1. The said register was sent by this Court for examination by Scotland Yard with the consent of both parties, but when the report arrived the advocates of the parties did not desire to look into it or to use it as evidence though they offered no objection to the Judges seeing it. The document was not proved or marked as an exhibit. Biswas J., however, referred to it in his judgment, but neither Costello J., nor Lodge J. took any notice of it. The judgment of Biswas J., however, indicates that he arrived at the finding that the entry had been tampered with in the interest of defendant 1 independently of the report of Scotland Yard. Section 167, Evidence Act, makes the point thus taken by the petitioner an unsubstantial one.

VI. A very important point in the case is whether the plaintiff is Kumar Ramendra Narayan Roy, and the importance of that point would remain even if it be found that the Kumar did not die on 8th May 1909 or at all. On the question of identity the plaintiff relied upon physical marks and features and on the evidence of recognition. The defendant's case on the point was that there was no similarity but that assuming that there was some similarity in appearance between the plaintiff and Kumar Ramendra Narayan, the plaintiff cannot be the Kumar because the mental equipment, and the standard of literacy and education of the plaintiff, which was low, cannot bear comparison with the literacy, mental equipment and standard of education of refinement which Ramendra Narayan had. That was the case of defendant 1 from the beginning. The plaintiff was examined in Court from 11th December 1933. He was witness 10 examined in Court. The advocate for defendant 1 cross-examined him in detail and at great length. Many of his questions were directed to test his mental equipment and past habits. After about 300 witnesses had been examined in Court on behalf of the plaintiff, defendant 1 filed with petitions dated 12th, 16th, 17th, 20th, 23rd, 26th April, and 2nd May 1934, (Part 1, Vol. VI, pages 297 and 341) a large number of documents, vouchers and estate papers purporting to bear the signature of Ramendra Narayan in some cases and in some cases his alleged sanction, conveyed by the words "sanction or granted" alleged to have been written by him. The statement made in those petitions was that they were lying in the Record Room of the estate unnoticed and were discovered only after diligent search. By those papers defendant 1 wanted to prove that Kumar Ramendra Narayan was a man of much superior intellectual standard and of different habits than the plaintiff. Those papers were allowed to be filed but the Additional District Judge expressly recorded orders that their reception in evidence would be considered later on when they would be tendered (Orders Nos. 646, 653 and 670, Part 1, Vol. I). Some of those documents were then put by the defendant's advocate in cross-examination of the plaintiff's witnesses but consistently with the orders previously recorded by the learned Judge he allowed them to be marked for identification only (X 79 to X 276) and not as exhibits in the case, as he had not then decided whether they could be received in evidence in view of O. 13, Rr. 1 and 2, Civil P. C., (Order No. 672 dated 26th April 1934 and No. 484 dated 4th May 1934. Part 1, Vol. I and Part 1, Vol. IV, p. 430, line 8 and Part 1, Vol. VII, p. 25). By the last mentioned order he held, and we think rightly, that those documents came within O. 13, Rule 1, Civil P. C. Defendant 1 therefore required leave from the Court under Rule 2 of that Order before they could be used as evidence by her. But her advocate did not ask for leave, till 24th September 1934. In the meantime whenever the learned Judge asked him to apply for leave under O. 13, R. 2 he took up the position that he would choose his own time to make such an application. He eventually asked for leave but by his order dated 29th September 1934 the learned Judge refused the same (Part 1, Vol. X, page 406). The appellant attacked the aforesaid two orders of the learned Judge dated 4th May and 29th September 1934 in the appeal which she preferred against the decree of the learned Judge and pressed her objections by submitting written notes of argument on the point.

The learned Judges of this Court gave consideration to those objections. They admitted some of them on which the signatures had been proved, but did not admit the rest on the ground that no useful purpose would be served and the petitioner's advocate acquiesced. Paragraph 79 of the counter-affidavit of Monmohan Roy taken with the agreed record of the proceedings of the Court of 17th May 1939 establish this position. No doubt no formal order giving reasons was recorded by this Court for not taking them in but the law requires such an order only when documents rejected by the trial Court are received in evidence by the appellate Court, (O. 41, R. 27, Civil P. C.). In any view, the acceptance of these documents was a matter of discretion. In view of the fact that both the trial Judge and Costello and Biswas JJ. have found that a large number of spurious documents have been produced on behalf of the defendant and that the defendant's agents had no scruples in tampering with the evidence we cannot say that the discretion has not been rightly exercised by this Court in not accepting them in evidence.

VII. The argument of the learned advocate for the petitioner on this point rests upon two observations, one made by Costello, J. and the other by Biswas J. in the course of their judgments. The former said that the principle was well established

that a Court of appeal confronted with questions of fact ought not to interfere with the decision of the trial Court unless upon a searching review of all the evidence, and the facts and circumstances of the case, it is of opinion that the conclusions arrived at were clearly wrong. Biswas J., dealt with the question of the burden of the appellant in an appeal and quoted with approval the observations of Lord Buckmaster in 26 C. W. N. 322[6] that "if all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded." The learned advocate for the petitioner says that the observations thus made do not adequately and completely represent the functions of an appellate tribunal. For that purpose he refers us to the observations made in 45 C. W. N. 435[7] at page 439; 41 C. W. N. 624[8] at p. 627 and (1936) A. C. 206[9] at p. 220. It is quite true that every appeal from a Judge trying a case without jury is a retrial, so that the appellate Court is bound to exercise a judgment of its own, because the appellate Court is in its turn a judge of fact. Where the law gives a right of appeal from a judgment of a trial Court on questions of fact as well as on questions of law, the Court of appeal has to consider and weigh the judgment appealed against. It has to examine the materials on the record and to come to its own conclusions. But reading the judgments of Costello and Biswas JJ., we cannot come to the conclusion that the said learned Judges shirked their duty to weigh the evidence and to arrive at their own independent conclusions—Costello J. on the "Darjeeling Chapter" and Biswas J. on the "Identity Chapter". The appeal was heard for 164 days, during which evidence on every point was placed and discussed in detail. All the learned Judges put searching questions to the advocates, and quite a large number; there were frequent discussions between the Bench and Bar. The agreed record of the proceedings of Court prepared from shorthand notes shew all this. Both the learned Judges kept clearly before their mind the vital questions and both of them, as their judgments indicate, detailed in an exhaustive manner the various items of evidence on the record, sifted and weighed them carefully, considered the findings and reasonings of the trial Judge and finally concurred with him. Even if a complete statement of the functions of an appellate Court has not been made in their judgments, their judgments afford ample evidence that they decided the case in a manner in which an appellate Court should, and is required to decide.

VIII. The question of limitation was not argued in open Court but by agreement written notes of argument were placed before the learned Judges. Those notes have been placed before us. From the notes submitted by the petitioner we find that arguments on her behalf were shaped only on the pleadings in the case. No material finding of fact bearing on the question of limitation or adverse possession arrived at by the trial Judge was challenged either therein or in the memorandum of appeal which covered 348 grounds. The finding arrived at by the learned Additional District Judge at p. 122, Part I, Vol. XVIII of his judgment is that the plaintiff began realising rent from the tenants shortly after his arrival at Dacca and continued to do so till about 1930. In support of his finding he referred to many documents. In a letter written by Dr. Ashutosh Das Gupta, who is an important figure in the case and an important witness on the defendant's side, on 5th May 1921 the fact was admitted that even then tenants of the Bhowal estate were paying the plaintiff rent and nazar in large numbers. This letter, which is Ex. 398, has been noticed in the judgment of Biswas J. The Appellate Side Rules of the High Court require the appellant to include in the printed record of the appeal all materials necessary to challenge a finding of the trial Judge which the appellant proposes to challenge (Part 2, Chap. 9, R. 11 note (1) of the Appellate Side Rules). The collection papers and some of the exhibits on which the learned Additional District Judge relied in arriving at the finding that the plaintiff had been making extensive collection from 1921 to 1930 have not been included in the paper book of the appeal. This affords an additional indication that that finding was not challenged in this Court. In the written notes of arguments on the question of limitation and adverse possession which was put in on behalf of the plaintiff, it was expressly pointed out "that no question of limitation can arise in this suit in view of the fact that the plaintiff since 4th May 1921 admittedly has been accepting Nazar and realising rent from the tenants as the true owner." The note then gave the reference to the relevant evidence which covered the period 1921 to 1930. As the finding of the trial Judge had not been challenged in this Court the word admittedly was used. The statement so made in that note was not controverted and has not been challenged even before us by the petitioner's advocate. In this state of things the questions of limitation and prescription are answered by facts.

The learned advocate for the petitioner firstly contends that Art. 120, Limitation Act, is applicable and time began to run from 3rd June 1921 when the notice to the effect that plaintiff was an imposter was published on behalf of the Board of Revenue. That could have been a possible contention, if the plaint had not been amended by the addition of the prayer for possession. The addition of that prayer attracted either Art. 142 or Art. 144, Limitation Act, and there is thus no scope for the application of the residuary article, namely Art. 120, when the decree that has been granted to the plaintiff is for recovery of possession. It was next submitted by the petitioner's advocate that under Art. 142 or Art. 144 the plaintiff's suit is barred—at least there arises a substantial question of law for consideration. Both the contentions are met by the aforesaid finding of the learned Additional District Judge which was not challenged as incorrect by the petitioner in this Court. There cannot be on that finding any case of defendant 1 acquiring title by prescription. Kumar Ramendra was in possession till 8th May 1909, and assuming the plaintiff to be the Kumar, and that is the finding of fact of the majority of the Judges of this Court, he began to collect rent and Nazar on or before 5th May 1921, that is within twelve years. He continued to do so thereafter for years. Those acts of possession on his part destroyed the adequacy and interrupted that exclusiveness and continuity which is demanded from any person

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6. ('22) 9 A. I. R. 1922 P. C. 39 : 65 I. C. 305 : 26 C. W. N. 322 (P.C.), Nabakishore Mandal v. Upendra Kishore Mandal.
7. ('41) 28 A. I. R. 1941 P. C. 16 : 193 I. C. 220 : I.L.R. (1941) 1 Cal. 468 : I.L.R. (1941) Kar P. C. 51 : 68 I. A. 34 : 45 C. W. N. 435 (P.C.), Srish Chandra Nandy v. Rakhalananda Thakur.
8. ('37) 31 S. L. R. 213 : 167 I. C. 8 : 41 C. W. N. 624 (P.C.), Ahsanulla Shah v. Ziauddin Shah.
9. (1936) 1936 A. C. 206 : 104 L. J. K. B. 576 : 153 L. T. 421 : 41 Com Cas 35, Flower v. Ebbw Vale Steel Iron and Coal Company.

challenging by possession the title of a rightful owner 48 I. A. 395.[10] This suit was instituted in 1930, i.e., within 12 years from the time when the plaintiff first began to collect rent.

Regarding the applicability of Art. 142, there is no allegation of either dispossession or discontinuance of possession in the plaint and the facts of this case do not either justify such a position. In para. 3 of the plaint, the plaintiff states that during his absence the physical enjoyment of his wife was in law, his possession, and in para. 4 he simply states that after his return obstruction was placed to his full enjoyment of the benefits of the property, although the tenants began to pay him rent on the declaration of his identity which was made on 4th May 1921. If the position indicated in para. 3 of the plaint be correct, that would afford an additional reason for holding that there can be no question either of limitation or of adverse possession of Bibhabati against her husband. She went into possession on the basis that she was her husband's heir. It is well settled that the nature of title which a person acquires by prescription depends upon the nature of his assertion. It is also an established principle, and it has been so formulated by the Judicial Committee of the Privy Council, that where a Hindu lady acquires by prescription title to immovable property on the assertion that she had been possessing it as a Hindu widow, that is, as heir to her husband, that property becomes a part of her husband's estate. It does not become her stridhan, and on her death it would be inherited not by her heirs but by the heirs of her husband, 51 I. A. 171.[11]

If a Hindu widow by prescription acquires only a title for her husband's estate it seems clear that the nature of the assertion involved in her possession is the assertion of her husband's title. It follows, and that is the accepted view, that she in claiming the widow's estate, does not cherish any animus to exclude her husband—on the other hand her animus is one of recognition of her husband's title. Bibhabati's possession was accordingly possession not adverse to her husband, the plaintiff. It must therefore necessarily be on his behalf. For these reasons, we cannot certify the question of limitation or of adverse possession, on which all the three Judges are agreed to be a substantial question of law. We have been finally asked to grant leave under cl. (c) of S. 109, Civil P. C. We cannot accede to that request. There is no question of great public importance. The suit is one for property only and so definable in money value. The case does not in our opinion come within the principles laid down in 28 I.A. 11[12] and of 48 I.A. 31.[13] For the reasons given above, we refuse a certificate and dismiss the application of the petitioner for leave to appeal to His Majesty in Council with costs to the plaintiff opposite party. Hearing fee is assessed at thirty gold mohurs. After we had pronounced our order by which we refused leave to the petitioner to appeal to His Majesty in Council, Mr. Pal states to us on behalf of the petitioner that he does not desire to press his application wherein a prayer was made for taking security from the opposite party No. 1. He further prayed for withdrawal of the said application without prejudice to his putting in such other application as his client may be advised to, if and when an application for special leave to His Majesty in Council is made. We allow him to withdraw the application without prejudice to his rights to make such further application that his client might be advised to make, if and when an application for special leave to His Majesty in Council is made.

R.K. *Certificate refused.*

10. ('22) 9 A.I.R. 1922 P.C. 181 : 66 I. C. 451 : 44 Mad. 883 : 48 I.A. 395 (P.C.), Kuthali Moothavar v. Peringati Kunhaharan Kutty.
11. ('24) 11 A.I.R. 1924 P.C. 121 : 80 I.C. 788 : 5 Lah. 192 : 51 I.A. 171 (P.C.), Lajwanti v. Safa Chand.
12. ('01) 23 All. 227 : 28 I.A. 11: 7 Sar. 825 (P.C.), Banarsi Prasad v. Kashi Kishen Narain.
13. ('21) 8 A.I.R. 1921 P. C. 25 : 60 I.C. 85 : 48 I.A. 31 : 44 Mad. 293 (P.C.), Radha Krishna v. Swaminatha.

A. I. R. (29) 1942 Calcutta 505

BISWAS J.

Panchanon Ray and others—*Appellants*

v.

Fazlur Rahman Chaudhury and others—*Respondents.*

Appeal No. 1496 of 1937, Decided on 21st May 1942, from appellate decree of Sub-Judge, First Court, Jessore, D/- 4th June 1937.

(a) Easement—Right of way—Three distinct classes of rights of way namely private, public and one belonging to certain classes of persons or portion of public, explained.

In India, as in England, there are three distinct classes of rights of way. First, there are private rights of way vested in particular individuals or in individual owners of particular tenements: these are easements proper, and commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons or certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or a village: such rights may be regarded as quasi-easements, and commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of the public at large, and the source of these, when not created by legislative enactment, is dedication : 15 Cal. 460 (F.B.), *Rel. on.* [P 507 C 1]

Limitation Act —
('42) Chitaley, S. 26, N. 7 Pt. 1.
('38) Rustomji, Page 510 N. "Right of way."

(b) Highway—Public right of way—Whether there has been dedication is question of fact — Finding thereon is binding in second appeal.

In the case of a public right of way the question whether there has been dedication or not is one of fact, and has to be decided by the ultimate Court of fact with reference to the circumstances of the case. A finding on that question is conclusive in second appeal : (1914) A. C. 95 and (1935) 1 K. B. 310, *Rel. on.* [P 507 C 2]

C. P. C. —
('40) Chitaley, Ss. 100 & 101, N. 28 Pt. 3; N. 52 Pts. 1, 3, 4.
('41) Mulla, Page 366 N. "No second appeal lies on the ground of an erroneous finding of fact."

(c) Highway—Public right of way—Dedication —Nature of—Dedication may be inferred from actual user—Nature and extent of user explained —Dedication can be presumed from long user.

In the case of a public right of way dedication implies a gift or grant by the owner of the land to the public of the right of way over it: it presupposes,

a therefore, an intention to dedicate — an *animus dedicandi*. It also requires acceptance by the public. Where the intention is expressed in words or writing, the matter admits of direct proof and presents little difficulty, but more often than not, that is not the case, and it must then become a matter of inference. The inference is obviously to be drawn from evidence of overt acts or conduct on the part of the owner of the land viewed in the light of surrounding circumstances. Such evidence is best furnished by proof of actual user by the public, from which public acceptance of the dedication may be likewise inferred. The user must be by the public generally, and not by a section of it, for there cannot be a dedication to a limited part of the public: (1843) 11 M. & W. 827, *Rel. on*; ('35) 22 A. I. R. 1935 Cal. 413, *Expl.* [P 507 C 2; P 508 C 1]

b Such user, again, is not proved by merely showing access to or use of the passage by members of the public. The user must be shown to be as of right, that is to say, it must purport to be in exercise of a public right of way, and acquiesced in as such by or on behalf of the owner of the land against whom the presumption of dedication is to be made. The extent of the land-owner's acquiescence is in fact a material question, for, a single act of interruption by the owner is of much more weight, upon a question of intention to dedicate, than many acts of enjoyment: (1843) 11 M. & W. 827, *Rel. on.* [P 508 C 1]

As regards the length of public user, the period is material only as one element from which the intention to dedicate may be inferred: there is neither a fixed minimum period nor a fixed maximum period which must compel such an inference,

c for it is dedication and not user that constitutes a highway; user is merely the evidence that proves the dedication. This no doubt presupposes the existence of an owner capable in law of dedicating, but it does not follow that such a person must be proved to be living within the period over which actual user is established. So long, therefore, as dedication may be inferred from user, it is by no means necessary that the evidence of user must go back to the date of dedication. The dedication can be presumed from long user: (1927) 1 Ch. 367 and (1901) 2 Ch. 647, *Rel. on.* [P 508 C 1]

(d) Highway—Public right of way — Dedication—Presumption of dedication from continuous user is question of fact and not of law — Hence Court is not bound to give effect to presumption and hold dedication proved as matter

d **of course merely because there is no evidence of rebuttal.**

Though proof of open, uninterrupted and continuous user may give rise to a presumption of dedication in the case of an alleged public right of way, the presumption is still one of fact, and not one of law. It cannot be said therefore that if there is no evidence in rebuttal the Court shall be bound to give effect to the presumption and hold dedication proved as a matter of course: (1914) A. C. 338 and (1935) 1 K.B. 310, *Rel. on.* [P 508 C 2]

(e) Custom—Antiquity—Proof — Strict rules of English law do not apply—Hearsay evidence —Admissibility.

The strict rules of English law governing the establishment of custom cannot be applied in India in the matter of proof of antiquity. A custom in order to be valid must be ancient but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district: ('41) 28 A.I.R. 1941 P.C. 21 and ('17) 4 A.I.R. 1917 P.C. 181, *Rel. on.* [P 509 C 1]

If proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred: (1838) 2 M. & R. 129 and (1877) 3 Q.B.D. 85, *Rel. on.* [P 509 C 1]

After the existence of the custom for some years f has been proved by direct evidence, it can only as a rule be shown to be immemorial by hearsay evidence. It is for this reason that hearsay evidence is allowable for the purpose as an exception to the general rule: ('25) 12 A.I.R. 1925 P.C. 213, *Rel. on.* [P 509 C 1]

There is no reason why 50 or 60 years' user might not, in the circumstances of the case, be regarded as sufficient to indicate the existence of the right from a much remoter period. [P 509 C 2]

(f) Custom—Right of way—Finding that user was permissive negatives customary right of way.

A finding that the user was permissive is enough by itself to dispose of a case regarding a customary right of way. [P 509 C 2]

g *Phani Bhusan Chakravarti, Binayak Nath Banerjee, Gopesh Chandra Chatterjee and Paritosh Sarkar*—for Appellants.

Chandra Sekhar Sen and Jyotish Chandra Pal —for Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a representative suit instituted under O. 1, R. 8, Civil P. C. The plaintiffs purport to sue on behalf of the inhabitants of four villages, and ask for a declaration of a right of boat passage and certain consequential reliefs. The right is claimed over a stretch of water which is described in the plaint as a baor, and which they say appertains to a zemindary mahal bearing touzi No. 399 of the Nadia Collectorate. There is a rough sketch given in the plaint, which shows that the baor is a semi-circular channel, and skirts the plaintiffs' villages on one side, and the defendants' lands on the other. h It has an outlet at two ends towards the south into a river called the Kapotakshi, which flows east to west, forming as it were a chord to the semi-circle. It is said that the western outlet has been silted up, so that the only communication with the river now is by the other opening at the eastern end.

The plaintiffs' case is that this eastern end was recently obstructed by the defendants who put up a dam across the channel, first with a bamboo fence, and then with an iron netting, and that this had the effect of interfering with the right of boat passage which the plaintiffs and their co-villagers had been enjoying in this water-course from time immemorial. The defence is a complete denial of the right claimed. It is stated that the baor is the private property of the owners of the touzi which they have let out in putni, and that the defendants hold it as part of their mourashi mokarari tenure under the putnidars. They accordingly claim the right of exclusive user of the baor, and as since

obtaining settlement they have thrown into it large quantities of spawn with a view to the rearing of fish, they maintain they are fully entitled to take all necessary protective measures to prevent the escape of fish into the river Kapotakshi. The defendants do not object to the plaintiffs using the water as riparian owners.

Both the Courts below dismissed the plaintiffs' suit, except as to the right to use the water as aforesaid, which is decreed on the ground that it is not opposed by the defendants. Hence the present appeal. The right which is claimed in the suit is in essence a right of way, but no clear-cut or definite case is made in the plaint as to the basis of the claim or the mode of acquisition of the right. The right is variously described as an "easement of necessity," a "prescriptive easement," a "customary easement," an "easement acquired by user from time immemorial" and an "easement based on lost or implied grant." This is probably the reason why the Courts below say that reading the plaint, it is difficult to make out what the plaintiffs claim or do not claim. The substantial allegation is that the plaintiffs, meaning thereby the inhabitants of the villages concerned, have been enjoying the right "from time immemorial," "openly," "peaceably," "without interruption" and "as of right." As the Full Bench pointed out in the well-known case in 15 Cal. 460,[1] in India, as in England, there are three distinct classes of rights of way. First, there are private rights of way vested in particular individuals or in individual owners of particular tenements : these are easements proper, and commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons or certain portions of the public, such as the freemen of a city, the tenants of a manor; or the inhabitants of a parish or a village : such rights may be regarded as quasi-easements, and commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of the public at large, and the source of these, when not created by legislative enactment, is dedication.

It appears that at the trial, notwithstanding the recitals in the plaint, the plaintiffs sought to make out a case under each of the three heads stated above, but in this appeal, Mr. Chakravarti on their behalf frankly conceded that in view of the nature of the suit as well as the findings of the Courts below, he could not support the claim of a private right of way, that is to say, of an easement founded on grant or prescription. He restricted himself accordingly to the other two grounds (1) that the right claimed was a public right of way, and (2) that it was a customary right. On both these points, the lower appellate Court, in concurrence with the Court of first instance, had also found against the appellants, but Mr. Chakravarti contended that in arriving at the findings the learned Subordinate Judge had failed to apply the correct principles of law. As regards the claim of a public right of way, apart from pointing out that there was not the remotest suggestion of dedication in the plaint, the learned Judge found that there was no evidence on record to show any dedication on the part of anybody at any time. The baor, he added, admittedly belonged to the zemindars, and it was necessary therefore to prove that if there was a dedication, it had been made by the zemindars only, and not by the putnidars. This, he said, had not been shown.

This seems to be such a clear and definite finding that it is difficult to see how in the face of it the appellants could sustain their claim of a public right of way. As is well settled on the authorities, the question whether there has been dedication or not is one of fact, and has to be decided by the ultimate Court of fact with reference to the circumstances of the case: *see* for instance, the opening words of Lord Dunedin's judgment in (1914) A. C. 95[2] at page 99 and (1935) 1 K. B. 310.[3] A finding on such an issue should obviously, therefore, be conclusive in second appeal. What nevertheless gave Mr. Chakravarti a chance to raise an argument on the point was a statement in the judgment of the learned Subordinate Judge to the effect that dedication could not be presumed from long user. This, it was said, was a mis-statement of the law, and the finding was accordingly attacked as vitiated by this incorrect view. In other words, Mr. Chakravarti's contention was that the learned Judge must have arrived at his finding without any reference to the evidence of public user, and that as such, it could not be accepted as a proper or legal finding.

To say that dedication cannot be presumed from long user is undoubtedly to utter a proposition which cannot be supported. It would in fact be contrary to the settled law on the subject. Dedication, as the term implies, is a gift or grant by the owner of the land to the public of the right of way over it : it presupposes, therefore, an intention to dedicate—an *animus dedicandi*, as it is put, and one may add, it also requires acceptance by the public. Where the intention is expressed in words or writing, the matter admits of direct proof and presents little difficulty, but more often than not, that is not the case, and the authorities clearly establish that it must then become a matter of inference. The inference is obviously to be drawn from evidence of overt acts or conduct on the part of the owner of the land viewed in the light of surrounding circumstances, and there can be little doubt that such evidence is best furnished by proof of actual user by the public, from which public acceptance of the dedication may be likewise inferred : *see* Halsbury's Laws of England, Hailsham edition, Vol. 16, p. 218, Ss. 259 and 260, pages 224-225, S. 270.

The learned Subordinate Judge cites the authority of a decision of this Court in support of his statement, 39 C.W.N. 303,[4] but that was a case of a *cul de sac*, and all that was pointed out was that in such a case mere user by the public was not sufficient to raise an inference of dedication, but that it had to be further shown that public money had been spent upon it. This is quite in accord with the law as laid down in English cases (Halsbury, Vol. 16, pages 225-226, S. 272), and it certainly does not detract from the general rule, but only means that the rule requires qualification by reason of the nature of the *locus in quo*. To support the inference of dedication of a highway to the public, it is very important however to have regard to the nature and extent of the user. For one thing, the user must be by the public generally, and not by a section of it,

1. ('88) 15 Cal. 460 (F.B.), Chuni Lall v. Ram Kishen.

2. (1914) 1914 A.C. 95 : 83 L.J.Ch. 411 : 110 L.T. 546: 78 J.P. 97: 12 L.G.R. 90: 30 T.L.R. 168 : 58 S. J. 233, Rowley v. Tottenham Urban District Council.

3. (1935) 1 K.B. 310 : 104 L.J.K.B. 109 : 152 L.T. 133 : 99 J. P. 93 : 33 L. G. R. 39: 79 S. J. 11: 51 T.L.R. 131, Williams-Ellis v. Cobb.

4. ('35) 22 A.I.R. 1935 Cal. 413 : 157 I.C. 224 : 60 C. L. J. 556 : 39 C. W. N. 303, Samarendra Nath Saha v. Harendra Kumar.

for, as Baron Parke observed in (1843) 11 M. & W. 827[5] at page 830, there cannot be a dedication to a limited part of the public. Such user, again, is not proved by merely showing access to or use of the passage by members of the public, as this may mean no more than that the public cannot be excluded without excluding the more limited class of persons who are really entitled or permitted to use the passage. What must be shown is that the user is as of right, that is to say, it must purport to be in exercise of a public right of way, and acquiesced in as such by or on behalf of the owner of the land against whom the presumption of dedication is to be made. The extent of the land-owner's acquiescence is in fact a material question, for to quote another dictum of Baron Parke in the same case in (1843) 11 M. & W. 827,[5] a single act of interruption by the owner is of much more weight, upon a question of intention to dedicate, than many acts of enjoyment.

As regards the length of public user, the period is material only as one element from which the intention to dedicate may be inferred: there is neither a fixed minimum period which must be proved in order to justify an inference of dedication, nor a fixed maximum period which must compel such an inference. As pointed out by Romer J. in (1927) 1 Ch. 367[6] at p. 378, quoting from Buckley J. in (1901) 2 Ch. 647,[7] it is dedication and not user that constitutes a highway; user is merely the evidence that proves the dedication. This no doubt pre-supposes the existence of an owner capable in law of dedicating, but it does not follow that such a person must be proved to be living within the period over which actual user is established. To hold otherwise would be to confuse user, which is only evidence of dedication, with the dedication itself. If the user is sufficient to raise a presumption of dedication, the dedication may well have taken place long before the first proved act of user. So long, therefore, as dedication may be inferred from user, it is by no means necessary that the evidence of user must go back to the date of dedication. This would explain why, where the origin of a way was accounted for, four years has been regarded as insufficient, but where other facts pointed to an intention to dedicate, 18 months has been held to be sufficient, and so too, in other cases six years and eight years (Halsbury, Vol. 16, p. 225, section 271).

Such being the legal position, I think it must be held that the learned Judge in the present case did in fact misdirect himself in saying that dedication could not be presumed from long user, and in so far as there is evidence of user on record, his finding against dedication must consequently be set aside. I have looked into the evidence myself and cannot say that it is clearly of such an unequivocal character that it cannot legitimately give rise to a presumption of dedication. The matter must accordingly be remitted to the lower appellate Court in order that as the ultimate tribunal of fact on this question, it may consider the evidence as a whole and come to its own conclusion. A word of warning is perhaps necessary in this connexion, and it is this that though proof of open, uninterrupted and continuous user may give rise to a presumption of dedication, the presumption is still one of fact, and not one of law. It must not be supposed, therefore, that if there is no evidence in rebuttal, the Court shall be bound to give effect to the presumption and hold dedication proved as a matter of course. This is a proposition which is now established on the highest authority, that of the House of Lords in (1914) A. C. 338,[8] overruling the contrary view which had been expressed by the Court of Appeal, by a majority, in that case: *see also* (1935) 1 K. B. 310.[3]

Turning now to the alternative ground of claim on the footing of a customary right of boat passage, which had also been negatived by the learned Subordinate Judge, Mr. Chakravarti's main criticism was directed to showing that the Court had applied a wrong standard as to the length of user which was necessary to establish a customary right. The learned Judge took the view that a custom to be valid in law must be shown to have had its origin beyond the period of living memory, and as in this case, the evidence of user did not go back to a period of more than 50 or 60 years at the most prior to the suit, he held this was wholly insufficient to establish the right claimed. An essential attribute of a valid custom is no doubt its remote antiquity, and it may be conceded that the English rule as to the test of antiquity is as laid down in Blackstone's Commentaries, namely that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom": *see* (1867) 2 H. L. 239,[9] where Willes J. at page 259 said, "a custom originating within the time of memory, even though existing in fact, is void, at law." But even in England this statement has been qualified, and it has been held that where it is impossible to show a continued existence of the custom from a time preceding the memory of man, which, as is well-known, has long since been fixed at the year 1189, the commencement of the reign of Richard I, the Courts will support the custom if circumstances be proved which raise a presumption that the custom in fact existed at that remote date. Thus, in (1877) 3 Q. B. D. 85,[10] at p. 104, Cockburn C. J. after referring to the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence, said:

"The Judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from the time of legal memory, that is to say, from the time of Richard I."

To the same effect were the observations of Tindal C. J. in (1838) 2 M. & R. 129,[11] at p. 136:

"As to the proof of the custom, you cannot indeed reasonably expect to have it proved before you that such a custom did in fact exist before time of legal memory, that is, before the first year of the reign of Richard I; for if you did, it would,

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5. (1843) 11 M. & W. 827 : 63 R. R. 782, Poole v. Huskinson.
6. (1927) 1 Ch. 367 : 95 L. J. Ch. 312 : 135 L. T. 281 : 90 J. P. 173 : 24 L. G. R. 333 : 70 S. J. 690, Stoney v. Eastbourne Rural District Council.
7. (1901) 2 Ch. 647 : 70 L. J. Ch. 808 : 85 L. T. 414 : 50 W. R. 22 : 66 J. P. 71, Attorney-General v. Esher Linoleum Co.
8. (1914) 1914 A. C. 338 : 83 L. J. K. B. 745 : 110 L. T. 834 : 78 J. P. 273 : 12 L. G. R. 334 ; 30 T. L. R. 297, Folkestone Corporation v. Brockman.
9. (1867) 2 H. L. 239 : 36 L. J. Ex. 225 : 16 W. R. 44, London Corporation v. Cox.
10. (1877) 3 Q. B. D. 85 : 38 L. T. 510 : 47 L. J. Q. B. 163 : 26 W. R. 221, Angus v. Dalton.
11. (1838) 2 M. & R. 129, Bastard v. Smith.

in effect, destroy the validity of almost all customs; but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom."

In other words, if proof be given of facts from which it can be inferred that user corresponding to the alleged custom in fact existed at some time past, the existence of the custom from the remoter era will be inferred, and as Farwell J. observed in (1904) 2 Ch. 534,[12] at p. 556 :

"Not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right."

In India, there is express authority for holding against the application of the strict rules of English law governing the establishment of custom : *see* the observations of Lord Buckmaster in 45 I. A. 10[13] at p. 14. Reference may also be made to a more recent decision of the Privy Council in 68 I. A. 1[14] where Mr. Jayakar, delivering the judgment of the Board referring to the English rule as stated in Blackstone's Commentaries, observed that it was neither apposite nor useful, when applied to Indian conditions :

"It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient ; but it is not of the essence of the rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district . . . It would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that in every case the antiquity of a custom must be carried back to a period which is beyond the memory of man."

In 52 I. A. 279,[15] the existence of a local custom was supported by witnesses from their personal knowledge under 20 years, and also by hearsay evidence, and it was held that an "immemorial" custom was thereby established within the meaning of S. 2, Bengal Regulation 11 of 1825. Their Lordships expressly held that as to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only as a rule be shown to be immemorial by hearsay evidence, and they go on to point out that it is for this reason that hearsay evidence is allowable for the purpose as an exception to the general rule.

There can be no doubt that the learned Subordinate Judge in this case failed to apply the correct rule in appraising the evidence of user for the purpose of establishing the alleged customary right. There is no reason why 50 or 60 years' user might not, in the circumstances of the case be regarded as sufficient to indicate the existence of the right from a much remoter period. This was practically not disputed by Mr. Sen on behalf of the respondents, but his main answer was a finding in another part of the judgment to the effect that the plying of boats in the baor was permissive, which finding, if well-founded, would of course be enough by itself to dispose of the whole of the plaintiffs' case regarding a customary right of way. Mr. Chakravarti contended that this was a perverse finding, and not in accordance with the defendants' case as made in the pleadings or in the evidence. Without going so far as that, I am inclined to think that the learned Judge's approach to the evidence was not from the correct standpoint. In any case, I am of opinion that there is sufficient evidence on the record on which it will be for the Court to say, without insisting on too strict a standard as to the quantum of evidence, whether or not a customary right of way has been proved to exist. The question of a customary right of boat passage must also, therefore, be remitted to the lower appellate Court for further consideration in the light of the principles already indicated. As the case is being remitted to the Court below, I refrain from expressing any opinion on the evidence myself.

The result is that the appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside, and the case remitted to the lower appellate Court to be dealt with in accordance with law as directed above. Costs will abide the result.

G.N./R.K. *Appeal allowed.*

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12. (1904) 2 Ch. 534 : 74 L. J. Ch. 71 : 91 L. T. 513 : 68 J. P. 479, Mercer v. Denne.

13. ('17) 4 A. I. R. 1917 P. C. 181 : 43 I. C. 306 : 45 Cal. 450 : 45 I. A. 10 : 12 S. L. R. 104 (P. C.), Abdul Hussein Khan v. Bibi Sona Dero.

14. ('41) 28 A.I.R. 1941 P. C. 21 : 193 I. C. 436 : I. L. R. (1941) Kar. P.C. 22 : 68 I. A. 1 : I. L. R. (1941) Lah. 154 (P. C.), Mt. Subhani v. Nawab.

15. ('25) 12 A. I. R. 1925 P. C. 213 : 89 I. C. 737 : 52 I. A. 279 : 4 Pat. 788 (P. C.), Rajendra Narain v. Ganganda Singh.

A. I. R. (29) 1942 Calcutta 509

EDGLEY J.

Brijraj Marwari and others — *Applicants*

v.

Anant Prosad — *Respondent.*

Suit No. 1286 of 1935, Decided on 18th November 1941.

(a) Contract — Law to be applied—Intention of parties.

The law of contract depends upon the intention of the parties: 1924 A. C. 514 and 1938 A. C. 224, *Rel. on.* [P 510 C 1]

(b) Bengal Money-Lenders Act (10 of 1940) — Preamble — Act does not apply to money-lending transaction in Bihar.

The expression "transactions of money-lending in Bengal" in the preamble of the Act can only mean transactions of money-lending which take place in Bengal. Therefore, the Act cannot apply to such transactions taking place in Bihar. [P 510 C 2]

S. R. Das — for Applicants.

S. B. Sinha — for Respondent.

ORDER. — The petitioner in this case is applying for certain reliefs under the Bengal Money-Lenders Act, 1940, in respect of a promissory note which was executed by him on 10th July 1932. It appears that a suit was instituted in this Court on this promissory note on 9th July 1935 and a con-

sent decree was passed against the petitioner on 21st June 1937. The decree-holder now seeks to put the consent decree into execution but the petitioner maintains that it should be re-opened as it falls within the scope of the provisions of the Bengal Money-Lenders Act. Mr. Das on behalf of the respondent in this case contends that the Bengal Money-Lenders Act cannot be applicable as the loan was made in Bihar and the law applicable to the loan must be that of Bihar. He maintains that, having regard to the terms of Preamble to the Bengal Money-Lenders Act, all that the Legislature purported to do in passing this Act was to regulate money-lending business in Bengal and the terms of the Act can have no possible application to the loans made in Bihar.

Learned counsel for the petitioner, on the other hand, maintains that the terms of the Bengal Money-Lenders Act are sufficiently wide to cover a transaction of this sort, especially in view of the fact that the promissory note dated 10th July 1932 contained an express clause to the effect that the principal amount together with interest and compound interest should be paid on demand either at Bhagalpur or Calcutta. The main point for consideration in this case is whether the provisions of the Bengal Money-Lenders Act can govern a loan, such as that with which we are now dealing, which was made outside Bengal. Mr. Sinha on the authority of 1924 A. C. 514[1] contends that the law of the contract should be *lex loci solutionis*. It was, however, pointed out by the Judicial Committee in 1938 A. C. 224[2] that the law of the contract depends upon the intention of the parties. In that case their Lordships said that "the proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract."

In the case with which we are now dealing the intention of the parties on 10th July 1932 clearly was that interest should be paid at a rate which was then legal both in Bihar and Bengal, where the law with reference to money lending transactions was the same. It cannot therefore be said that, by stating that the principal amount might be repaid either at Bhagalpur or Calcutta, they intended to express any preference in favour of the law of either province but from the circumstances which existed at the time when the loan was made I think that the most reasonable way to interpret the contract dated 10th July 1932 is, to hold that the intention of the parties was that the contract should be governed by the law of the place at which the loan was effected, namely, the law of Bihar. The question then arises whether the Bengal Legislature in enacting the Bengal Money-Lenders Act, 1940, intended to make its terms applicable to money-lending transactions which may have taken place outside the province. Mr. Sinha relies on the terms of S. 36 of the Act which direct the Courts in Bengal to give relief to borrowers "in any suit to which this Act applies." This expression is defined in S. 2 (22) of the Act. But in neither of these sections do we find any clear terms to indicate that the Bengal Legislature intended to affect loans other than those which had been made in Bengal. On the other hand, the Preamble to the Act describes this measure of legislation as "an Act further to regulate transactions of money lending in Bengal." Mr. Sinha argues that this Preamble should be interpreted to mean that the Legislature intended to enact a statute which would regulate in Bengal all transactions relating to money-lending. In my view however this is not what the Preamble states. I think the expression "transactions of money-lending in Bengal" can only mean transactions of money-lending which take place in Bengal. If it had been the intention of the Legislature to affect such transactions which take place elsewhere they should have used more precise language. My conclusion is that the Bengal Money-Lenders Act cannot apply in the case with which we are now dealing and, in these circumstances, this application must be dismissed with costs.

K.S./R.K. *Application dismissed.*

1. (1924) 1924 A. C. 514 : 93 L. J. P. C. 133 : 131 L. T. 1, Beniam & Co. v. L. S. Debono.
2. (1938) 1938 A.C. 224 : 107 L. J. P.C. 5 : (1937) 4 All. E. R. 206 : 157 L. T. 522 : 54 T. L. R. 5, Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.

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B. K. MUKHERJEA AND BLANK JJ.

Hirendra Lal Sarkar — Petitioner

v.

Smt. Kanaklata Choudhurani and others — Opposite Party.

Civil Revn. Petns. Nos. 1131, 1132, 1270 and 1271 of 1941, Decided on 29th May 1942, from order of Dist. Judge, 24-Parganas at Alipur, D/- 14th May 1941.

(a) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), S. 26-F — Words "cosharer tenant" in S. 26-F include cosharer by purchase — It is enough if he has acquired share at any time before application for pre-emption under S. 26F provided application itself was made within time — Right of pre-emption passes with share to which it is attached.

The words "cosharer tenant" in S. 26-F are wide enough to include a cosharer by purchase. Since a cosharer by purchase is competent to apply for pre-emption under S. 26-F it is enough, that he has acquired a share at any time before the application was presented, provided the application itself was made within time. Where the vendors of the purchaser undoubtedly had the right to apply for pre-emption and before that right was lost by efflux of time they transferred their entire interest in the tenancy to purchaser, the latter would certainly step into the shoes of the former and be able to exercise the same rights which could have been asserted by the vendors. The right of pre-emption is not a mere

personal right. It is a right exercisable by a cosharer by reason of his ownership of a portion of the tenancy and when the share in the tenancy to which the right is attached is transferred, the right goes along with it. [P 511 C 2 ; P 512 C 1]

(b) Bengal Tenancy Act (8 of 1885 as amended by Act 6 of 1938), Ss. 23A to 38—Ss. 23-A to 38 apply to occupancy holdings pure and simple—They have no application when tenant has higher rights under express or implied grant though such rights are combined with those of occupancy raiyat acquired under Act — Rent free holder is fixed rate tenant — Even if he is not Ss. 23A to 38 cannot apply to him as he has higher rights than those of occupancy raiyat.

Sections 23A to 38 are applicable when the tenancies are occupancy holdings pure and simple but they have no application when the tenant has higher rights in the land under an express or implied grant from the landlord, though such rights are combined with those of an occupancy raiyat acquired under express provisions of the Act. A rent free holder is a tenant within the meaning of section 3 (17) of the Act. When a landlord grants a raiyati settlement of certain lands to another and it is agreed by and between the parties at the time of the inception of the tenancy that no rent would be payable in respect of the same, the tenant may, without impropriety be considered to be a raiyat at a fixed rate. It is true that the rent is not fixed at a particular figure and is fixed at nil but the essential element of a mokarari holding, namely, that the landlord cannot demand any excess rent from the tenant, is present in such cases. Even if a niskar raiyat or rent free holder is not exactly a raiyat at a fixed rate his rights are much higher than those of an occupancy raiyat and therefore Ss. 23-A to 38 cannot apply to him simply because, in addition to his rent free right, he has acquired the status of an occupancy raiyat by remaining in possession for 12 years or more : ('40) 27 A.I.R. 1940 Cal. 460, *Approved.* [P 512 C 2 ; P 513 C 1]

Jatindra N. Sanyal (in 1131 and 1132) — for Petitioner.

Gunada Charan Sen and Joy Gopal Ghosh — for Petitioner (in 1131 and 1132) and for Opposite Party (in 1270 and 1271).

Rajendra Ch. Guha, Satindra Nath Roy Choudhari and Sovendra M. Bose — for Opposite Party (in 1131 and 1132) and for Petitioners (in 1270 and 1271).

B. K. MUKHERJEA J.—These are four connected revision cases which arise out of certain proceedings under S. 26 F, Ben. Ten. Act, as it stands after the amendment of 1938, commenced by one Hirendra Lal Sarkar who is the petitioner in Civil Revn. Cases Nos. 1131 and 1132 of 1941, for pre-emption of certain shares in eleven occupancy holdings, which were sold by some of the cosharers to one Kanaklata Chowdhurani who is opposite party No. 1 in these two revision cases. These raiyati holdings are situated at Bausdroni in the district of 24-Parganas and two of the cosharer tenants, viz., Golam Rab Jamadar and Khatijan Bibi sold their 2 as. 15 gds. and odd share to Kanaklata Chowdhurani by a conveyance which was executed on 10th July 1939. On 4th November 1939, there was another conveyance executed by Abdul Khalek Munshi and others who had 4 as. 6 gds. and odd share in all these eleven holdings in favour of the same Kanaklata Chawdhurani. Hirendra Lal Sarkar who claimed to be a cosharer in these tenancies presented two applications, one on 4th October 1939 and the other on 4th March 1940, for pre-emption of the shares conveyed by the aforesaid two kabals to Kanaklata, in the Court of the Second Subordinate Judge of Alipore and they were registered as Misc. Cases Nos. 116 of 1939 and 20 of 1940. Both these cases were heard together and a number of defences were taken by Kanaklata Chowdhurani who resisted the petitioner's claim for pre-emption. The trial Court by its order dated 13th January 1941, rejected both these applications on the ground that they were not maintainable in law and that the deposits made by Hirendra were insufficient.

Against that order two appeals were taken by the petitioner Hirendra to the Court of the District Judge of 24-Parganas. The District Judge who heard these appeals reversed the judgment of the trial Court on both the points and allowed the petitioner's claim for pre-emption except with regard to two holdings which were recorded in khatian Nos. 71 and 307 of the C. S. records. With regard to these two holdings the tenants were described as occupancy raiyats who had acquired rent-free title by long possession and enjoyment and the District Judge held that these two must be taken to be holdings of raiyats at fixed rates which would not come within the purview of S. 26F, Ben. Ten. Act. Against this part of the order of the District Judge which dismissed his claim in respect of the two rent-free holdings Hirendra has obtained two rules which are Civil Revision Cases Nos. 1131 and 1132 of 1941. Kanaklata on the other hand obtained the other two rules being Civil Revision Cases Nos. 1270 and 1271 of 1941 against that part of the order of the District Judge which reversed the judgment of the trial Court and allowed the claim of the petitioner in respect of nine out of the eleven holdings. It would be convenient if we take these last two rules first. The trial Court held inter alia that the petitioner Hirendra Lal Sarkar being himself a cosharer in these tenancies by purchase was incapable of claiming pre-emption under S. 26F, Ben. Ten. Act. According to the Subordinate Judge the expression "cosharer tenants" as used in S. 26F, Ben. Ten. Act, excludes a cosharer by purchase; for otherwise it would defeat the object of the section which is to prevent introduction of strangers as cosharers in the property. The District Judge held on the other hand that this would be putting a too narrow construction upon the words of the section which are in themselves absolutely plain and unambiguous. Mr. Rajendra Chandra Guha who appears in support of these two rules obtained by Kanaklata does not dispute the interpretation put by the District Judge and he has given up the extreme contention which found favour with the trial Judge, viz., that Hirendra's claim for pre-emption was altogether untenable in law.

The only point which he has raised on behalf of his clients is that Hirendra acquired an interest in five out of the eleven holdings only on 28th July 1939, whereas the kabala by Golam Rab Jamadar and Khatijan Bibi was executed on 10th July 1939. As Hirendra was not a cosharer in these five holdings at the date of the purchase by Kanaklata, of the shares of Golam Rab Jamadar and Khatijan Bibi he had no right to apply for the purchase of this share under S. 26F, Ben. Ten. Act. We do not think that we can accept this contention as sound. If a cosharer by purchase is competent to apply for pre-emption under S. 26F, Ben. Ten. Act, it is enough, in our opinion, that he has acquired a share at any time before the application was pre-

sented, provided the application itself was made within time. In the case before us, the vendors of Hirendra undoubtedly had the right to apply for pre-emption and as before this right was lost by efflux of time they transferred their entire interest in the tenancy to Hirendra the latter would certainly step into the shoes of the former and be able to exercise the same rights which could have been asserted by them. The right of pre-emption is not a mere personal right as was held by the trial Judge. It is a right exercisable by a cosharer by reason of his ownership of a portion of the tenancy and when the share in the tenancy to which the right is attached is transferred, the right goes along with it. We hold therefore that the view taken by the District Judge is right and these two rules, viz., 1270 and 1271 of 1941 must be discharged. We make no order as to costs. We now come to the other rules in which Hirendra figures as the petitioner and they raise a somewhat interesting point as to whether the provisions of S. 26F, Ben. Ten. Act, are at all applicable when the transfer is of a share in a niskar or rent-free holding belonging to an occupancy raiyat. The Court below answered the question in the negative relying on a decision of Edgley J., in 44 C.W.N. 232[1] where it was held by the learned Judge that S. 26G, Ben. Ten. Act, was not applicable to a mortgage of a niskar holding. The learned Judge was of opinion that there was no essential difference between the holding of a raiyat at a fixed rate and that of a niskar raiyat; and consequently as laid down in S. 18 (2), Ben. Ten. Act, the provisions of Section 26F of the Act are excluded when there is transfer of a portion of rent-free holding, even if the tenant had occupancy rights in the same. Mr. Sen argues that the essential feature of a raiyati at fixed rate is that the rent or rate of rent is fixed in perpetuity; but when no rent is payable, no question of fixity of rent arises. The point is not free from doubt, and some difficulty arises by reason of the fact that no specific provision was made by the Legislature in respect of rent-free holdings of a raiyat.

Under S. 3(17), Ben. Ten. Act, a "tenant" means a person who holds land under another person and is, or but for a special contract to the contrary would be, liable to pay rent for that land to that person. A rent-free holder is therefore a tenant and he can come under the category of different classes of tenants which are recognized in S. 4, Ben. Ten. Act. His rights and liabilities are thus dependent upon the status of his landlord and the particular purpose for which the tenancy was created. A rent-free holder who holds lands under another person for purposes of cultivation and whose landlord is not a raiyat himself may certainly be regarded as a raiyat. The question is whether he is to be treated as a raiyat at a fixed rate or an ordinary raiyat with or without rights of occupancy. We think that when a landlord grants a raiyati settlement of certain lands to another and it is agreed by and between the parties at the time of the inception of the tenancy that no rent would be payable in respect of the same, the tenant may, without impropriety, be considered to be a raiyat at a fixed rate. It is true that the rent is not fixed at a particular figure and is fixed at nil but the essential element of a mokarari holding, namely, that the landlord cannot demand any excess rent from the tenant, is present in such cases, and even if the tenant acquires occupancy rights by remaining in possession of the lands for 12 years or more the provisions of Ss. 24, 27 and 28 to 38, Ben. Ten. Act, are ex hypothesi not applicable to them.

We think that it could not have been the intention of the Legislature that the tenants in such cases would be subject to all the limitations and restrictions regarding transfer and enjoyment of the lands as are set out in Ss. 23A, 25 and 26 series of the Ben. Ten. Act. A raiyat at a fixed rate enjoys higher rights than those of an ordinary occupancy raiyat because the landlord has reserved to himself only the right to a fixed amount of rent from the tenant which cannot be enhanced in future. The position of a tenant with regard to whom the landlord has given up his right to claim rent for all time to come cannot surely be in a worse position. His position rather approximates to that of a proprietor though some disabilities of a tenant might still attach to him. Thus he can be subject to such limitations and restrictions regarding transfer or enjoyment of the land as were agreed to between him and the landlord at the time when the tenancy originated. Again, if he acquires any contiguous land by right of accretion he would be liable to pay rent for such land. But subject to these few limitations, the rights of a rent-free holder are much higher than those of an occupancy raiyat and it could not be the policy of the Legislature to saddle such tenant with all the restrictions and disabilities of an occupancy raiyat, simply because, in addition to his rent-free right, he has acquired the status of an occupancy raiyat.

An argument may be founded on behalf of the petitioner upon the provisions of S. 26H, Ben. Ten. Act, which is now repealed by Bengal Act, 6 of 1938. That section provided a fixed landlord's fee in case of a transfer of a rent-free holding of an occupancy raiyat. This was necessary because of the old S. 26D which provided various methods for calculating the landlord's transfer fees as laid down in S. 26C and the landlord it appears got a very substantial share of the value of the transferred holding whichever method of calculation came into operation. Under S. 26H, however, the landlord got a fixed nominal fee of Rs. 2 whatever the value of the holding might be and this was to be paid in the manner provided in Ss. 12 and 13, Ben. Ten. Act. The intention of the Legislature, it appears, was to place the rent-free holding of a raiyat on the same footing as a rent-free tenure and it is difficult to say from the provisions of S. 26H, Ben. Ten. Act, that the Legislature intended that a rent-free holding should be subject to all the provisions relating to pre-emption as an ordinary occupancy holding.

In the case before us the settlement records describe the tenants with regard to these two holdings in the following manner : 'Settled raiyat enjoying niskar right by long possession and enjoyment' and the same description occurs in the kobalas that were executed by the cosharer tenants. It appears therefore that there was no grant forthcoming in this case but a grant was presumed from the fact that the tenant was in occupation for a long period of time without payment of any rent to the landlord. In such cases the proper legal inference is that the tenancy was a rent-free one in its very inception. In our opinion, Ss. 23A to 38, Ben. Ten. Act, are applicable when the tenancies are occupancy holdings pure and simple but they have no application when the tenant has higher rights in the land under an express or implied grant from the landlord, though such rights are combined with those of an occupancy raiyat acquired under express

1. ('40) 27 A. I. R. 1940 Cal. 460 : 190 I. C. 446 : I. L. R. (1940) 1 Cal. 342 : 44 C. W. N. 232, Debendra Nath Majhi v. Sarat Chandra Nayak.

provisions of the Act. To hold otherwise would be to nullify the grant altogether. So even if we hold that a niskar raiyat is not exactly a raiyat at fixed rate, we think that the provisions of S. 26F, Ben. Ten. Act, have no application in his case. We hold therefore that the view taken by the Court below is right and the claim for pre-emption made by Hirendra in respect of the two niskar holdings must fail. These two rules are also discharged. No order as to costs.

BLANK J. — I agree.

G.N./R.K. *Rules discharged.*

A. I. R. (29) 1942 Calcutta 513

BISWAS J.

Debendra Nath Biswas and another — Defendants 1 and 4 — Appellants

v.

Umesh Chandra Mondal and others — Plaintiffs — Respondents.

Appeal No. 753 of 1939, Decided on 21st August 1941, from Appellate decree of Sub-Judge, 2nd Court, Faridpur, D/- 23rd January 1939.

Cosharer—Partition — Tenancy created over land by former co-owner without concurrence of person to whom it is allotted by decree for partition of civil Court — Such person is not bound by tenancy — Tenancy is transferred to lands allotted to former co-owners and occupancy rights acquired by their tenants are also attached to such lands allotted to them.

A person to whom a parcel of land has been allotted by a decree for partition of a Civil Court, does not take it subject to a settlement of tenancy granted by his former co-owners without his concurrence when the land was the joint property of all the cosharers : ('26) 13 A.I.R. 1926 Cal. 714 (F.B.), *Foll.*; 1 I. A. 106 (P.C.), *Rel. on*; ('29) 16 A. I. R. 1929 Pat. 208, *Disting.* [P 513 C 2]

The tenancy itself is transferred by operation of law to other lands which have been allotted to the former co-owners on partition. And where the person with whom the lands were settled by the former co-owners have acquired occupancy rights, such rights could attach only to the lands to which the tenancy is transferred : 20 Cal. 708 (F.B.), *Disting.* [P 514 C 1]

Rajendra Bhusan Bakshi, Ram Mohan Bhattacharyya and Amal Kumar Mookerjee — for Appellants.

Hemendra Chandra Sen and Santosh Nath Sen — for Respondents.

JUDGMENT. — This appeal arises out of a suit for recovery of khas possession on declaration of the plaintiffs' title, and is on behalf of the defendants. Both the Courts below decreed the suit. The plaintiffs are admittedly one out of four groups of cosharers who jointly owned a tenure bearing a jama of Rs. 28-4-0 per year. In the settlement records the tenure appears to have been recorded in four different khatians in the names of the four different groups, and a particular Dag No. 2371, being the dag with which we are concerned in this appeal, was shown as appertaining to the share of a group other than the plaintiffs. This dag represented a raiyati jama of 8 annas held by two persons named Pratap Chandra Ray and Pramatha Nath Ray. The plaintiffs' case is that after the publication of the record of rights there was a partition suit amongst the plaintiffs and their cosharers, and in that suit a decree was made which apparently disturbed the previous arrangement regarding separate possession as evidenced by the settlement record. The lands which comprised dag No. 2371 were allotted under this partition decree to the plaintiffs. The plaintiffs maintain that as a result of this partition they were not bound to recognise the tenancy which might have previously existed in respect of the disputed dag, and they accordingly commenced the present action against the appellants who claimed to be transferees of the western moiety of this dag from one of the original tenants Pratap Chandra Ray under a kobala dated 16th December 1925. The transfer had been taken in the name of defendant 4 alone, but the plaintiffs also impleaded his father and his uncles defendants 1 to 3, for greater safety. For present purposes all these defendants may be supposed to represent the same interest.

The main contentions on behalf of the defendants were twofold. In the first place, they contended, relying on the settlement record, that the tenure to which the dag in suit appertained had been held by the plaintiffs and their cosharers in severalty before the partition, and that as such possession had been with the concurrence of all the parties concerned, the plaintiffs were bound to recognise the tenancy in respect of this dag. The plaintiffs were in fact to be treated as mere assignees of the interest of the cosharers under whom the tenancy was originally held, and hence not entitled to ignore the tenancy. Secondly, it was said that in any view, the defendants' vendor had acquired a right of occupancy in the land in suit by more than 12 years' occupation under the landlords, and that as at the date of their purchase occupancy holdings were transferable by statute, the defendants had also acquired occupancy rights by such purchase irrespective of whether they themselves had completed 12 years' possession as raiyats.

As regards the first point, it is clear that it depends on a question of fact as to whether or not before the partition suit the plaintiffs and their co-sharers had possessed the tenure in severalty as alleged by the defendants. The learned Subordinate Judge thought that had such possession in severalty existed, there could have been no subsequent suit for partition. He held in fact that such possession in severalty could not at all be established in this case. That is a finding which is conclusive in second appeal, and the case must, therefore, be taken to come within the scope of the Full Bench ruling in 53 Cal. 694.[1] It was held in that case that a person to whom a parcel of land has been allotted by a decree for partition of a civil Court, does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the cosharers. The Full Bench applied the principle of the well-known case in 1 I. A. 106,[2] to the case of a lease. There is nothing to show that in making the allotment to the plaintiffs under the partition decree in the present case, the existence of this tenancy within the lands allotted to them had been at all taken into account, and there is no reason therefore why the plaintiffs should be held bound by this settlement to which they were not parties and which had not been granted with their concurrence. I do not think that on the findings there is any scope here for an argument like the one which was suggested in a Patna

1. ('26) 13 A.I.R. 1926 Cal. 714 : 95 I. C. 516 : 43 C.L.J. 333 : 30 C. W. N. 511 : 53 Cal. 694 (F.B.), Niranjan Mukherjee v. Soudamini Dassi.
2. ('74) 1 I. A. 106 : 21 W. R. 233 : 3 Sar. 333 : 2 Suther 942 (P.C.), Byjnath v. Ramoodeen.

a case to which Mr. Bakshi referred, 8 Pat. 258,[3] that in the partition between the plaintiffs and their cosharers the disputed lands had been allotted to the plaintiffs as raiyati lands and rated as such. The first ground urged by the appellants must consequently fail.

The second contention is also easily disposed of. It may be that the Roys with whom the dag was originally settled by the plaintiffs' cosharers acquired occupancy rights, and it may also be that the defendants by virtue of their purchase acquired similar rights, but if upon the partition the tenancy itself was transferred by operation of law to other lands, then such rights could attach only to the lands to which the tenancy was so transferred. After the partition, it could no longer be said that the raiyati jama which had been created by the plaintiffs' cosharers still subsisted in Dag No. 2371, b but a new holding was substituted for it under, and within the lands allotted to, these cosharers, and it was in respect of this substituted holding that the defendants could really claim their occupancy rights. The principle of the Full Bench decision in 20 Cal. 708,[4] which the defendants sought to invoke, has clearly no application to the facts of the present case. Here as already stated, as a result of the partition decree and by operation of the principle laid down in the other Full Bench case, 53 Cal. 694,[1] the tenancy in the original holding was extinguished, and a new holding created in its place, and there could be no question of the tenants still holding the former merely because they had been inducted into it. The second ground advanced on behalf of the appellants thus also fails. In my opinion therefore the plaintiffs are entitled to a decree as ordered by c the learned Munsif. The result is that the appeal is dismissed with costs. The appellants will have time till the end of December 1941 to vacate the lands. Leave under Cl. 15, Letters Patent, refused.

K.S./R.K. *Appeal dismissed.*

3. ('29) 16 A.I.R. 1929 Pat. 208 : 116 I. C. 781 : 8 Pat. 258, Raghunandan Sahay v. Dripa Nath Sahai.

4. ('93) 20 Cal. 708 (F.B.), Binad Lala Pakrashi v. Kalu Pakrashi.

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B. K. MUKHERJEA AND BLANK JJ.

Saradindu Mukherjee—Defendant 1—Appellant

v.

Sm. Kunja Kamini Roy and others, Plaintiffs and another, Defendant 2—Respondents.

Appeal No. 190 of 1939, Decided on 22nd May 1942, from original decree of Sub-Judge, 3rd Court, 24-Parganas at Alipore, D-/ 1st May 1939.

(a) Bengal Tenancy Act (8 of 1885), S. 12 — Suit by lessor for arrears of rent against original tenant and his assignee — Transfer found valid under S. 12—Liability of each defendant capable of being apportioned from material on record — Joint decree against defendants is not justified.

Where in a suit for arrears of rent by the lessor against the original tenant and his assignee, the transfer by the original tenant is found to have been completed under S. 12, a joint decree against the defendant is not justified when the liability of the defendants could have been easily apportioned from the materials appearing on the face of the record, The Court ought in such a case to apportion the e liability of each defendant and pass decree accordingly. [P 515 C 1]

(b) Benami—Stranger to deed of transfer can challenge transfer as benami—Suit by lessor for arrears of rent—Lessee alleging to have transferred his interest — Plaintiff stranger to deed of transfer can raise question of benami.

A stranger to a deed of transfer can challenge the transfer as benami. The principle that a stranger to a deed which is intended to be real and operative between the parties thereto cannot dispute the payment or non-payment of the consideration or its adequacy or inadequacy has no bearing in a case where the deed is challenged as fictitious and never designed to operate as a real deed or to effect transfer of title. Consequently, where in a suit for arrears of rent by the lessor the lessee alleges to have transferred his interest the plaintiff lessor is com- f petent to raise the question of the benami character of the transfer even though he was not a party to the deed of transfer : ('23) 10 A. I. R. 1923 Cal. 521, *Rel. on*; 27 All. 271 (P.C.), *Expl.* [P 515 C 2]

(c) Transfer of Property Act (1882), S. 108 (J) —Tenant's liability for rent founded on privity of estate ceases as soon as interest is transferred—Liability of original lessee does not cease until assignee is accepted as tenant by lessor expressly or impliedly.

It is a well-settled rule of English law which has been adopted in S. 108 (J) that when the liability of a tenant to pay rent is founded on privity of estate, the liability ceases as soon as the interest is transferred to some other person. But so far as the original lessee is concerned, his liability does not cease with mere assignment. The lessor in such cases can g enforce payment of rent from his original tenant by reason of a privity of contract and the liability of the original tenant can only cease after the assignee is accepted as tenant by the lessor either expressly or impliedly. [P 516 C 1]

T. P. Act—

('36) Mulla, Page 613, Pts. (c), (d); Page 614, Pt. (c).

('34) Mitra, Page 601, N. 580, Page 602, N. 580 "Privity of Estate."

(d) Bengal Tenancy Act (8 of 1885), S. 12 — Permanent tenure — Transfer of, completed by original tenant under S. 12—Lessor is bound to recognize transferee as tenant — Liability of original tenant to pay rent ceases as soon as transfer is complete though he remains liable for other personal obligations created by lease.

The effect of a transfer of a permanent tenure h being completed with all the formalities required by S. 12 is that there is a statutory obligation on the part of the lessor to recognise the transferee as a tenant. If there is a contract between a landlord and a tenant that the transfer shall not be valid and binding unless security is given or some other condition is fulfilled, the original tenant might still remain liable for the rent. But when there is no such condition, the lessor has got no other option but to recognize the transferee. On the transfer of a permanent tenure being complete under S. 12 the liability of the transferor who was an original tenant and not an assignee ceases. Though the original tenant would be absolved from his liability to pay rent as soon as the transfer was complete still he would remain liable for the performance of other personal obligations created by the lease : ('23) 10 A. I. R. 1923 P. C. 88; ('30) 17 A. I. R. 1930 P. C. 193; 12 C. W. N. 478 and ('26) 13 A. I. R. 1926 Cal. 451, *Rel. on.* [P 516 C 2]

Atul Ch. Gupta, Rajendra B. Bakshi and Amal Kr. Mukherjee—for Appellant.

Gopendra Nath Das and Khitindra Kr. Mitter — for Respondents.

JUDGMENT.—This appeal is on behalf of defendant 1 and it arises out of a suit for recovery of arrears of rent. Defendant 1 and three other persons took a mokarari lease of a large quantity of land in the Sundarbans from the predecessors of the plaintiffs, under a registered potta, dated 16th July 1928. The rent reserved was Rs. 5600 a year, payable in four instalments, in the months of Poush, Magh, Falgoon and Chait, every year. Besides this yearly rent, the lessees undertook to pay revenues and cesses payable in respect of the property and also rents due by the lessors to their superior landlords. Defendant 1 subsequently acquired the interest of his other three cosharers in the tenure and became the sole owner thereof. In 1932 there were certain litigations between the lessors and defendant 1 and as a result of these the rent was reduced from rupees 5600 to Rs. 5100 a year, all the other terms of the potta being kept intact. On 27th January 1936, corresponding to 13th Magh 1342 B. S., defendant 1 sold his interest in the tenure to defendant 2. The present suit was brought by the plaintiffs lessors on 12th April 1938 and they claimed arrears of rent for the period commencing from the Poush kist of 1342 B. S. and ending with the Falgoon kist of 1344 B. S. The claim was laid at Rs. 18027 odd. The plaintiffs' case was that defendant 2 was a relation and benamdar of defendant 1 and the transfer in her favour was a collusive and sham transaction. They therefore claimed rents from both the defendants.

The trial Judge came to the finding that defendant 2 was not a benamdar of defendant 1 and in his opinion the question of benami could not be raised by the plaintiffs, who were no parties to the conveyance. The conclusions of the Subordinate Judge therefore were that defendant 1 was tenant up to 27th January 1936 and for the subsequent period in suit, defendant 2 was the tenant. The learned Judge however refused to apportion the liability of these two defendants, being of opinion that this was neither easy nor proper. Defendant 1 has come up to this Court on appeal and the only contention put forward on behalf of him by Mr. Gupta is that on the findings arrived at by the Subordinate Judge himself, the appellant should not have been made liable for rents that fell due after the date of the transfer of the tenure to defendant 2 and that for the subsequent period defendant 2 alone should have been made liable. It seems to us that if the conclusions of law and fact arrived at by the Subordinate Judge be accepted as correct, his decision cannot possibly be supported. According to the Subordinate Judge defendant 1 ceased to be a tenant on and from 27th January 1936 and he was further of opinion that he was not personally liable under the terms of the Potta for any rent that accrued due subsequent to the transfer. In these circumstances it is difficult to see why there was a joint decree made against both the defendants, when their liability could have been easily apportioned on the materials appearing on the face of the record.

Mr. Das who appears on behalf of the plaintiffs respondents, has appreciated the difficulty in his way and he has attempted to support the decision of the Subordinate Judge on grounds other than those upon which the latter relied. The contentions put forward by him are of two-fold character. In the first place, he says that the Court below should have held on evidence that defendant 2 was a mere benamidar of defendant 1 and it erred in law in holding that the plaintiffs were incapable of raising the question of banami in the present litigation. The second ground taken is that even if defendant 2 was not a benamidar of defendant 1, defendant 1 as one of the original lessees, was bound by the personal covenant in the Potta to pay the rent in spite of the fact that he had assigned his interest to another person. These are the two points that require consideration in this case. So far as the first point is concerned we agree with Mr. Das that the Court below was wrong in holding on the authority of the decision in 32 I. A. 113,[1] that the plaintiffs not being parties to the deed of transfer were not competent to raise the question of benami in the present litigation. As was held in 37 C. L. J. 122,[2] the principle enunciated by the Judicial Committee in 32 I. A. 113[1] that a stranger to a deed which is intended to be real and operative between the parties thereto cannot dispute the payment or non-payment of the consideration or its adequacy or inadequacy has no bearing in a case where the deed is challenged as fictitious and never designed to operate as real deed or to effect transfer of title. We think however that the evidence which has been adduced on behalf of the plaintiffs in the present case falls short of what is necessary to establish a case of benami. The only witness who has been examined on behalf the plaintiffs is his officer Jogesh Chandra Dey. This witness in his deposition states as follows:

"Saradindu Babu said that he had made the benami transaction in his relation's name and that defendant 2 was his relation and mother-in-law. . . We learnt on enquiry that Nanda Rani has no means to purchase properties for Rs. 4000 and Saradindu Babu himself maintains her."

In cross-examination he stated further :

"Each year I meet Saradindu Babu who also goes to Rai Bahadur Gunendra Krishna Roy's house. In his presence Saradindu Babu said that he had made the benami transaction."

It is impossible to believe that if defendant 1 really intended to make a sham transfer for the purpose of avoiding his liability for rent he would himself go to his landlord and tell him about it. It is true that there is no denial on the part of defendant 1 that Nanda Rani is related to him. The attesting witnesses to the deed of sale also are all employees of defendant 1 and it is admitted by defendant 1's own witnesses that even after the purchase, the management of the property was left in the hands of one of the officers of defendant 1. These are suspicious circumstances, no doubt, and throw considerable suspicion regarding the genuineness of the transfer. But we cannot rest our decision on mere surmises or suspicions. There is no evidence on the plaintiff's side to prove that there was no payment of consideration by Nanda Rani. Certainly the plaintiffs could have produced better evidence to prove that the transaction was in reality a benami affair. We, therefore, overrule the first contention of Mr. Das.

The second point put forward by Mr. Das raises a question of some importance. It is a well settled

1. ('05) 27 All. 271: 32 I.A. 113: 8 O.C. 155: 8 Sar. 772 (P. C.), Lala Achalram v. Raza Kazim Hussain Khan.
2. ('23) 10 A. I. R. 1923 Cal. 521: 74 I. C. 392: 37 C.L.J. 122, Kamini Kumar Deb v. Durga Charan Nag.

rule of English law which has been adopted in the Transfer of Property Act (*vide* S. 108 (J), T.P. Act) that when the liability of a tenant to pay rent is founded on privity of estate, the liability ceases as soon as the interest is transferred to some other person. But so far as the original lessee is concerned, his liability does not cease with mere assignment. The lessor in such cases can enforce payment of rent from his original tenant by reason of a privity of contract and the liability of the original tenant can only cease after the assignee is accepted as tenant by the lessor either expressly or impliedly. The question is how far this principle is applicable to the case of a transfer of a permanent tenure governed by the Bengal Tenancy Act. Under S. 11, Ben. Ten. Act, a permanent tenure is capable of being transferred in the same manner and to the same extent as any other immovable property. Section 12 prescribes the mode in which the transfer is to be effected. As soon as the document by which the transfer is made is registered, and the registration is not to take place unless the landlord's fees are paid, the transfer is complete. It has been held by the Judicial Committee in 50 I. A. 155[3] following a long series of decisions of this Court that as soon as the transfer is complete, the liability of the old tenant for rent ceases. It is true that the facts of this case do not show as to whether the transfer in that case was by the original tenant or a subsequent assignee. But their Lordships expressly approved of the decision in 12 C. W.N. 478,[4] where the original lessee was held to be absolved from liability to pay rent after a deed of release was executed and registered by him. It appears indeed that there was an additional finding in 12 C. W. N. 478[4] that the plaintiff landlord never asked for any rent from the old lessees; but that was not the basis of the decision of the learned Judges.

The case in 12 C. W. N. 478,[4] was followed by Walmsley and Mukherji JJ. in 29 C. W. N. 1020,[5] and it was held that on the transfer of a permanent tenure being complete under S. 12, Ben. Ten. Act, the liability of the transferor who was the original tenant and not an assignee, would cease. It was held further that though the original tenant would be absolved from his liability to pay rent as soon as the transfer was complete, still he would remain liable for the performance of other personal obligations created by the lease. As has been said already, even under the English law, the liability of the original tenant to pay rent comes to an end as soon as there is recognition of the assignee as a tenant by the lessor. We think that the effect of a transfer being completed with all the formalities required by S. 12, Ben. Ten. Act, is, that there is a statutory obligation on the part of the lessor to recognize the transferee as a tenant. Of course, if there is a contract between a landlord and a tenant that the transfer shall not be valid and binding unless security is given or some other condition is fulfilled, the original tenant might still remain liable for the rent. But when there is no such condition, the lessor has got no other option but to recognize the transferee.

It is to be noted that before 1885 the duty was fixed upon the transferee of a tenure to get his name recorded in the Sherista of the landlord and if he failed to do that, the landlord could ignore him altogether and proceed against the recorded tenant for recovery of arrears of rent. The Act of 1885 made a change in this respect and under it, as soon as the deed of transfer is registered, the old tenant walks out of the field, no matter whether the landlord has actual notice of it or not—*vide* the observation of the Judicial Committee in 57 I. A. 214[6] at p. 221. We therefore think that in the present case the liability of defendant 1 for the rent ceased after 27th January 1936. He would only be liable for the rent of the Pous Kist of 1342 B. S. and for the subsequent period the decree should be made against defendant 2 alone. The result is that we allow the appeal and modify the judgment of the learned Subordinate Judge. The plaintiffs will have a decree for Rs. 1626-15-3 against defendant 1 and for Rs. 16400-9-6 against defendant 2 with proportionate costs of the trial Court against each. There will be no order for costs in this Court. The cross-objection is dismissed. There will be no order for costs in the cross-objection.

G.N./R.K. *Appeal allowed.*

3. ('23) 10 A.I.R. 1923 P. C. 88 : 73 I. C. 193 : 50 Cal. 680 : 50 I.A. 155 (P.C.), Surapati Roy v. Ram Narain Mukherjee.
4. ('08) 12 C. W. N. 478, Hemendra Nath Mukherjee v. Kumar Nath Roy.
5. ('26) 13 A.I.R. 1926 Cal. 451 : 90 I. C. 451 : 42 C.L.J. 490 : 29 C.W.N. 1020, Kanai Lal Ghose v. Basanta Behari Sen.
6. ('30) 17 A. I. R. 1930 P. C. 193 : 126 I. C. 422 : 58 Cal. 301 : 57 I. A. 214 (P. C.), Jitendra Nath Ghose v. Monmohan Ghose.

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LORT-WILLIAMS J.

In re Bengal Electric Lamp Works Ltd.

Application in Ordinary Original Civil Jurisdiction, Decided on 18th July 1941.

(a) Company — Forfeiture of shares—Every condition precedent provided by articles must be strictly and literally complied with—Failure of directors to appoint place at which and persons to whom call money was payable held rendered resolutions and notices of calls invalid and no shares could be forfeited for non-payment of call—Notice requiring payment of Rs. 13,500 in respect of calls and allotment money held bad as requiring payment of too large sum and of sums not due.

In the case of forfeiture of the shares of a shareholder by the company a strict adherence to the provisions of contract between the company and share-holders is necessary. No forfeiture of shares can be made unless every condition precedent has been strictly and literally complied with, a very little inaccuracy being as fatal as the greatest.

[P 521 C 1]

In the resolution for making a call on the shareholder passed by the Board of Directors nothing was said about the persons to whom and the place at which the amount of the call was to be paid as required by Art. 15 of the Articles of the Company under which the directors were to appoint the place at which and the persons to whom the amount of the calls was to be paid. The notice issued to the share-holder requested him to pay the call money to the "Company's Head Office" and was signed "by order of the Board, P. C. Datta, Secretary." The notice was headed "14 Clive Street" but there was nothing to show that the Company's Head Office was at Clive Street or at any other place. The resolutions to appoint or fix the persons to whom and the times and places at which the call money was to be paid were to be made under the articles of the

company with the authority of a resolution of the directors duly assembled at a Board or in any case by a resolution in writing signed by all the directors present in Calcutta as required by Art. 106. There was no evidence of any such resolutions having been passed nor were any such resolutions entered in the minute books of the company as required by the articles :

Held that the failure of the directors to appoint or fix the place at which and the persons to whom the call money was to be paid rendered the resolutions and notices of calls invalid and ultra vires and there could be no forfeiture of the shares for non-payment of the calls : (1889) 42 Ch. D 209 ; ('38) 25 A. I. R. 1938 P. C. 284 and (1877) 5 Ch. D 687, *Rel. on* ; ('33) 20 A. I. R. 1933 Bom. 80, *Dissent.*; (1848) 2 Ex. 118, *Disting.* [P 521 C 1]

Held further that the notice requiring payment of Rs. 13,500 in respect of calls and allotment money was bad as it required payment of too large a sum and of sums which were not due and therefore forfeiture based upon the failure to pay the allotment money was bad, invalid and ultra vires : (1877) 5 Ch. D. 687, *Rel. on.* [P 521 C 2]

(b) Company—Forfeiture of shares — Right to object to by share-holder cannot be waived.

There can be no waiver by the share-holder of his right to object to the forfeiture of his shares by the company : ('38) 25 A. I. R. 1938 P. C. 284, *Rel. on.* [P 521 C 1, 2]

P. C. Ghose — for Applicant.

Sarat Ch. Bose and H. N. Sanyal — for the Company.

ORDER. — This is the petition of Prafulla Kumar Basu, who asks for an order for rectification of the register of members of the respondent company by restoring the petitioner's name as the holder of 1500 ordinary shares. He states that he was the registered holder of 1500 ordinary shares in the capital of the company, having applied for allotment on or about 6th January 1940 and having paid Rs. 1500 to the company along with his application for and on behalf of one Kamta Prosad Bhargava. The company decided to treat the petitioner as the absolute owner of the shares and declined to recognise Bhargava as having any right in the said shares or to register the transfer of the shares to him. On 2nd February 1941 the petitioner received a letter from the company informing him that the sum of Rs. 13,500 due for calls on his shares was long overdue, "as per details given below," namely :

"Allotment money 3000 due date 10-2-40.
1st call money 3000 due date 31-5-40.
2nd call money 3000 due date 13-8-40.
3rd call money 3000 due date 30-9-40.
4th call money 1500 due date 18-12-40.

Making a total of Rs. 13,500."

Further, the petitioner was informed that the Directors required him on or before 28th February 1941 to pay the sum of Rs. 13,500 at the registered office of the company at 14 Clive Street, Calcutta, and that in the event of non-payment the shares would be liable to be forfeited. The petitioner admits that he received the notice of allotment and also notice of the purported fourth call dated 18th November 1940, but no notice of the purported first, second and third calls was ever given to him. In reply to the letter of 18th November giving notice of the fourth call, the petitioner wrote putting on record that he had not received any other notice of call. Subsequently, one Gopee Ballav Sen wanted to take a transfer of his shares from the petitioner and was willing to pay the balance of the face value of the shares in full. Accordingly on 28th February 1941 the petitioner and Gopee Ballav Sen executed a deed of transfer and the petitioner wrote a letter addressed to the company saying that he had transferred the shares to Mr. Sen and that the latter would pay Rs. 13,500 to the company. On the same date Mr. Sen forwarded to the company the transfer deed and the letter from the petitioner, accompanied by a cheque for Rs. 13,512-4-0 being the balance of the face value of the shares, together with a sum of Rs. 11-4-0 for stamps for the transfer and Re. 1 for transfer fee. The company refused to register the transfer. On 14th April 1941 the petitioner received a letter from the company dated 2nd April 1941 intimating that by a resolution of the board of directors passed on 31st March 1941 the shares standing in the name of the petitioner had been forfeited.

In the affidavit in opposition made by the managing director of the company dated 12th May 1941 it is contended that notice of every call was sent to the petitioner and with regard to the first call the respondents produced a peon book signed by Mr. B. K. Mittra who, they alleged, was an assistant of Messrs. Indian Loan & Trading Co., Ltd., of which the petitioner is a director. The registered office of that company is situated at No. 102H, Russa Road which is the residential address of the petitioner. The notice of the second call was sent by post and is evidenced by the despatch book of the company. The notice of the third call was sent by peon book signed by the petitioner himself. I am satisfied that the notices of all these calls reached the petitioner. The relevant Articles of Association of the company are as follows :

7. "If, by the condition of allotment of any shares the whole or part of the amount or issue price thereof shall be payable by instalments, every such instalment shall, when due, be paid to the company by the person who for the time being shall be the registered holder of the share or his legal representative."

15. "The directors may from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments."

17. "Fifteen days' notice of any call shall be given specifying the time and place of payment, and to whom call shall be paid."

23. "If any member fails to pay any call or instalment on or before the day appointed for the payment of the same the directors may at any time thereafter during such time, as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same, together with any interest that may have accrued, and all expenses that may have been incurred by the company by reason of such non-payment."

24. "The notice shall name a day and a place or places on and at which such call or instalment and such interest and expenses as aforesaid are to be paid. The notice shall also state that in the event of non-payment at or before the time and at the place appointed, the shares in respect of which the call was made or instalment is payable will be liable to be forfeited."

25. "If the requisitions of any such notice as aforesaid are not complied with any shares in respect of which such notice has been given, may, at any time thereafter before payment of calls or instalments, interest and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited shares, and not actually paid before the forfeiture."

33. "The provisions of these articles as to forfeiture shall apply in the case of non-payment of any sum which by the terms of the issue of a share becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified."

36. "The directors may at any time in their absolute and uncontrolled discretion and without assigning any reason decline to register any proposed transfer of shares. This clause shall also apply to a case where the proposed transferee is already a member."

99. "The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit, and may determine the quorum necessary for the transaction of business. Until otherwise determined three directors shall be a quorum. A director interested is to be counted in a quorum notwithstanding his interest."

100. "A director may at any time convene a meeting of the directors. It shall not be necessary to give notice of a meeting of the directors to a director who is not in Calcutta. Questions arising at any meeting shall be decided by a majority of votes, and in case of any equality of votes, the chairman shall have a second or casting vote."

106. "A resolution in writing signed by all the directors present in Calcutta shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted."

108. "The directors shall cause minutes to be duly entered in books provided for the purpose: (a) Of the names of the directors present at each meeting of the directors and of any committee of directors. (b) Of all orders made by the directors and committees of directors. (c) Of all resolutions and proceedings of general meetings and of meetings of the directors and committees.

And any such minutes of any meeting of the directors or of any committee or of the company, if purporting to be signed by the chairman of such meeting or by the chairman of the next succeeding meeting, shall be receivable as prima facie evidence of the matters stated in such minutes."

145. "Any notice sent by post shall be deemed to have been served on the second day following that on which the envelope or wrapper containing the same is posted and in proving such service it shall be sufficient to prove that the envelope or wrapper containing the notice was properly addressed and put into the post office. And a certificate in writing signed by the manager, secretary or other officer of the company that the envelope or wrapper containing the notice was so addressed and posted shall be conclusive evidence thereof. Any notice which may be given by advertisement shall be deemed to have been served when the newspaper containing the notice is published."

Notice of allotment was given on 6th January 1940 with regard to 1100 ordinary shares and the petitioner was asked to pay the sum of Rs. 2200, being Rs. 2 per share, on or before 10th February 1940 to the company's head office. This letter was signed by the managing director. There was a similar notice with regard to the balance of 400 ordinary shares. With regard to the first call made on 27th April 1940, a resolution was passed by the board of directors in the following form: "Resolved that the first call of Rs. 2 per ordinary share be and is made on the 17,954 ordinary shares as per list submitted to this meeting. This call be and is made payable on or before 31st May 1940," and the notice to the petitioner was sent on 2nd May requesting him to remit Rs. 3000 in respect of this call, on or before 31st May 1940 to the "Company's Head Office" and is signed "By order of the Board, P. C. Datta, Secretary." The letter is headed "14 Clive Street," but there is nothing to show whether the company's head office is at Clive Street or at any other address. All the calls were in a similar form, and it is to be noted that nothing is said in the resolution about the persons and places to be appointed by the directors in accordance with the provisions of Art. 15, and though the notice states that the amount due under the call is to be paid at the head office of the company, it gives no address of such office nor is there any mention of the person to whom the money is to be paid, as provided by the Articles or by Art. 17.

It is, therefore, contended on behalf of the petitioner that the calls were invalid because they were not correct in form as provided by the Articles and that the notices given in respect of those calls were bad and ultra vires for similar reasons. Though Art. 106 provides that "a resolution in writing signed by all the directors present in Calcutta shall be as valid and effectual as if it had been passed at a meeting of the directors duly called and constituted," there is no evidence of any such resolution having been signed nor is there any evidence to show that after the resolutions making the calls, there were any subsequent resolutions appointing the persons and places to whom and at which the call money was to be paid, nor is there any evidence of any resolution either made at a meeting of directors or signed by them which would justify the statement "by order of the board" made in the notices given by the secretary with regard to any of the calls. Article 108 provides that the directors shall cause minutes to be entered in the books of all orders made by the directors and committees of directors and of all resolutions passed at meetings of directors or committees or a general meeting. The minutes have been produced and no such resolutions as are required by the Articles are to be found in the minutes. In (1900) 2 Ch. D. 230[1] at p. 231 it was held that a resolution of the company was ineffectual because the notices summoning the meeting had been issued by the secretary without the authority of a resolution of the directors duly assembled at a board. Cozens-Hardy J. as he then was, said at p. 235 that:

"It was laid down by the Court of Exchequer in (1867) 2 Ex. 158,[2] that directors must act together as a board, and that it is not sufficient to procure the separate authority of a sufficient number of directors to constitute a quorum."

It is true that in the present case Art. 110 (4) enables

1. (1900) 2 Ch. D. 230 : 69 L. J. Ch. 497 : 83 L. T. 166 : 7 Manson 243, In re Hay Craft Gold Reduction and Mining Co.
2. (1867) 2 Ex. 158 : 36 L. J. Ex. 37 : 4 H. & C. 463 : 12 Jur. (N.S.) 548 : 14 L. T. 626 : 14 W. R. 968, D'Arcy v. Tammar, Kill Hill and Callington Ry. Co.

a the directors to appoint officers and determine their powers and duties and that Art. 111 provides that the directors may delegate certain powers and that by resolution the directors empowered the secretary to call meetings of the directors, never the less, it is clear that resolutions to appoint or fix the persons times and places respecting calls must be made with the authority of a resolution of the directors duly assembled at a board, or in any case by a resolution in writing signed by all the directors present in Calcutta, and there is no evidence of any such resolution having been passed. As was stated by Lord Romer in 43 C. W. N. 205[3] at p. 213 :

" This may seem to be somewhat technical ; but in the matter of the forfeiture of shares technicalities must be strictly observed. And it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to b insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of the company."

But on the specific question as to whether it is necessary for the directors to name the persons, times and places in the resolution making a call or whether these persons, times and places may be appointed by a subsequent resolution, or whether they may be published to the share-holders by means merely of a direction of the directors or even by publication in the press, it is curious that there are no recent English decisions. The case in (1848) 2 Ex. 118[4] was tried in 1848. In that case Baron Parke said at p. 122 :

" It is clear that the word 'call' is used in the Act in two different senses. In one part it means, c the applications to the share-holders to pay and in another, the amount to be paid. I am therefore of opinion, that it is not a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment ; but the directors must appoint a time and place, which must be notified to the share holder by a notice, allowing him twenty-one days for the purpose of payment. The case in (1840) 7 M. & W. 243[5] proves that the resolution need not contain the place of payment, and I think that by implication it also proves, that it need not contain the time of payment. The resolution is nothing more than a determination that thereafter 'a call' shall be made, that is that an application shall be made to each share holder for a proportion of his share ; and it is enough if the d directors appoint a time or place, either by public advertisement, (where such a mode is allowed by the private act) as in the case referred to, or under the general act by an individual notice to each share-holder."

Even in this case the learned Baron uses the word "appoint." That is to say, it is necessary for the directors to appoint a time or place either by public advertisement if allowed by the Act or the articles, or by a notice to each share-holder and such appointment in the present case, can be made only by a e resolution passed at a meeting of the Board of Directors or by one signed in accordance with the provisions of Art. 106. In (1877) 5 Ch. D. 687,[6] the company was governed by the regulations of Table A in the Companies Act, 1862, the directors made a call and gave verbal instructions to the secretary to make it payable on 16th December and the secretary sent a circular notice to the shareholders accordingly. One of the shareholders did not pay and on 21st December the secretary wrote to him, telling him that if he did not pay the amount of the call together with interest at 5 per cent. from the date of the call, on or before 31st December his shares would be liable to forfeiture. He did not pay, and on 4th January the directors passed a resolution forfeiting his shares. It was held, that as the notice of 21st December claimed interest from the date of the call instead of from the date fixed f for its payment, as provided by cl. 6 of Table A, it was a bad notice and the forfeiture was invalid, and an injunction was granted restraining the company from proceeding further under the resolution of forfeiture. Semble that the time for payment of the call could not properly be fixed by a mere verbal direction to the Secretary, and the decision of Jessel M. R. was reversed. Jessel M. R. at p. 690 had said as follows :

"The objection is that there is no formal resolution entered in the book of the directors appointing a day for the call. Now, all that Table A says is, if any member fails to pay any call on the day appointed for payment thereof the directors may at any time thereafter forthwith serve a notice which they have done, to state whether a day has been appointed for the payment of the call. Now, it is g quite clear that the Act of Parliament does not require the day for the call to be named in the same resolution as the one by which the call is made. You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter."

He then referred to the cases which I have mentioned and the judgment of Baron Parke and came to the conclusion that all that was required was that the directors should "authorise the secretary, the proper officer, to write the proper letter. He says h he does it by authority of the directors; that is all that is wanted. No formal resolution is required and he positively states that which the Court would presume without evidence, that it was written by the authority of the directors." In reversing this decision, James L. J. at p. 693 said :

"I am of opinion that the notice of 21st December did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regulations of Table A. It was the established rule of the Court of Chancery and of the Courts of Common law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid. I may add that,

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3. ('38) 25 A.I.R. 1938 P. C. 284: 178 I. C. 659: 43 C.W.N. 205 : I.L.R. (1939) Lah. 1 : I.L.R. (1939) Kar. P. C. 16 (P.C.), Premila Devi v. The Peoples Bank of Northen India, Ltd.

4. (1848) 2 Ex. 118 : 17 L. J. Ex. 102 : 12 Jur. 101 : 76 R. R. 520, Newry and Enniskillen Railway Co. v. Edmunds.

5. (1840) 7 M. & W. 243 : H. & W. 30 : 10 L. J. Ex. 17 : 2 Rail. Cas. 401 : 56 R. R. 699, Great North of England Railway v. Biddulph.

6. (1877) 5 Ch. D. 687 : 46 L. J. Ch. 786 : 36 L. T. 528 : 25 W. R. 548, Johnson v. Lyttle's Iron Agency.

as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary, it ought to be fixed by a formal resolution of the directors."

Mellish L. J. said as follows :

"I am of the same opinion. I think it is clear that a forfeiture of shares is to all intents and purposes the same thing as any other forfeiture which deprives a man of his property. The rule at common law was that before any forfeiture could take place, all the conditions precedent must have been strictly complied with. Clause 17 of table A says, that if the call is not paid on the appointed day, the directors may serve a notice on the shareholder requiring him to pay it together with interest and any expenses which may have accrued; and by cl. 19, if the requisitions of the notice are not complied with, the directors may forfeit the shares. And cl. 6 provides that interest is to be payable from the day appointed for payment of the call to the time of actual payment. If no notice under cl. 17 had been served, it is clear that the forfeiture would be altogether bad. In this case the notice of 21st December was inaccurate in demanding the payment of interest from the date of the call. Was that a good notice? I think that if the notice departs in any respect from the statutory form it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it is invalid."

Baggallay J. A. at p. 694 said :

"I am of the same opinion. The Legislature has thought fit to impose very heavy penalties for the non-payment of calls upon shares. Not only are the shares liable to forfeiture but the shareholder can also be sued for the unpaid calls. The Legislature has pointed out the steps which are to be taken previously to the forfeiture, and it is essential that all those steps should be strictly followed. In the present case one of those steps has not been properly taken, and the forfeiture is therefore invalid."

And as I have already pointed out it was held in (1900) 2 Ch. D. 230[1] that such directions must be given under the authority of a resolution of the directors to be assembled at a board. In (1889) 42 Ch. D. 209[7] it was held that a resolution for a call to be valid must state not only the amount of the call, but also the time at which it is to be paid. Thus, where the directors of a company passed a resolution for a call and the resolution fixed the sum per share to be called up, but left the date at which it was to be paid in blank, and some time afterwards a resolution was passed fixing the date for payment, and notices of the call were sent to the shareholders, there was no proper call made until the second resolution fixing the date of payment, and that the second resolution did not in point of date relate back to the first. In that case Art. 38 of the company provided that "the amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the board."

Lord Esher M. R. at p. 228 said as follows :

"But it has been strenuously argued that there was a good call on 18th December and as the question has been argued, I do not hesitate to express my opinion upon it. My opinion is, that there was no call whatever made on 18th December. In order to make a call within the articles of association, we must see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Article 38 says the time and place for payment must be stated. Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. The article says 'as shall be appointed from time to time.' I take those words to mean this: that the directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up. After making a call, as for instance, 5s. per share, if a particular number of shareholders do not pay on the day appointed, the directors may, under Art. 44, appoint another day, but only after they have made a valid appointment of a certain day in the first instance; and then owing to circumstances that have arisen since, they may appoint a further day on which those who have been called on to pay on the first day, and have not paid, are to pay the call; and then under Arts. 46 and 51, if they do not pay on that further day, the remedy of the directors is either by action or forfeiture. These provisions make the case stronger against the company, because they show that there was no valid call made on 18th December, and that no time or place of payment was appointed until 17th January following.

"But then it is said that the resolution of 17th January reverts back to 18th December; but, if there is a resolution passed that a call shall be made and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but that there is no call until the latter day, that is to say, the first resolution must be carried down to the second. Therefore, if there was a valid call on 17th January, there was no valid call until 17th January."

Later, Lord Esher said at p. 236 :

"I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of a call that the time and place for payment should be determined."

These are the whole of the English cases which can be discovered on this point. There are three cases in the Bombay High Court the first being 50 Bom. 461[8] and the second being 54 Bom. 178,[9] in both of which cases the learned Judges followed the decision in (1889) 42 Ch. D. 209,[7] the third is 35 Bom. L. R. 26.[10] In that Case No. 18 of the articles of association was the same as Art. 15 in the present case. The case was tried by Beaumont C. J. and Blackwell J. The learned Chief Justice

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7. (1889) 42 Ch.D. 209 : 58 L.J.Ch. 633 : 61 L. T. 601 : 37 W. R. 692 : 1 Meg. 251, In re Cowley & Co.

8. ('26) 13 A. I. R. 1926 Bom. 341 : 94 I. C. 681 : 50 Bom. 461 : 28 Bom. L. R. 411, Pioneer Alkali Works, Ltd. v. Amiruddin Shabbhoy Tyebji.

9. ('30) 17 A. I. R. 1930 Bom. 267 : 125 I. C. 419 : 54 Bom. 178 : 32 Bom. L. R. 87, Bhagirathi Spinning, Weaving and Manufacturing Co. Ltd. v. Balaji Bhowani Powar.

10. ('33) 20 A. I. R. 1933 Bom. 80 : 148 I.C. 143 : 57 Bom. 413 : 35 Bom. L. R. 26, Dhanraj Keshrimal v. H. H. Wadia.

followed the earlier decisions, especially the judgment of Baron Parke to which I have referred, and distinguished the decision of Lord Esher M. R. in (1889) 42 Ch. D. 209.[7] It was held that under the article it was not necessary for the resolution making the calls to specify the persons to whom and the place where the call were to be paid. That it was not necessary to have a formal resolution of the Board of Directors specifying the person to whom and the place where a call was to be made, since the form of the notice showed that it was "by order of the board" which raised a presumption that the matter was the subject of directions even in the absence of a formal resolution. That even if it were necessary to have a formal resolution of the board stating the names of the persons to whom and the place where, the call should be paid, it was a matter which it would be open to the parties to waive; and that the applicant had waived any such right. With regard to the decision of Sir George Jessel M. R. in (1877) 5 Ch. D. 687[6] the learned Chief Justice seemed to think that his judgment was reversed by the Court of appeal only upon the ground that the notice for final payment was inaccurate and therefore the forfeiture founded on the notice was bad. Further he observed, that none of the Judges in the Court of appeal expressed dissent from the views of the Master of the Rolls as to the construction of Table A, except that James L. J., expressed the tentative view that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary, and that it ought to be fixed by a formal resolution of the directors, and the learned Chief Justice thought that the case was a direct authority for the proposition that under such articles it is not necessary for the resolution making the call to specify the time for payment, and a fortiori it was not necessary to specify the person to whom or the place where the call was to be made.

It seems to me, with respect that the learned Chief Justice did not give sufficient weight to the observations of the Lords Justices about the necessity for strict adherence to the provisions of the contract between the company and the shareholders and that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with a very little inaccuracy being as fatal as the greatest. He distinguished (1889) 42 Ch. D. 209[7] on the ground that the material article was in different terms. It is true that the wording of the article was somewhat different from the article in the case with which he was dealing and the article in the present case. But in my opinion, the effect of the article is substantially the same in all three cases. In (1889) 42 Ch. D. 209[7] Art. 38 provided that the amount payable on the shares should be payable at the bankers of the company or that the board should appoint a place at which the amount should be paid in such instalments and manner and at such time as the board should appoint. I do not think it is possible to distinguish the present case from (1889) 42 Ch. D. 209[7] and for the reasons given, I prefer the latter decision to the previous decisions to which I have referred. The respondents in the present case contend, further, that the petitioner has waived any right to object to the resolutions or the notices because of his letter dated 28th February 1941. In my opinion, his letter cannot be taken to be a waiver of his right to object to the forfeiture of his shares. What he asked the company to do was to allow the shares to be transferred to Mr. Gopee Ballav Sen, who was willing to pay the whole of the sum outstanding upon the shares, namely, Rs. 13,500. Further, he could not waive his rights. I have already referred to Lord Romer's judgment in 43 C. W. N. 205[3] where he states that others than the share-holders are interested in a forfeiture of shares, e. g., the creditors. He goes on to say as follows :

"The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the share-holder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual share-holder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due."

The last point raised on behalf of the respondent company was that the petitioner had admittedly applied for allotment of shares and allotment had been made, and on 6th January 1940, he was asked to pay the allotment money. The answer to this contention is that Art. 23 requires that if a member has failed to pay a call or any instalment, which undoubtedly would include the allotment money, the directors must serve a notice requiring him to pay, together with any interest which may have accrued and all expenses that may have been incurred by the company by reason of such non-payment. Such notice must be strictly accurate, as other notices to which I have already referred. The notice in the present case was dated 31st January 1941, and required him to pay a sum of Rs. 13,500 at the registered office of the company, 14 Clive Street, Calcutta. This notice was faulty not only because it failed to mention the person to whom the payment was to be made, but in addition it asked for payment with respect not only to the allotment money, but to the four calls amounting to Rs. 10,500. As I have already stated, these were not valid calls owing to defects in the resolutions passed and notices given on behalf of the company and this notice was defective in a way similar to the notice referred to in (1877) 5 Ch. D. 687,[6] namely it required payment of too large a sum and of sums which were not due and was a bad notice. Therefore, forfeiture based upon failure to pay the allotment money, is a bad forfeiture invalid and ultra vires. For these reasons the petitioner is entitled to have the register rectified by restoring his name as the holder of 1500 ordinary shares in the company. The petition is, therefore, allowed with costs; certified for counsel. The costs will be as of one day's hearing.

G.N./R.K. *Petition allowed.*

A. I. R. (29) 1942 Calcutta 521

HENDERSON J.

Kalidas Saha — Decree-holder — Appellant

v.

Rai Kiran Chandra Roy Bahadur and others — Judgment-debtors — Respondents.

Appeal No. 185 of 1941, Decided on 15th June 1942, from appellate order of Dist. Judge, Nadia, D/- 31st May 1941.

(a) Calcutta High Court Civil Rules and Orders, R. 782 — Failure to comply with R. 782 does not render order of attachment invalid.

Rule 782 certainly tends to prevent orders of attachment from being mislaid, overlooked or suppressed. But failure to comply with R. 782 does not render an order of attachment invalid so as to entitle the Court to pay money out in defiance of the order of attachment. [P 522 C 1]

(b) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A—Retrospective effect of S. 168A is confined to case set out in Section 168A (2).

The only reasonable interpretation of S. 168A is that the intention of the Legislature was that retrospective effect was to be confined to the case set out in S. 168A (2) : ('42) 29 A.I.R. 1942 Cal. 429, *Ref.* [P 522 C 2]

Bhagirath Chandra Das and Nagendra Nath Talukdar — for Appellant.

Santosh Nath Sen — for Respondents.

JUDGMENT. — This appeal is by the decree-holder. It raises a point in connexion with the effect of S. 168A, Ben. Ten. Act. The appellant obtained a decree for rent against the respondents. There was some money lying in another Court in connexion with the execution of a decree obtained by the respondents against a third person. The appellant applied for attachment of this money and an order in terms of the prayer was made on 8th January 1941. The order reached the Court in question that same afternoon. The new S. 168A, Ben. Ten. Act, came into force on 9th January 1941. Briefly, the point of law argued in this appeal is whether it has retrospective effect. In resisting the appeal, Mr. Sen raised a further point whether the order of attachment was effective. He relied on the judgment of the Privy Council in 32 C.W.N. 821.[1] The relevant passage is in these words :

"Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done."

In the present case there was nothing which required to be done in the second Court and the attachment became effective as soon as the order was received there. The learned Munsif thought that the attachment could not become effective until R. 782 of the Civil Rules and Orders, was complied with. This rule certainly tends to prevent these orders from being mislaid, overlooked or suppressed. But failure to comply with it will not entitle the Court to pay money out in defiance of the order of attachment. The attachment, therefore, was validly effected on 8th January 1941. It is accordingly necessary to consider whether the enactment of S. 168A has rendered the attachment infructuous. On this point, Mr. Sen contended that S. 168A merely modifies the law of procedure, and must, therefore, be given retrospective effect in the absence of any express provision to the contrary. Sub-section (2) was accordingly misconceived and redundant. Mr. Das argued on the other hand that the appellant has been deprived of a right to realize his debt from this particular fund. The point had to be considered by my learned brothers Nasim Ali and Pal JJ. in 46 C.W.N. 540.[2] The dispute in that case was whether the section was ultra vires. In dealing with that point the learned Judges had to consider whether the section prescribes a special form of procedure, and came to the conclusion that it does. The fact remains, however, that the section specifically deals with the question of retrospective effect. The relevant sub-section is as follows :

"In any proceeding pending on the date of the commencement of the Bengal Tenancy (Amendment) Act, 1940, in execution of a decree or certificate to which the provisions of sub-s. (1) apply, if there has been attached any immovable property of the judgment-debtor other than the entire tenure or holding to which the decree or certificate relates, and if the property so attached has not been sold, the Court or certificate officer as the case may be shall on the application of the judgment-debtor direct that on payment by the judgment-debtor of the costs of the attachment, the property so attached shall be released."

The draftsman approached the question from the standpoint that the section will not have retrospective effect in the absence of express provision to the contrary. This sub-s. (2) makes such provision. If the draftsman had approached the question from the stand point that the section would have retrospective effect in the absence of an express provision to the contrary, this sub-section would have been drafted in the converse way. But it cannot be merely brushed aside as redundant. The words are there and some meaning must be attached to them. In my judgment, the only reasonable interpretation is that the intention of the Legislature was that retrospective effect was to be confined to the case set out in the sub-section. The appeal is accordingly allowed. The orders of the Courts below are set aside, the objection under S. 47 of the respondents is dismissed, and I direct that the money attached be paid out to the decree-holder. The judgment-debtors will pay the costs of the appellant in all Courts. Hearing fee is assessed at one gold mohur.

7th July 1942. — Leave to appeal under Cl. 15, Letters Patent, is granted on the undertaking given in the application filed on 3rd July 1942.

G.N./R.K. *Appeal allowed.*

1. ('28) 15 A.I.R. 1928 P.C. 139 : 109 I.C. 626 : 51 Mad. 349 : 55 I. A. 256 : 32 C. W. N. 821 (P. C.), Muthiah Chetty v. Palaniappa Chetti.

2. ('42) 29 A.I.R. 1942 Cal. 429 : 201 I. C. 24 : 75 C. L. J. 190 : 46 C. W. N. 540, Satish Chandra v. Sudhir Krishna.

A. I. R. (29) 1942 Calcutta 522

B. K. MUKHERJEA AND SEN JJ.

Sashi Bhusan Misra and others—Mortgagees — Petitioners

v.

Madhu Sudan Mondal s/o Lalu Mondal — Mortgagor — Opposite Party.

Civil Rule No. 1816 of 1940, Decided on 22nd December 1941, issued in application for setting aside judgment and order of Munsif, 2nd Court, Contai (Midnapur), D/- 11th September 1940.

(a) Mortgage — Usufructuary — Covenant to indemnify does not affect.

A covenant to indemnify the mortgagee in case of dispossession does not affect the nature of the mortgage. [P 523 C 1]

T. P. Act —

('36) Mulla, Page 341 Note : "Usufructuary mortgage."

('34) Mitra, Page 315 N. 343.

(b) Bengal Tenancy Act (8 of 1885), S. 26G (5) — Mortgagor has choice — If claim is once dismissed by Revenue Officer he cannot apply to civil Court — Right is recurring right.

The proceeding is of a purely summary character and the intention of the Legislature was that the mortgagor will have an option in the matter either to approach the Revenue Officer or a civil Court, but once he has made his choice, and had his claim dismissed after being heard by a Revenue Officer, he cannot apply to the civil Court again for the same relief. A principle akin to that of election of remedies can be invoked in such cases against the mortgagor. The right to recover possession is a recurring right and continues so long as possession is not restored to him. If the right to recover possession is negatived by a competent tribunal, it cannot certainly be reagitated in the same Court or another Court, but if the application is merely dismissed for default, a subsequent application cannot be barred, as the latter is not based on the same cause of action. [P 523 C 2; P 524 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 26G (5)—Revenue Officer is not Court within S. 141, Civil P. C.

The Revenue Officer acting under S. 26G (5), Ben. Ten. Act, is not a Court within the meaning of S. 141, Civil P. C., and consequently O. 9, R. 9, Civil P. C., has no application where the application under S. 26 (G) (5), Ben. Ten. Act, is dismissed for default : ('40) 27 A. I. R. 1940 Cal. 111, *Rel. on*; 9 Cal. 295 (P. C.); 5 All. 406 and 12 Cal. 50, *Ref.* [P 523 C 2; P 524 C 1]

C. P. C. —

('40) Chitaley, Preamble N. 18.

('41) Mulla, Page 448 Note : "Proceedings in any Court of civil jurisdiction."

Kalipada Sinha — for Petitioners.

Jyotish Chandra Pal — for Opposite Party.

ORDER.—This rule is directed against an order made by the Munsif, Second Court, Contai, allowing an application of the mortgagor, opposite party, for restoration of possession of the mortgaged property under S. 26 (G) (5), Ben. Ten. Act. Two points have been taken before us by the learned advocate who appears on behalf of the mortgagees, petitioners. It is contended in the first place that S. 26G (5), Ben. Ten. Act, is ultra vires of the Provincial Legislature and consequently cannot create any rights in the mortgagor. The second point taken is that as there was a previous application under S. 26G (5) presented by the mortgagor before a Revenue Officer which was dismissed for default, a fresh application to a civil Court is not maintainable.

So far as the first point is concerned, it is concluded by the decision of a Division Bench of this Court in 45 C. W. N. 823.[1] It cannot be disputed that the mortgage in question is a pure usufructuary mortgage. Under its terms, the mortgagee was to remain in possession of the mortgaged property till the mortgage money was paid, and he was to enjoy the usufruct in lieu of interest. There was indeed a covenant to indemnify the mortgagee in case of dispossession, but as has been repeatedly held, such a covenant does not affect the nature of the mortgage.

The second argument put forward by the learned advocate raises a question of some nicety. Section 26G (5), Ben. Ten. Act, lays down, inter alia that on expiry of the period of 15 years from the date of the registration of the mortgage deed, the consideration for a complete usufructuary mortgage would be deemed to be extinguished and the mortgagor shall be entitled to possession of the mortgaged holding; and he may, if he is not forthwith given possession, apply to the Court or a revenue officer to be restored thereto. The proceeding is of a purely summary character, and it seems to me that the intention of the Legislature was that the mortgagor will have an option in the matter either to approach the revenue officer or a civil Court, but once he has made his choice, and had his claim dismissed by a revenue officer, he cannot apply to the civil Court again for the same relief. A principle akin to that of election of remedies can, in my opinion, be invoked in such cases against the mortgagor. This principle, however, cannot assist the mortgagee in the present case. Here the matter was neither heard nor decided; the application was simply dismissed for default, and there was no decision against the mortgagor. The mortgagee can in my opinion succeed, only if the fresh application filed before the Munsif comes within the mischief of O. 9, R. 9, Civil P. C.

As there was no suit which was dismissed wholly or partially for default, O. 9, R. 9 has no direct application to the present case, but the learned advocate for the petitioner relies upon S. 141, Civil P. C., and contends that as the proceeding is of a civil nature, the procedure provided in the Civil Procedure Code, should be applied to this case also. I am extremely doubtful whether the Revenue Officer was a Court exercising civil jurisdiction within the meaning of S. 141, Civil P. C. The learned advocate has in this connexion drawn our attention to certain decisions to wit 9 Cal. 295;[2] 5 All. 406[3] and 12 Cal. 50[4] which lay down that the provisions of the Civil Procedure Code are applicable to Revenue Courts on such matters upon which the special Acts are silent. These were all Courts having jurisdiction under special or local laws to entertain suits or proceedings for the rent, revenue or profits of land. The special Acts which created these Courts laid down the procedure that was to be followed, and for the most part it was modelled on the provisions of the Civil Procedure Code. On such matters for which there were no provisions in the Special Act, they were held to be guided by the Civil Procedure Code itself. Section 26 G (5), Ben. Ten. Act, however, uses the expression Revenue Officer as contradistinguished from Court and the implication seems to be that the Revenue Officer is not a Court at all. Section 189, Ben. Ten. Act, provides that : "The local Government may from time to time, by notification in the official gazette make rules consistent with the Act—(1) to regulate the procedure to be followed by Revenue Officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer (a) any power exercised by a civil Court in the trial of suits . . . ."

No rules have, as yet been framed by the Local Government and no authority has been conferred on Revenue Officers to exercise the powers of a Civil

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1. ('42) 29 A. I. R. 1942 Cal. 55 : 198 I.C. 674 : 45 C. W. N. 823 : 74 C. L. J. 370, Akbar Ali v. Mafizuddi.

2. ('83) 9 Cal. 295 : 9 I. A. 174 : 12 C.L.R. 361 : 4 Sar. 392 (P. C.), Nilmoni Singh v. Taranath.

3. ('83) 5 All. 406 : 1883 A.W.N. 92, Madhoprakash v. Murli Manohar.

4. ('86) 12 Cal. 50, Adhirani Narain Kumari v. Raghu Mahapatro.

Court. It was held in 44 C. W. N. 1915 that the order of a Revenue Officer under 26G, Ben. Ten. Act, was not revisable by this Court under S. 115, Civil P. C. I am inclined to hold therefore that the Revenue Officer was not a Court within the meaning of S. 141, Civil P. C., and consequently O. 9, R. 9 has no application to the facts of the present case. But even assuming that the Revenue Officer was a Court exercising civil jurisdiction, I do not think that the provision of O. 9, R. 9, Civil P. C., is attracted to the case before us. Under S. 26 G (5) as soon as the period specified in that section expires, the consideration for the mortgage must be deemed to be extinguished, and the mortgagor gets the right to recover possession of the mortgaged property. In case the mortgagee does not deliver up possession of the property to the mortgagor, the latter can avail himself of the summary proceeding provided by the section and apply for possession, to a Revenue Officer or the Civil Court as he thinks proper. The right to recover possession is a recurring right and continues so long as possession is not restored to him. If the right to recover possession is negatived by a competent tribunal, it cannot certainly be reagitated in the same Court or another Court, but if the application is merely dismissed for default, a subsequent application cannot be barred, as the latter is not based on the same cause of action. The position is the same as in the case of partition suits, and so long as the right to partition remains the mere dismissal of a previous suit for non-prosecution is no bar to a subsequent suit. In my opinion, therefore the view taken by the Court below is right. The rule is discharged without any order as to costs. Certificate is given under S. 205, Government of India Act.

R.K. *Rule discharged.*

5. ('40) 27 A. I. R. 1940 Cal. 111 : 187 I. C. 14 : I. L. R. (1940) 1 Cal. 329 : 70 C. L. J. 570 : 44 C. W. N. 191, Kashinath Haldar v. Karnadhar Baidya.

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MOHAMAD AKRAM AND PAL JJ.

Emperor

v.

Naibulla alias Fulir Bap s/o Baser Fakir — Appellant.

Death Ref. No. 20 of 1941 and Appeal No. 515 of 1941, Decided on 16th September 1941.

(a) Criminal P. C. (1898), S. 297 — Murder case—Charge to jury—First information report containing statement as to confession by accused while in police custody treated as substantial evidence—Inadmissibility of confession not pointed out — Whole case resting on circumstantial evidence — Jury not told how to deal with such evidence—Charge held amounted to misdirection — Proper directions as to circumstantial evidence indicated.

In a case under S. 302, Penal Code, the Judge charged the jury as follows: "The evidence which consists of the depositions of witnesses and of the first information report and a search list is entirely circumstantial, that is to say, nobody saw the accused inflicting wounds on his wife which resulted in her death, but there are circumstances which are supposed to lead to the only inference therefrom that it was the accused and none else who caused the death of his wife." The first information report contained a statement as to confession by the accused while in the custody of the police:

Held that the charge to the jury amounted to misdirection for the following reasons—(1) the first information report was not a substantive evidence and yet the jury was told as if it was such evidence on which alone the jury could base its finding; [P 526 C 1]

(2) since the whole evidence was circumstantial and the whole case practically hinged on the evidence of a single man, the confession of the accused, if any, was of very great consequence and was certainly likely to weigh much with the jury and therefore the failure of the Judge to warn the jury that the confession by the accused while in police custody referred to in the first information report was not admissible in evidence amounted to a grave error in the charge; [P 526 C 1]

(3) the Judge ought to have directed the jury how to deal with purely circumstantial evidence and should have warned the jury that unless they were in a position to say that the circumstances all pointed only to the guilt of the accused and to nothing else and that they were not at all consistent with his innocence they should not find against the accused. [P 526 C 1]

Cr. P. C.—
('41) Chitaley, S. 297 N. 9 Pt. 38; N. 11 Pts. 19, and 26.
('41) Mitra, Page 1030 N. 915.

(b) Criminal P. C. (1898), Ss. 376, 374 and 423 (2) — Reference under S. 374 — Error in charge such as would entitle High Court to reverse jury's verdict under S. 423 (2) — While dealing with reference under S. 376, High Court can order only retrial by jury.

Where while dealing under S. 376 with a reference under S. 374 the High Court finds that there has been such an error in the charge as would entitle the High Court to reverse the verdict of the jury under S. 423 (2) it is not open to the High Court to look into the evidence in order to confirm the conviction on its own view of the facts. An order of retrial by the jury is the only course left to the High Court on such an occasion if in its view there is evidence on record for the jury: ('36) 23 A.I.R. 1936 Cal. 73 (judgment of Lort-Williams J.), *Approved.* [P 526 C 2]

Section 376 (b) really has in view the circumstances of S. 237, Criminal P. C., and does not empower the High Court to convict the accused on its own appreciation of facts. If the words "any offence" in S. 376 (b) would include also the offence of which there was conviction, then at least when the accused is convicted again of the same offence it amounts to confirmation of the conviction and not a conviction on annulment of the conviction. [P 526 C 2; P 527 C 1]

Cr. P. C.—
('41) Chitaley, S. 376 N. 1 Pts. 1 and 4; N. 5; N. 6 Pt. 1.
('41) Mitra, Page 1235 N. 1059.

(c) Criminal P. C. (1898), Ss. 423 and 418 (2) — Jury trial — No death sentence — Appellate Court cannot convict on its own appreciation of facts — Jury's verdict vitiated — Appellate Court should order retrial by jury unless it acquits or discharges accused—Effect of S. 418 (2).

In cases of trial by jury where there has been no sentence of death the appellate Court cannot con-

a vict on its own appreciation of facts. If in its opinion the verdict of the jury is vitiated that verdict is to be set aside and unless the appellate Court acquits or discharges the accused a retrial by the jury should be directed. Section 418 (2) no doubt extends the right of appeal of an accused so as to entitle him to appeal on matters of fact as well. But that would not necessarily mean that where the accused prefers an appeal on a question of law only the High Court will be entitled to look into the questions of facts as well in order to maintain the conviction. [P 526 C 2; P 527 C 1]

Cr. P. C.—

('41) Chitaley, S. 418 N. 4 Pt. 2; S. 423 N. 40.

('41) Mitra, Page 1040 Notes 916, 917; Page 1322 N. 1124: "Sub-section 2;" Page 1365 N. 1152.

(d) Criminal P. C. (1898), Ss. 376, 374 and
b 418—Power on reference under S. 374 is subject to results of appeal under S. 418 — Appeal succeeding on its own grounds — Its results cannot be allowed to be affected by exercise of powers under Ss. 374 to 376 — In appeal High Court finding charge to jury amounting to misdirection—It can order retrial.

The power conferred on the High Court under S. 376 on a reference under S. 374 is subject to the results of the appeal under S. 418. If the appeal itself succeeds on its own grounds its result should not be allowed to be affected by the exercise of any power conferred on the High Court by Ss. 374 to 376, Criminal P. C. If the High Court finds that the verdict of the jury is erroneous owing to a misdirection by the Judge, the High Court can direct a retrial. [P 527 C 1]

c Cr. P. C.—

('41) Chitaley, S. 418 N. 4.

('41) Mitra, Page 1322 N. 1124: "Sub-section 2."

Nirmal Kumar Sen — for the Crown.

Jajneswar Mondal — for Appellant.

PAL J. — This is a reference under S. 374, Criminal P. C., for confirmation of the sentence of death passed on the accused by the Additional Sessions Judge of Dacca, on 6th August 1941. The accused also has preferred the Appeal No. 515 of 1941 from the same order of conviction and sentence. The reference and the appeal are heard together and disposed of by this judgment. The prosecution case is that on 12th April 1941, at village Atusal, P. S. Monohardi at about 10 A. M. the accused Naibulla killed his wife by inflicting cut wounds on her neck in his hut and then ran away. The cries
d of the deceased attracted the attention of a neighbour, P. W. 1, who saw the accused running away, chased him and arrested him about half a mile away with the help of two others. He was made over to the rural police and then sent up to the police station. Information of the crime was given to the police by the elder brother of the accused. Upon these facts the accused has been charged with having committed murder of his wife, an offence punishable under S. 302, Penal Code. The accused pleaded not guilty. He has not set up any special story by way of defence. The accused was tried by a jury of nine jurors. Eleven witnesses including the investigating Police Officers and the Medical Officer who held the post mortem examination were examined by the prosecution in this case. The Jury returned a unanimous verdict of guilty under S. 302, Penal Code, against the accused and the learned Additional Sessions Judge accepting this unanimous verdict, convicted the accused under S. 302, Penal Code, and passed the sentence of death on 6th August, 1941. The Reference by the Additional e Sessions Judge is for the confirmation of this sentence of death and the appeal by the accused is from this conviction and sentence.

The learned advocate appearing in support of the appeal urges the following points for our consideration: (1) The verdict of the jury is erroneous owing to a misdirection by the Judge on a material point; (2) The verdict of the jury having been vitiated by the misdirection, the conviction and the sentence based on such verdict must be set aside and the case sent back for retrial unless the High Court acquits or discharges the accused in exercise of power under S. 423 (1) (b), Criminal P. C.; (3) If the appeal of the accused thus succeeds, the reference under S. 374, Criminal P. C., automatically fails and the High Court can no longer exercise the powers conferred upon it by S. 376, Criminal P. C.; (4) Even if the High Court can still proceed under f S. 376, Criminal P. C., the evidence in the case is not sufficient to establish the guilt of the accused. In support of the first point the learned advocate refers to a passage in the heads of charge to the jury where the Additional Sessions Judge charged the jury in the following terms:

"The evidence which consists of the depositions of witnesses and of the first information report and a search list is entirely circumstantial, that is to say, nobody saw the accused inflicting wounds on his wife which resulted in her death, but there are circumstances which are supposed to lead to the only inference therefrom that it was the accused and none else who caused the death of his wife."

The first information report ran as follows:

"I am Abdul Hossain, son of late Basir Fakir of Atushail P. S. Manohardi, District Dacca. Coming g to the thana in company with Ashanulla Chowkidar of my Mahalla, and Chowkidar Upendra Dey of Patali Union, and producing before you my brother Nayebulla brought under arrest and one dao with wooden handle both dao and handle besmeared with blood, I lodge this ejahar to the effect following: To-day at about 10 A. M., I was informed at my house by Soratali, son of Umarali of Galgalia that my brother Nayebulla had murdered his wife Mijajennessa alias Lalirma. His house is some quarter mile off to the north-east of mine. I then went to the house of Nayebulla and found that the neck of the said Mijajennessa alias Lalirma was cut from behind and slightly remaining attached in the front and she was lying dead in the west-bhiti kitchen of Nayebulla. I found in that house Assu, Kadir, Alimaddin Munshi, dead wife of Nayebulla and also other people of Atushail and learnt from them that h Nayebulla had murdered Lalirma at about 9 A. M. this day. I found in the kitchen near the dead body cooked rice in an earthern pot (shanki) and also scattered around. I did not ask anybody why he had committed murder. My presumption is that the quarrel arose over rice and Nayebulla killed her. I learnt from them that after committing murder Nayebulla had gone towards south. I then went to that direction to search for him and after going to some distance I came to learn from Jalu son of Naju of Galgalia that Nayebulla had been arrested at Kashva. I went there at 12 noon and found Nayebulla in custody of Chowkidars Ashanulla and Upendra in the house of Abdul Ali Sarkar at Atushail and also found President Hamid Bhuya and (also) a dao besmeared with blood in the hand of Chowkidar Ashanulla and heard from the Chowkidars that Nayebulla had murdered his wife with this dao and the said dao was found by them in the ghar where murder had been committed. The ac-

a cused Nayebulla made a confession before President Hamid Bhuya in my presence that he had murdered his wife. Then the said Hamid Bhuya directed me and the Chowkidars to come to the Monohardi P. S. with the accused Nayebulla and that dao and lodge ejahar: hence I came to the thana and lodge this ejahar. Nayebulla is my younger brother and we live in separate mess. I am in good terms with him. Lalirma would be about 35/36 years old. She has two sons and one daughter. This is my ejahar. The ejahar being read over to me and finding the same to have been recorded according to my statement I put my signature thereon below. It may be noted that we reached the thana at 5-15 P. M.

The learned advocate contends that here the Additional Sessions Judge committed the following errors :

1. (a) The first information report is not substan-
b tive evidence in the case; yet the jury was told as if it was such substantive evidence on which alone the jury could base its findings: (b) The first information report contained a statement as to confession by the accused while in the custody of the police; this confession was not admissible in evidence. The Additional Sessions Judge did not warn the jury as to this; on the other hand his direction that the first information report was evidence in the case must have led the jury to accept and rely on the entire document with all its contents as admissible evidence; (c) The warning of the Additional Sessions Judge as to confession contained elsewhere in the charge refers to another confession and as the record itself will show he did not expunge the portion of the first information report containing the alleged confessional statements.

c 2.(a) The learned Additional Sessions Judge did not at all direct the jury as to how to deal with the evidence when it is purely circumstantial; (b) On the other hand, he directed the jury that the circumstances were such as to lead to the only inference therefrom that it was the accused and none else who caused the death of his wife. Nothing was thus left to the jury to find. The Judge expressed his opinion unduly strongly and did not even warn the jury that it was not bound to accept this opinion.

In our opinion there is much substance in the first point thus urged by the learned advocate appearing for the accused. We are unable to take the view that the jury was properly directed on this important point. In a case like this where the whole evidence is circumstantial and where the whole case practically hinges on the evidence of a single man, the confession of the accused, if any, is of very great
d consequence and is certainly likely to weigh much with the jury. It is really regrettable that the learned Judge did not take that amount of care in directing the jury which the gravity of the charge demanded. We are not satisfied with the learned Judge's direction on the point of circumstantial evidence also. The handling of the circumstantial evidence is indeed a very difficult matter, and it is too much to expect that a jury can deal with it without any assistance from the Judge on the point. The jury should have been warned that unless they were in a position to say that the circumstances all pointed only to the guilt of the accused and to nothing else and that they were not at all consistent with his innocence, they should not find against the accused. The third contention of the learned advocate appearing for the accused in this case raises a question about which there has already been a good deal of divergence of judicial opinion. The power of the High Court on a reference under S. 374, Cr. P. C., is defined by S. 376 of that Code.
e It is beyond controversy that on such a reference the High Court may look into the evidence in the case and may acquit the accused person (S. 376 (c)) or order a new trial on the same or an amended charge (S. 376 (b) last portion). It is again beyond all controversy that if there be no valid ground for an appeal, the High Court may confirm the sentence or pass any other sentence warranted by law (Section 376 (a)). The question about which there has been divergence of judicial opinion can really be reduced to this : where there has been such an error as would entitle the High Court to reverse the verdict of the jury under S. 423 (2), Cr. P. C., whether it is open to the High Court to look into the evidence in order to confirm the conviction on its own view of the facts or whether it is incumbent on it to direct a new trial if, in its view, there is evidence on record for the jury. The latest case of this Court on the point is 40 C. W. N. 432.[1] In this case Lort-
f Williams J. seems to have taken the view that a new trial would be necessary in such circumstances. There were some errors of law at the trial by the jury in this case. Lort-Williams J., referring to these errors, observed :

"On the whole however, I have come to the conclusion that none of these errors are more than comparatively minor blemishes on what was otherwise a careful and very able charge, and a masterly exposition of intricate evidence at the end of a long and difficult trial. Nevertheless, if I thought that these errors had seriously prejudiced the accused or that their omission would possibly have led to a different result, or that they had caused any failure of justice it would have been necessary to order a new trial."

g No doubt, the learned Judge did not discuss the law or the various decisions on the point. But at the same time he expressed his view clearly enough in the above passage. Our learned brother Nasim Ali J., in this case, however, held otherwise on this point. On a review of the various decisions as also of the law on the point he seems to have concluded that the High Court can convict the accused on its own view of the facts and is not bound to order a re-trial. Had it been necessary for us to come to any decision on the point a reference to the Full Bench perhaps would have been desirable in view of the divergence of judicial opinion which has already accumulated round this point. The inclination of our own views on the point is towards holding that an order of retrial by the jury would be the only course left to the High Court on such an occasion.

h Section 376, Cr. P. C., by its proviso clearly indicates that even when there has been a reference under S. 374 the appeal by the accused still remains to be disposed of on its own grounds. Section 423, Cr. P. C., lays down the powers of the Appellate Court in disposing of such appeals. It seems to be the settled law that at least in cases of trial by jury and where there has been no sentence of death the appellate Court cannot convict on its own appreciation of facts. If in its opinion the verdict of the jury is vitiated that verdict is to be set aside and unless the Appellate Court acquits or discharges the accused a re-trial by the jury should be directed. Section 418 (2), Criminal P. C., no doubt extends the right of appeal of an accused so as to entitle him to appeal on matters of fact as well. But that, in our opinion, would not necessarily mean that

1. ('36) 23 A.I.R. 1936 Cal. 73 : 161 I. C. 74 : 63 Cal. 929 : 37 Cr. L. J. 394 : 64 C. L. J. 154 : 40 C. W. N. 432, Emperor v. Benoyendra Chandra.

where the accused prefers an appeal on a question of law only the High Court will be entitled to look into the questions of facts as well in order to maintain the conviction. Section 376 (a), Criminal P. C., empowers the High Court to confirm the sentence only after the disposal of the appeal, if any, by the accused. Consequently, if in the appeal the accused makes out his grounds of appeal and thus succeeds in having the conviction set aside there will be nothing before the High Court for confirmation under S. 376 (a). No doubt, usually the appeal under S. 418, Criminal P. C., and the reference under S. 374 are heard together. But that, in our opinion, should not prejudice the appellant in any way so as to entitle the High Court to throw out the appeal as the result of its own appreciation of the evidence coming before it for the purposes of the reference. Section 376 (b), Criminal P. C., lays down that on a reference under S. 374, the High Court "may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or amended charge". This at the first blush might appear wide enough to cover exactly the case in question and to empower the High Court to convict the accused on its own appreciation of facts. The clause no doubt says "may annul the conviction and convict the accused of any offence", but it seems that the clause really has in view the circumstances of S. 237, Criminal P. C. If the words "any offence" would include also the offence of which there was conviction, then at least when the accused is convicted again of the same offence it amounts to confirmation of the conviction and not a conviction on annulment of the conviction. In our opinion, the power conferred on the High Court on a reference under S. 374, Criminal P. C., is subject to the results of the appeal under S. 418, Criminal P. C. If the appeal itself succeeds on its own grounds its result should not be allowed to be affected by the exercise of any power conferred on the High Court by Ss. 374 to 376, Criminal P. C.

Section 376 (b) expressly empowers the High Court to order a new trial and there cannot be any possible controversy that if the High Court finds that the verdict of the jury is erroneous owing to a misdirection by the Judge, the High Court can direct a re-trial. As we are inclined to follow this course in the present case it is not necessary for us to discuss the controversial point any further. As we are going to direct a re-trial in this case, it is not necessary for us to consider the fourth point raised by the learned advocate for the accused. It would be sufficient to say that in our opinion even after excluding the inadmissible evidence there will still remain enough evidence for the jury. The result is that we reject the reference and allow the appeal, the conviction and the sentence passed on the accused are set aside, and the case is sent back for re-trial by a fresh jury.

MOHAMAD AKRAM J.—I agree.

G.N./R.K. *Appeal allowed.*

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BISWAS J.

Ananda Mohan Poddar and others

v.

Durga Charan Dutta and others.

Appeal No. 226 of 1939, Decided on 5th March 1942, from appellate decree of Sub-Judge, 1st Court, Dacca, D/- 28th June 1938.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 37 (1) — Onus lies on tenant to prove that he comes under exception—It is enough if he proves long and undisturbed possession — Court will then presume in his favour.

In a suit for ejectment of an under-tenant under S. 37 the onus lies on the defendant to prove that he comes within one or other of the exceptions mentioned in the section, assuming, of course, that the lands held by the defendant are comprised in the estate which was sold. When he claims under the exception in Cl. 1 it must be a matter of great difficulty for him to give positive evidence in support of his case by carrying the proof right back to the date of the permanent settlement. If the Courts were to insist on such a strict standard of proof the protection given by the Act might indeed be rendered illusory. Therefore, in applying the rules of evidence to a case of this kind, the Courts have been induced to take a reasonable and rational view and allow the defendant the benefit of a certain presumption from mere proof of long and undisturbed possession. As to what should be deemed to be sufficiently long possession for the purpose of justifying such a presumption, that has of course varied, as it must, in different cases, according to the facts and circumstances thereof. In the absence of anything to the contrary coming from the side of the plaintiffs, it is open to the Court to infer as a fact that the tenure did exist at the date of the permanent settlement, seeing it was proved by positive evidence to have been in existence in 1830 : 20 W. R. 44 (P. C.); 3 C. W. N. 341; 8 C. L. J. 177 and 10 C. W. N. 503, *Rel. on.* [P 528 C 2; P 529 C 1]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 37 (1), (2)—Tenure existing from date of permanent settlement—Proof that it has been held at fixed rent is not necessary.

If a tenure is proved to have existed from the date of the permanent settlement, Cl. (2) of S. 37 would be applicable, and cl. (2) does not require that the tenure should have been held at a fixed rent. [P 529 C 1]

Chandra Sekhar Sen — for Appellants.

Amarendra Mohan Mitra and Nagendra Mohan Saha — for Respondents.

JUDGMENT. — This is an appeal on behalf of the plaintiffs against a decision of the Subordinate Judge of Dacca, modifying that of the Additional Munsif of Narayanganj. The plaintiffs were purchasers of a taluk named Taluk Rajaram Roy, being estate No. 4015 of the Dacca Collectorate, from one Prasanna Chandra Saha by a kobala dated 10th December 1934. Prasanna, in his turn, had acquired the taluk by purchase at a sale for arrears of revenue held on 20th June 1934, and for the purposes of the suit, the plaintiffs have been held to be entitled to all the rights of the purchaser at the revenue sale. After their purchase, the plaintiffs through Prasanna applied for delivery of possession, and possession was delivered to them on 11th April 1935. Thereafter they got their names recorded in the collectorate register, but when they went to take actual possession, they were resisted by the defendants. That led them to commence the present action. There were a large number of defendants, but the suit was contested by only three of them, defendants 1, 2 and 42. The main defence was that the disputed lands were comprised in a mokarary tenure Sikmi Taluk Bhagyamanta Roy held under Estate Rajaram Roy from the time of the Permanent Settlement; in other words, that

the defendants were protected from ejectment by virtue of cl. 1 of S. 37 of Act 11 of 1859. A further plea was taken in respect of one specific plot, C. S. Dag No. 24, as regards which it was alleged that it did not form part of the estate which had been sold, but that it appertained to a separate taluk No. 12520, which had been carved out of the parent estate as a result of butwara proceedings under the Estates Partition Act.

As regards plot No. 24, both Courts held that it appertained to Estate No. 4015. On the other point, the learned Munsif negatived the defence, but on appeal the learned Subordinate Judge gave effect to it, holding that the Sikmi Taluk set up by the defendants was shown to have been in existence from the date of the Permanent Settlement. Against this decision the plaintiffs have preferred the present appeal, and the defendants have filed a cross-objection as regards plot No. 24. The main question which has been argued by Mr. Sen, on behalf of the plaintiffs, is that the finding of the learned Subordinate Judge is not a proper or legal finding at all, inasmuch as it is based on certain presumptions not warranted by law. It appears that in support of their case that the Sikmi Taluk existed from the time of the Permanent Settlement, the defendants relied on certain ancient documents which have been marked as Exs. E to H, the oldest of which, Ex. E, is a judgment of the year 1853 in a proceeding under Act 4 of 1840. It is said that these documents make mention of a subordinate taluk Bhagyamanta Roy under taluk Rajaram Roy, which the learned Judge apparently takes to be identical with the Sikmi Taluk alleged by the defendants. In the said Ex. E there is a reference to two earlier documents, one of the year 1846 and the other of the year 1830, and it is said that these documents also contain an allusion to the Sikmi Taluk. From these data the learned Subordinate Judge came to the conclusion that the Sikmi Taluk was definitely proved to have existed at least as far back as 1830, and then from this finding, he proceeded to draw the further inference, in the absence of any evidence to the contrary from the plaintiffs' side, that the taluk must have been in existence since the date of the Permanent Settlement. It is Mr. Sen's grievance that the learned Judge permitted himself to draw this inference, presuming backwards from 1830 to the year 1793.

So far as the question of the identity of the Sikmi Taluk is concerned, namely, its identity with the taluk mentioned in the documents relied on by the defendants, I do not think the appellants can go behind the finding of the lower appellate Court in this respect, nor, in my opinion, are they entitled to challenge the conclusion that the Sikmi taluk was shown to have been in existence at least as far back as 1830. The only question which may be said to have the semblance of a question of law is whether this last mentioned fact is sufficient in law to raise the further presumption in favour of the defendants regarding the existence of the taluk at the date of the Permanent Settlement. The learned Subordinate Judge expressed himself on this question in these terms :

"It is not necessary for the defendants to prove by evidence that the Sikmi Taluk was created before the time of the Permanent Settlement. Mere proof of existence of the Sikmi Taluk from over 100 years back raises the presumption in the defendants' favour and shifts the onus on the plaintiffs to show that the Sikmi Taluk was created after the creation of the parent taluk."

It may be taken for granted that in a suit for ejectment of an under-tenant under S. 37 of the Revenue Sale Law, the onus lies on the defendant to prove that he comes within one or other of the exceptions mentioned in the section, assuming, of course, that the lands held by the defendant are comprised in the estate which was sold. The exception on which the defendants rely in the present case is that set out in cl. (1), which saves an istamrari or mokarari tenure which has been held at a fixed rent from the time of the permanent settlement. It is obvious that in many cases it must be a matter of great difficulty for a defendant to give positive evidence in support of a case under this exception, by carrying the proof right back to the date of the permanent settlement. If the Courts were to insist on such a strict standard of proof, the protection given by the Act might indeed be rendered illusory. It is not to be wondered at, therefore, that in applying the rules of evidence to a case of this kind, the Courts have been induced to take a reasonable and rational view, and allow the defendant the benefit of a certain presumption from mere proof of long and undisturbed possession. As to what should be deemed to be sufficiently long possession for the purpose of justifying such a presumption that has of course varied, as it must, in different cases, according to the facts and circumstances thereof.

There is an instructive judgment of the Judicial Committee in an old case reported in 20 W. R. 44,[1] where certain principles were laid down by their Lordships as to the burden of proof as regards the existence of tenures created before the perpetual settlement. These principles have been since applied by this Court in several cases arising between purchasers at revenue sales and holders of under-tenures, and so far as I can see, it has been uniformly held that though the burden of proof rests upon the defendants whose tenures are questioned by the auction-purchasers, the burden will nevertheless be lightened to a great extent by giving effect to presumptions in their favour arising from proof of long and undisturbed possession. Thus, in 3 C. W. N. 341,[2] it was found that the taluk had been in existence and in the possession of the defendants and their predecessors for a period of 100 years, which meant in that case a period going back to five years after the date of the permanent settlement, but there was no proof one way or the other as to the precise date on which the taluk had been created. Still their Lordships held that so far as probabilities were concerned, it was, to say the least, as probable that it had been created before the date of the permanent settlement, as that it had been created within the five years which elapsed since that date. In 8 C. L. J. 177,[3] Mitra J. also quoting from the Privy Council decision referred to above, definitely negatived the suggestion that in a case of this description direct evidence must be given to prove the existence of a tenure from before the permanent settlement, in order that it might be protected from avoidance on account of a revenue sale. Here, the positive evidence went back to the year 1824, but the learned Judge was not prepared to say that the Court could not from this and other facts that might be present come to the conclusion that the tenure had been in existence in 1793. The

1. ('73) 20 W. R. 44: 12 Beng. L. R. 210 : 3 Sar. 264 (P.C.), Forbes v. Meer Mahomed Hossein.
2. ('99) 3 C. W. N. 341, Nityanund Roy v. Banshi Chandra.
3. ('08) 8 C. L. J. 177, Ananda Chandra v. Kunjo Behari.

same rule was again affirmed in 10 C. W. N. 503,[4] where the defendants had proved that the tenures were mentioned in the survey chitta of 1839, that they were not avoided on purchase by the Government and were again recognised by Government in 1864, that rents had been paid at a uniform rate for at least 60 years and that there had been sales of the tenures. It was held upon these facts that the Court might and ought to presume backwards and hold that the defendants had succeeded in discharging the burden of proof which S. 37 threw on them.

Mr. Sen has sought to distinguish these cases. All, he says, that these cases establish, is that there is nothing to prevent a Court of fact drawing, from direct evidence having reference to a particular point of time, a presumption regarding the existence of a similar state of things at a remote period, but he will object to the formulation of a principle that mere proof of the existence of a taluk in a particular year must inevitably raise a presumption that it must have subsisted also at an earlier date, however remote. I do not think that it was the intention of the Court in any of the cases referred to, to lay down a hard and fast rule of evidence in any such terms. On the other hand, it was expressly pointed out in some of these decisions that each case must depend upon its own facts, and speaking for myself, I respectfully agree that it must be so. In the present case, I do not think the learned Subordinate Judge, when he spoke of presumptions, meant in any sense to regard them in the same way as one would regard, for instance, a statutory presumption. All that he meant was that on the particular facts of the case, in the absence of anything to the contrary coming from the side of the plaintiffs, it was open to the Court to infer as a fact that the tenure did exist at the date of the Permanent Settlement, seeing it was proved by positive evidence to have been in existence in 1830. In other words, the position was that in view of the positive evidence in the case, the Court was prepared to bridge over the gap between the date of the Permanent Settlement and the year down to which the positive evidence went. In this view of the matter, I must hold that the finding of the learned Judge regarding the age of the tenure cannot be disturbed by me in second appeal. It must accordingly be held that the defendants have made out their case that the Sikmi taluk set up by them existed from the time of the Permanent Settlement.

Mr. Sen next argues that there is no direct evidence that the tenure had been so held at a fixed rent as required by cl. (1) of S. 37. I do not think that is of any consequence, having regard to the fact that if the tenure existed from the date of the Permanent Settlement, cl. (2) would be equally applicable, and cl. (2) does not require that the tenure should have been held at a fixed rent. As regards the cross-objection, which relates to plot No. 24, the finding is, as I have already pointed out, that it belongs to estate No. 4015. That finding cannot be attacked in second appeal. Mr. Mitra, however, says that his clients' alternative case regarding this plot had not been considered at all by the Courts below. That alternative case was that even if plot No. 24 appertained to estate No. 4015, it was still comprised in the Sikmi taluk set up by the defendants under that taluk. The question is whether I should direct a remand for a trial of this specific issue. It is said, the settlement record bears out the defendants' case that this plot is a part of the Sikmi taluk, but as against this, there is the finding of the learned Munsif, which seems to have been affirmed by the learned Subordinate Judge, to the effect that the defendants never realised any rent in respect of the lands in plot No. 24, showing to my mind that the defendants were not in possession of this plot. In this state of the record, I think it would be proper to send the case back to the lower appellate Court for a specific finding as to whether plot No. 24 was comprised in Sikmi taluk, and I direct accordingly. If it was a part of the Sikmi taluk, the plaintiffs' claim for ejectment must be dismissed; otherwise, if it is found to be not comprised in the taluk, the plaintiffs will be entitled to a decree for ejectment. The result is that, in my opinion, as regards the disputed lands, with the exception of plot No. 24, the plaintiffs will be entitled to a declaration of their title as the superior zemindars, but the rest of their claim will fail. The appeal, therefore, stands dismissed with costs; the cross-objection is allowed but costs will abide the result. Leave to appeal under Cl. 15 of the Letters Patent is refused.

K.S./R.K. *Appeal dismissed.*

4. ('06) 10 C. W. N. 503, Nagendra Lal Chaudhury v. Nazir Ali.

A. I. R. (29) 1942 Calcutta 529

LODGE AND ROXBURGH JJ.

J. N. Sharma & Sons (Firm) — *Petitioner*

v.

Corporation of Calcutta — *Opposite Party.*

Criminal Revn. Petn. No. 1061 of 1941, Decided on 25th November 1941.

Calcutta Municipal Act (3 of 1923), S. 388 — Only Magistrate who convicts can pass order restricting use of premises.

Under S. 388 the Magistrate who imposed the fine is alone authorized to pass an order directing that the premises be no longer used for the said purpose. No other Magistrate has jurisdiction to do so. [P 530 C 1]

N. K. Bosu, P. C. Chatterjee and Bhagirath Chandra Das — for Petitioner.

Pashupati Ghosh — for Opposite Party.

LODGE J.—This is a rule issued upon the Chief Executive Officer of the Corporation of Calcutta and upon the Honorary Municipal Magistrate of Cossipore to show cause why an order passed under S. 388, Calcutta Municipal Act, 1923, should not be set aside. The material facts are as follows : The petitioner was twice prosecuted and fined under S. 488, Calcutta Municipal Act, for contravention of the provisions of S. 386 (1) of that Act. The second of these two fines was imposed on 24th May 1941. Thereafter an application was made on behalf of the Corporation before a Magistrate other than the Magistrate, who convicted the petitioner under S. 488, for an order under S. 388, Calcutta Municipal Act. The Magistrate to whom the application was made, after an elaborate enquiry, came to the conclusion that the premises were kept in such a state as to be a nuisance and he directed under S. 388, Calcutta Municipal Act, "that No. 74, Barrackpore Trunk Road should no longer be used as a factory for such purpose as manufacturing iron materials by J. N. Sarma & Sons or other person or persons after 29th October 1941 and during the meantime work will only be carried on at this factory between the hours 8. A. M. and 5 P. M."

It is contended on behalf of the petitioner that the learned Magistrate, who passed this order, had no jurisdiction to do so. Our attention was drawn to S. 388, Calcutta Municipal Act. It provides that "whenever a Magistrate imposes a fine on any person under S. 488. . . . . He may, if it is proved to his satisfaction that such premises are kept in such a state as to be a nuisance, also direct that they shall no longer be used for the said purpose."

This section makes it clear that the Magistrate who imposed the fine is alone authorized to pass an order directing that the premises be no longer used for the said purpose. In our opinion this contention is correct and it must be held that the learned Magistrate, who passed the order under S. 388, had no jurisdiction to do so. On behalf of the Corporation, it has been argued that though the learned Magistrate who passed the order had no jurisdiction to do so under S. 388, Calcutta Municipal Act, he had jurisdiction to do so under S. 535 of that Act and that in purporting to pass the order under S. 388 he committed a mere irregularity. In our opinion, there is no substance in this argument. The proceedings before the Magistrate purported to be under S. 388 and the learned Magistrate applied his mind only to S. 388. We are not satisfied in any case that S. 535 would apply to a case of this nature. In the result the rule is made absolute and the order of the learned Magistrate passed under S. 388 is set aside.

ROXBURGH J. — I agree.

K.S./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 530

SEN J.

Ashutosh Dey — Plaintiff — Petitioner

v.

Foolchand Keshabdeo and another — Defendants — Respondents.

Small Cause Court Suit No. 15090 of 1939, Decided on 6th March 1942.

(a) Presidency Small Cause Courts Act (1882), S. 19 — Suit by *A* against *B* and *C* — *A* claiming to be cosharer with *C* of certain premises and that *B* was tenant of premises under him and *C* — *A* claiming his share of rent from *B* and in alternative from *C*—Suit held cognizable by Small Cause Court.

A in his suit against *B* and *C* claimed that he was a cosharer with *C* with respect to certain premises. He alleged that *B* was a tenant of those premises under himself and *C* and claimed his share of rent from *B*. In the alternative, *A* prayed that if *B* had paid all the rent to *C*, *C* should be made to pay *A*'s share of the rent. *B* took up the position that he was *C*'s tenant and had nothing to do with *A*. *C* claimed to be the sole owner of the premises :

Held that although a substantial question of title to immovable property was involved in the suit that question was merely an incidental one, and the Court therefore had jurisdiction to try the suit which was for the recovery of rent and, in the alternative, for the recovery of money had by the defendants on behalf of the plaintiff. Since the plaintiff claimed to be a cosharer landlord with *C* he was bound to add *C* as party to the suit for rent inasmuch as he alone could not sue for rent. Therefore, there was no error committed in making *C* party to the suit nor was the fact of his being party to the suit a circumstance which would oust the jurisdiction of the Court of Small Causes : 37 Bom. 675, *Rel. on* ; 31 Cal. 1001, *Expl. and Approved* ; 8 Cal. 238, *Disting.* [P 531 C 1,2]

(b) Civil P. C. (1908), S. 115 (c) — Scope and applicability — Small Cause Court Judge in reasons for his decision not mentioning certain documents—He cannot be said to have ignored them — Even if ignored, such omission does not come under S. 115 (c).

Section 115 (c) applies to errors committed in connexion with the exercise of jurisdiction or errors committed in respect of procedure. It does not apply to every error of law committed by a Judge: 11 Cal. 6 (P. C.) and ('17) 4 A.I.R. 1917 P. C. 71, *Rel. on* ; ('14) 1 A. I. R. 1914 Cal. 388, *Ref.* [P 532 C 1]

It is not necessary for a Judge of the Court of Small Causes to give the reasons for his decision on the points which arose for determination. All that he need do is to set out the points for determination and his decision thereon. Consequently, the fact that in the reasons for his decision the Small Cause Court Judge has not mentioned certain documents does not show that he has ignored those documents. Even if he ignored those documents such omission would not come within the mischief of S. 115 (c).

[P 531 C 2; P 532 C 1]

C. P. C. —

('40) Chitaley, S. 115, N. 2, Pt. 11; N. 12, Pt. 61.

('41) Mulla, Page 419, Note "What is not illegality or material irregularity."

(c) Civil P. C. (1908), S. 115 — Rent suit decreed by Small Cause Court Judge — Judgment as whole implying finding that relationship of landlord and tenant exists between plaintiff and defendant — Absence of express finding does not attract interference under S. 115.

Where a rent suit has been decreed by the Small Cause Court Judge and his judgment read as a whole does imply finding that the relationship of landlord and tenant exists between the plaintiff and the defendant the absence of an express finding matters little. In any case the absence of such an express finding is not a matter which would attract the interference of the High Court under S. 115. [P 532 C 1]

C. P. C. —

('40) Chitaley, S. 115, N. 12, Pt. 61.

('41) Mulla, Page 419, Note "What is not illegality or material irregularity."

Satis Ch. Bose — for Petitioner.

P. C. Ghose — for Respondents.

ORDER. — One Ashutosh Dey instituted a suit in the Court of Small Causes at Calcutta against five persons : (1) Foolchand Keshabdeo, (2) Jotindra Mohun Nundy, (3) Jagat Mohun Nundy, (4) Sudhangshu Mohun Nundy and (5) Sm. Radharani Dasi. The plaintiff's case was that he and defendants 2 to 5 were cosharers with respect to premises 8, Ram Kumar Rakhit Lane. He claimed that he had a 29/125th share therein, and the other cosharers had 96/125th share. He alleged that defendant 1 (Foolchand Keshabdeo) was a tenant of these premises under himself and his cosharers, and he claimed his share of the rent from Keshabdeo. In the alternative he claimed that if Keshabdeo had paid all the rent to defendants 2 to 5 those defendants should pay the plaintiff his share of the rent. The defendant, Keshabdeo, took up the position that he was a tenant under defendants 2 to 5, and that he had nothing to do with the plaintiff. Defendants 2 to 5 claimed that they were the sole owners of the premises, and that the

plaintiff had no share therein. No oral evidence was given, but certain documents were adduced in evidence. The learned Judge passed a decree in favour of the plaintiff, holding that the plaintiff had the share claimed by him in the premises and he found that Keshabdeo was a tenant under the plaintiff and his cosharers. Against this decision an application was made to the Full Bench of the Court of Small Causes under S. 38, Presidency Towns Insolvency Act. The Full Bench upheld the decision of the trial Judge. Thereupon defendants 2, 3 and 4 moved this Court and obtained a rule. The only question for determination is whether the decision of the Court of Small Causes is such as would justify this Court in exercising its revisional powers under the provisions of S. 115, Civil P. C.

Mr. Bose on behalf of the petitioners raises the following points : (1) He says that inasmuch as a substantial question of title to immovable property was raised the jurisdiction of the Court of Small Causes was ousted, and the learned Judge had no jurisdiction to pronounce judgment. (2) He contends that the learned Judge acted illegally and with material irregularity in the exercise of his jurisdiction inasmuch as he did not consider certain pieces of documentary evidence, namely an affidavit of assets filed in probate proceedings, an inventory also filed in those proceedings and a consent decree. (3) He contends that the learned Judge acted with material irregularity in giving the plaintiff a decree in the absence of any evidence to show that the plaintiff was the reversioner of one Sudebi Dasi whom the plaintiff alleged to be the last limited owner of the share claimed by him in these premises. Lastly he contends that the learned Judge has erred in giving the plaintiff a decree without finding that the relationship of landlord and tenant existed between the plaintiff and defendant 1. In my opinion, although a substantial question of title to immovable property was involved in the suit, this question was merely an incidental one, and the Court therefore had jurisdiction to try the suit which was for the recovery of the rent and, in the alternative, for the recovery of money had by the defendants on behalf of the plaintiff.

In this connexion I would refer to the decision of a Full Bench of the Bombay High Court in 37 Bom. 675.[1] The plaintiff brought a suit in the Court of Small Causes to recover a sum of Rs. 12 as the value of certain trees felled by the defendant. The plaintiff's claim to relief proceeded on the basis that the trees belonged to him because the land on which they stood also belonged to him. The question was raised that the Small Cause Court had no jurisdiction to entertain the suit. The Full Bench held that a Court of Small Causes could entertain a suit, the principal purpose of which was to determine a right to immovable property provided the suit in form did not ask for that relief, but for the payment of a sum of money. There are other cases of the Bombay High Court to the same effect. These cases are relied upon by the learned counsel appearing on behalf of the respondent. Mr. Bose on the other hand relied upon the decision in this Court in 31 Cal. 1001.[2] In this case the learned Chief Justice made an observation that if the question of title was the sole question in the case the jurisdiction of the Small Cause Court would be ousted. He held on the facts of the case before him that the sole question was not one of title and, therefore, the Court of Small Causes had jurisdiction. The facts of that case were these: The plaintiff sued the defendant for rent of certain premises. The defendant stated that he had surrendered his lease to the plaintiff and taken a fresh lease from a third party who had put him in possession. The Court of Small Causes referred the matter to this Court for their decision whether in these circumstances the Court of Small Causes could try the suit. This Court held that the question of title arose incidentally in the suit and, therefore, the Court of Small Causes had jurisdiction.

In the present case also I would point out that the question of title to immovable property is not the sole question involved in the case. One of the questions involved is whether or not the defendant Foolchand Keshabdeo is a tenant under the plaintiff Ashutosh Dey. In my opinion the case relied upon by Mr. Bose does not help him and there is no decision placed before me which would indicate that in the circumstances of the present case the jurisdiction of the Small Cause Court would be ousted. Mr. Bose also relied upon the well-known decision in 8 Cal. 238[3] and contended that where substantial questions of title have been raised in a suit for rent the Court should not entertain the suit, and it should direct the parties to have the question of title litigated in the proper Court. Now, 8 Cal. 238[3] does not lay down any such principle. All that it says is this: where a person sued for rent sets up the title of a third party and alleges that he holds under and pays rent to him, such third party ought not to be made a party to the suit so as to convert a simple suit for rent into one for determination of title to the property in respect of which the rent is claimed. In that case the plaintiff sued certain persons for rent. Those persons set up title in somebody else. The plaintiff did not join those persons as parties, but the Subordinate Judge insisted on their being joined as parties, and thereafter decided the question of title. This Court held that the procedure of the Subordinate Judge was erroneous. The present case is quite different. Here the plaintiff claims to be a cosharer landlord with defendants 2 to 5. He was bound to add them as parties to this suit for rent inasmuch as he alone could not sue for rent. Therefore, there has been no error committed in making defendants 2 to 5 parties to the suit: nor is the fact of their being parties to the suit a circumstance which would oust the jurisdiction of the Court of Small Causes.

As regards the point that the learned Judge has not considered certain documents put in evidence, all I need say is that it has not been shown that the learned Judge has not considered them. The documents were there, and I must presume that the learned Judge did consider them. The judgment is that of a Court of Small Causes, and it is not necessary for a Judge of the Court of Small Causes to give the reasons for his decision on the points which arose for determination. All that he need do is to set out the points for determination, and his decision thereon. This is what the learned Judge has done. It is true he has given certain reasons for his decision in which he has not mentioned these documents. That does not show that he has ignored these documents. Further, even if he ignored these documents, I am of opinion that such omission

1. ('13) 37 Bom. 675 : 20 I. C. 974 : 15 Bom. L. R. 773, Puttangowda Mallangowda v. Nilkanth Kalo.
2. ('04) 31 Cal. 1001, Rajendra Mullick v. Nanda Lal Gupta.
3. ('82) 8 Cal. 238 : 10 C. L. R. 581, Lodai Mollah v. Kally Dass Roy.

would not come within the mischief of S. 115 (c). In my opinion S. 115 (c) applies to errors committed in connexion with the exercise of jurisdiction or errors committed in respect of procedure. It does not apply to every error of law committed by a Judge. I am aware that there are authorities which have interpreted S. 115 (c) in a manner which gives this Court a very extended power of interference in revision. I am inclined, however, to follow the two Privy Council decisions in 11 I. A. 237[4] and the case in 44 I. A. 261.[5] In the last mentioned case referring to S. 115 their Lordships said this :

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

I was also referred in this connexion to the case in 41 Cal. 323[6] at page 328 where Chief Justice Jenkins said :

"It appears to me that S. 115 can only be called in aid when the failure of justice, if any, has been due to one or other of the faults of procedure indicated in that section. If there was an error committed (by the Small Cause Court Judge) it was an error of law and not of procedure, and in my opinion Fletcher J. had no power to interfere."

As stated before, Mr. Bose also argued that there was no evidence to show that the plaintiff was the reversioner of Sudebi Dasi, the last limited owner. I find, however, that there was such evidence. The proceedings before the Collector of Calcutta were put in evidence and the decision of the Collector was to the effect that the plaintiff was a reversioner of Sudebi Dasi. The relationship between the plaintiff and Sudebi Dasi was, apparently, never challenged in the present suit. The last point of Mr. Bose is also not of substance. The judgment read as a whole does imply finding that the relationship of landlord and tenant exists between the plaintiff and Keshabdeo. It is true that there is no express finding. That, in my opinion, matters little especially in the case of a judgment of a Court of Small Causes. In any case the absence of such an express finding is not a matter which would attract the interference of this Court under S. 115, Civil P. C. In these circumstances I hold that this rule must be discharged with costs.

G.N./R.K. *Rule discharged.*

4. ('89) 11 Cal. 6 : 11 I. A. 237 : 4 Sar. 559 (P. C.), Ameer Hossein Khan v. Sheo Baksh Singh.
5. ('17) 4 A. I. R. 1917 P. C. 71 : 40 I. C. 650 : 40 Mad. 793 : 44 I. A. 261 (P. C.), Balakrishna Udayar v. Vasudeva Aiyar.
6. ('14) 1 A.I.R. 1914 Cal. 388 : 23 I. C. 977 : 41 Cal. 323, Shew Prosad v. Ram Chunder.

A. I. R. (29) 1942 Calcutta 532

HENDERSON J.

Smt. Mahamaya Debi w/o Shyam Sundar Roy and another—Plaintiffs — Appellants

v.

Indra Narayan Das—Respondent.

Appeal No. 122 of 1941, Decided on 6th March 1942, from appellate order of Dist. Judge, Birbhum, D/- 2nd April 1941.

(a) Bengal Agricultural Debtors Act (7 of 1936), Ss. 34, 20 and 2 (8)—Rent decree tried to be executed — Share of putni transferred by judgment-debtor — Transferee applying under S. 8 — Notice under S. 34 issued to execution Court—Proceedings must be stayed.

R obtained a decree in a rent suit against one *J* and tried to execute it against *J*. *J* transferred 12 annas share in the putni to *A*. *A* made an application under S. 8 and the Board sent a notice under S. 34. The executing Court refused to stay proceedings :

Held that although *A* was not personally liable for the decretal amount he was bound to pay it if he wished to save the putni. He was entitled to make a case that this liability was a debt within the meaning of S. 2 (8) of the Act and under S. 20 of the Act it was for the board to decide whether this liability was a debt or not. Proceedings to realise the money must therefore be stayed on receipt of a notice under S. 34. [P 532 C 2]

(b) Bengal Agricultural Debtors Act (7 of 1936), S. 20—Transfer by third person whether benami — Question is to be decided by civil Court and not under S. 20.

It is not the duty of the board to decide whether a transfer of property by somebody else who is not before the board in favour of the agriculturist is a mere benami transaction. Such a question has nothing to do with the settlement of the debts of an agriculturist and is outside the scope of S. 20 of the Act. It must be decided by the civil Court. [P 533 C 1]

Radhika Charan Chatterji and Susil Kumar Biswas — for Appellants.

Gopendra Nath Das — for Respondent.

JUDGMENT. — This appeal is by two persons who are not judgment-debtors in the execution case. I may just as well say at once that they are the daughter-in-law and the minor son of the judgment-debtors. The fact that they filed this appeal is due to the refusal of the Munsif to obey a notice under S. 34, Bengal Agricultural Debtors Act, in connexion with an application filed by them under the provisions of the Act. The relevant facts are these : The respondent obtained a decree in a rent suit against one Jagadish Chandra Roy. His attempt to execute the decree was successfully baffled by Jagadish who made two applications to boards under the provisions of the Bengal Agricultural Debtors Act. Those applications have been dismissed and there is no longer anything to prevent the respondent from executing the decree which he obtained against Jagadish. On 6th November 1940, however, Jagadish transferred 12 annas share in the putni to the present appellants. The appellants made an application under S. 8, Bengal Agricultural Debtors Act. The board sent a notice under S. 34. The Munsif refused to stay proceedings and an appeal in the District Court was unsuccessful. Although the appellants are not personally liable for the decretal amount they are bound to pay it if they wish to save the putni. They are certainly entitled to make a case that this liability is a debt within the meaning of S. 2 (8) of the Act, and under S. 20 of the Act it is for the board to decide whether this liability is a debt or not. Proceedings to realise the money must therefore be stayed on receipt of a notice under S. 34. I can see no difficulty in that.

The point which the Munsif had to decide therefore was whether on receipt of this notice in connexion with an application by the appellants he was bound to stay the execution proceedings taken against Jagadish. There would have been no diffi-

culty in making a suitable order apart from the provisions of the new S. 168A, Ben. Ten. Act. The appropriate order would be that execution should go on against Jagadish but that the tenure should not be brought to sale. Mr. Das suggested that the tenure should be put up to sale in compliance with the terms of that new section and that he should run the risk that it would be discovered that the interest of Jagadish was only 4 annas. Under the terms, however, of the section it is not possible to put up to sale the interest only of Jagadish. The whole tenure has to be put up to sale and in view of the right of the appellants to save the property this cannot be done unless their application before the board has been disposed of. There is, however, one other matter which requires to be determined. It is of course not surprising that the respondent's case should be that the appellants are benamidars of Jagadish. Of course if they are, they have no interest in the tenure and there is no reason why the execution case should not go on.

This accordingly raises the question whether a matter of this kind has to be decided by the board or the civil Court. I am quite clear that it must be decided by the latter. Under S. 20 of the Act the board has to decide whether the appellants are debtors or not or whether their liability to deposit the decretal amount to save the property is a debt or not. That section must be interpreted with reference to the definitions in S. 2. The definition of 'debtor' is to be found in S. 2, sub-s. (9). It will be for the board to determine whether the appellants are what may be loosely described as agriculturists or whether they are persons who have no right to avail themselves of the benefits of this Act. There is nothing to suggest that it is the duty of the board to decide whether a transfer of property by somebody else who is not before the board at all is a mere benami transaction. Such a question has nothing to do with the settlement of the debts of an agriculturist and is outside the scope of S. 20 of the Act. In my judgment therefore, it must be decided by the civil Court. The appeal is accordingly allowed, the orders of both the Courts below are set aside and the Munsif is directed to decide whether the appellants are the benamidars of the judgment-debtor. If they are, he will proceed with the execution; if they are not, he will stay proceedings in compliance with the notice served under S. 34 of the Act. Both sides will be at liberty to adduce evidence. Costs in this Court and in the lower appellate Court will abide the result, hearing fee two gold mohurs.

R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 533

B. K. MUKHERJEA AND BLANK JJ.

Bejoy Kumar Saha represented by his next friend and guardian mother Kuntalabala Dasi — Appellant

v.

Ramapati Basu, receiver and others — Respondents.

Appeals Nos. 176, 177, 178, 179 and 180 of 1940, Decided on 21st May 1942, from original orders of Dist. Judge, Birbhum, D/- 16th March 1940.

(a) Presidency Towns Insolvency Act (1909), Ss. 17 and 52 (2) (b) — Father and sons constituting Mitakshara joint Hindu family—Father adjudicated insolvent — Undivided interest of sons in joint estate does not vest in Official Assignee under S. 17—But father's power to make sons' interest liable for his untainted debts vests in Official Assignee under S. 52 (2) (b).

Where a father, who together with his sons constitutes a Mitakshara joint family, is adjudicated insolvent, the undivided interest of the sons in the joint estate does not vest in the Official Assignee as a property of the insolvent under S. 17. The power or authority of the father however to make the son's interest liable for his debts contracted not for illegal or immoral purposes, vests in the Official Assignee under S. 52 (2) (b) and the power can be exercised by the Official Assignee subject to all the limitations under which the father himself could exercise it: ('25) 12 A.I R. 1925 P.C. 18 and ('36) 23 A.I.R. 1936 P.C. 277, *Rel. on.* [P 534 C 2]

Hindu law —
('40) Mulla, Page 307 Pt. (v); Page 308 Pt. (a).
('38) Gour, Page 546 Pts. 7-10.

(b) Provincial Insolvency Act (1920) — Construction—In construing Act Court must confine itself to its express provisions.

In construing a particular Insolvency Act, the Court must confine itself to its express provisions and should not be guided by considerations of what the creditor could do under the provisions of the other laws. Cases under the provisions of other Acts depend on different considerations and these decisions are likely to mislead a Court which has to construe a particular Insolvency Act: ('25) 12 A.I.R. 1925 P. C. 18, *Rel. on.* [P 536 C 1]

(c) Provincial Insolvency Act (1920), Ss. 28 (2) and 2 (d) — Mitakshara joint family consisting of father and sons — Father adjudicated insolvent — Whether father's power to make sons' interest liable vests in Official Receiver under S. 28 (2) *(Quære).*

When a father who together with his sons constitutes a Mitakshara joint family is adjudicated insolvent whether the father's power to make the sons' interest liable for his untainted debts vests in Official Receiver under S.28(2). [P 535 C 1; P 536 C 1]

Hindu law —
('40) Mulla, Page 307 Pt. (w); Page 308 Pt. (a).
('38) Gour, Page 546 Pts. 3 and 10.

(d) Hindu law—Joint family — Father under Mitakshara law and manager either in Dayabhaga or Mitakshara joint family — Powers of alienation of family property—Distinction.

As regards powers of alienation over the family property for purposes of family necessity or benefit, the manager or karta under the Dayabhaga law has the same position as a manager under the Mitakshara law. If there are debts binding on the family, a manager would have the right to alienate family property for payment of these debts so as to bind the interest of all the undivided members of the family whether they are adults or minors. There is considerable difference however between the position of a father under the Mitakshara law and that of a manager either in a Dayabhaga or Mitakshara joint family. The capacity of a father to avail himself of his son's interest for satisfying his just debts, is founded on the religious and moral obligation, which Hindu Smriti writers impose upon the son to rescue his father from the penalties arising from non-payment of debts. According to the strict tenets of the Hindu law, the son is bound to discharge the untainted debts of his father whether he received any asset from him or not. A manager on the other hand stands on a different footing altogether. His

a own debts are not binding on his coparceners, and he cannot make the joint estate liable for any personal obligation incurred by him. As an agent or mouth piece of the family he has an implied authority to sell or alienate family property for discharging family debts. These debts must be deemed to have been incurred by or on behalf of the other coparceners also. [P 536 C 1]

Hindu law —

('40) Mulla, Pages 271-279 Ss. 242-244 ; Page 291 S. 255; Page 292 S. 256; Page 325 S. 274; Page 356 S. 295; Page 373 S. 302.

('38) Gour, Page 358 Pt. 2; Page 444 Pt. 5; Page 515 S. 152 (1); Page 526 Pt. 4; Page 531 Para. 1350; Page 532 Para. 1351.

(e) Provincial Insolvency Act (1920), Ss. 28 (2) and 2 (d)—Words "for his own benefit" in S. 28 (2)—Meaning—Joint Dayabhaga family — b Insolvency of manager — Manager's power to sell interest of other coparceners for satisfaction of joint debts does not vest in receiver under S. 28 (2).

A power that can only be exercised for the joint benefit of the bankrupt and another is not a power that can be exercised for his own benefit within S. 2 (d) : (1929) 1 Ch. 435 and (1927) 1 Ch. 283, *Rel. on.* [P 536 C 2]

The power of a manager of joint Hindu family over the joint estate can never be exercised for his own benefit alone. It is exercisable for the benefit of the family as a whole, and it cannot be said that it is a "thing of value" so far as he himself is concerned. The family debts, even if contracted by a manager, must be deemed to be debts incurred by c all the members of the family, who occupy the position of debtors under law, and whose interests in the joint estate are liable to be sold for satisfaction of the same. The creditor has his remedy in law against every one of them but there is no warrant or justification for allowing the receiver in insolvency to seize and sell the share of those coparceners who have not been adjudicated insolvents, simply because the managing member has been so adjudged. Consequently on the insolvency of the managing member of a joint Dayabhaga family who is not and cannot be the father, his power to sell or mortgage the interest of other coparceners for satisfaction of joint debts does not vest in the receiver under S. 28 (2): ('25) 12 A. I. R. 1925 P. C. 18 and ('36) 23 A.I.R. 1936 P.C. 277, *Rel. on*; ('29) 16 A. I. R. 1929 Mad. 166 (view of Curgenven J.), *Appr.*; *Case law discussed.* [P 536 C 1, 2]

d Hindu law —

('40) Mulla, Page 312 S. 265 (3).

('38) Gour, Page 547 Pt. 1.

Rabindra N. Choudhury — for Appellant.

Gopendra Nath Das and Lala Hemanta Kumar — for Respondents.

JUDGMENT. — The facts giving rise to these connected appeals may be shortly stated as follows: There were five insolvency proceedings started by certain creditors against five debtors, to wit, Doman Chandra Saha, Sibadas Saha, Bholadas Saha, Damini Sundari Dasi and Lilabati Dasi, who together with Bijoy Saha an infant who is the appellant before us, constituted a joint Hindu family carrying on business at Sainthia under the names of Doman Chandra Saha, Kunja Lal Saha, and Kunja Lal Saha and Sons. The District Judge of Birbhum by his order dated 14th September 1935 while holding that the debts due by each of the debtors exceeded Rs. 500 in amount, and that there were acts of insolvency committed by all of them, dismissed the e applications for insolvency on the technical ground that they were not properly signed and verified by the petitioning creditors. Against this order, there were five appeals taken to this Court, and this Court by its order dated 13th June 1939 set aside the judgment of the trial Judge and adjudicated all the five debtors insolvents on the petition of one of the creditors named Dhansukh Das Hiralal. The learned Judges did not think it necessary, in these circumstances, to consider the applications of the other creditors. On 22nd September 1939 Ramapati Bose the respondent before us was appointed a receiver in respect of the estates of the insolvents. On 27th January 1940 the receiver reported to the Court that in taking possession of the properties of the insolvents he had to take possession of the undivided 1/6th share of Bijoy the infant cosharer in f the joint estate, although he was not adjudicated an insolvent, and he solicited directions from the Court as to whether the rents and profits in the minor's share should be handed over to him. The matter was heard in the presence of the guardian of the minor, and by his order dated 16th March 1940, it was held by the learned District Judge that as Doman Chandra Saha, the manager of the joint family was adjudicated an insolvent, the power which he had of disposing of the entire property, including the share of the minor for payment of joint business debts, vested in the receiver, and that the receiver could exercise these powers for the benefit of the creditors. It is the propriety of this order that has been challenged on behalf of Bejoy who is the appellant in these five appeals before us.

Mr. Chowdhury who appeared in support of the appeal has contended before us that under S. 28 (2), g Provincial Insolvency Act, all that vests in the receiver is the property of the insolvent and it cannot be said that the right if any of the manager to alienate the joint estate, under certain conditions, for the purpose of satisfying family debts is a property within the meaning of S. 2 (d), Provincial Insolvency Act, which would vest in the receiver under S. 28 of the Act. There are a number of cases, decided by other High Courts in India, where this question was agitated; though there is no authoritative pronouncement on the subject by this Court as yet. The question was raised in 41 C.W.N. 1079[1] but the learned Judges expressly left it undecided. As regards cases coming under the Presidency Towns Insolvency Act, it is now settled by two recent decisions of the Judicial Committee that when a father, who together with his sons constitutes a Mitakshara joint family, h is adjudicated insolvent, the undivided interest of the sons in the joint estate does not vest in the Official Assignee as a property of the insolvent under S. 17, Presidency Towns Insolvency Act. The power or authority of the father however to make the sons' interest liable for his debts contracted not for illegal or immoral purposes, vests in the Official Assignee under S. 52 (2) (b), Presidency Towns Insolvency Act, and the power can be exercised by the Official Assignee subject to all the limitations under which the father himself could exercise it: 52 I.A. 22[2] and 63 I. A. 384.[3]

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1. ('37) 24 A. I. R. 1937 Cal. 517 : 172 I. C. 914: I.L.R. (1937) 2 Cal. 675 : 66 C.L.J. 315 : 41 C.W.N. 1079, Indubala Dassi v. Bakkeswar Baneyi.
2. ('25) 12 A. I. R. 1925 P.C. 18 : 84 I. C. 883 : 52 I.A. 22 : 6 Lah. 1 (P.C.), Sat Narain v. Behari Lal.
3. ('36) 23 A.I.R. 1936 P. C. 277 : 164 I. C. 6 : 63 I. A. 384 : 17 Lah. 644 (P.C.), Sat Narain v. Srikishen Das.

In the first of these cases, the plaintiff appellant claimed a right of pre-emption over an adjoining house on the ground of contiguity. The defence was that as the plaintiff's father who was the karta of a Mitakshara joint family, had been adjudicated insolvent under the Presidency Towns Insolvency Act, the plaintiff's interest in the property by virtue of which the right of pre-emption was claimed, vested in the Official Assignee, and hence no longer existed. The trial Court negatived the defence and gave the plaintiff a decree. On appeal to the Lahore High Court, the learned Judges who heard the appeal made an order referring to a Full Bench the following question :

"Does an order of adjudication against a father vest in the Official Assignee his son's interest in the joint family property ?"

The Full Bench presided over by Shadilal C. J. answered this question in the affirmative. Against that an appeal was taken to the Privy Council and their Lordships of the Judicial Committee reversed the decision of the Full Bench, and restored the judgment of the trial Judge with slight modification. Their Lordships referred in their judgment to the provisions of S. 17 and S. 2 (e), Presidency Towns Insolvency Act, and held that as the father's power of disposal over the son's property was not absolute but conditional on his having debts of a particular type, it could not be regarded as property as defined in S. 2 (e), which contemplates an absolute and unconditional power of disposal. "It may be" so runs the judgment, "that under the provision of S. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee and no such provision should be read into the Act."

In the second case it was expressly held by their Lordships that the capacity of the father of a joint Hindu family governed by Mitakshara law to exercise his power to sell the joint family estate to enforce the pious obligation of his sons to discharge untainted antecedent debts, vests in the Official Assignee under S. 52 (2) (b), Presidency Towns Insolvency Act; and although such powers could be exercised subject to all the limitations under which it could be exercised by the father himself, it does not militate against the provisions of S. 49 (5) or of S. 17, Presidency Towns Insolvency Act. It will be seen that in both these cases, their Lordships of the Judicial Committee based their decision on the express provisions of the Presidency Towns Insolvency Act. Their definite decision was that the power of a Mitakshara father to dispose of his son's property under certain special circumstances was not "property" of the father which could vest in the Official Assignee under S. 17, Presidency Towns Insolvency Act. It was not the property itself but the power of the father relating to that property that would vest in and could be exercised by the Official Assignee under S. 52 (2) (b), Presidency Towns Insolvency Act, which runs as follows :

". . . the property of the insolvent shall comprise the following particulars namely :

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

There is no provision corresponding to S. 52 (2) (b), Presidency Towns Insolvency Act, in the Provincial Insolvency Act of 1920; yet it has been held by different High Courts in India that the power of the father to sell his son's interest for payment of his untainted debts is 'property,' which vests in the receiver under S. 28 (2), Provincial Act. Reference may be made among others to the cases in 49 Mad. 849;[4] 53 All. 239;[5] 55 Bom. 110;[6] 6 Lah. 493[7] and 5 Pat. 476.[8] It will be seen that S. 2 (d), Provincial Insolvency Act, is worded almost in the same manner as S. 2 (e), Presidency Towns Insolvency Act, and according to it the expression 'property' "includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." According to the Judicial Committee S. 2 (e), Presidency Towns Act, contemplates an unconditional power of disposal which the father does not possess over son's property. If the same meaning is attached to S. 2 (d), Provincial Act, it is difficult to see how the father's right could vest in the assignee under that Act. This difficulty was felt by many of the learned Judges who were parties to the above decisions, and some of them were of opinion that S. 2 (d), Provincial Insolvency Act need not be called in aid for this purpose at all, as S. 28 was by itself sufficient to vest the power in the receiver as a species of property belonging to the father : *vide* Krishnan J., in 49 Mad. 849.[4] Others again expressed the view that such power was "property" within S. 2 (d), Provincial Insolvency Act, and that the Judicial Committee was forced to put a strict interpretation upon S. 2 (e), Presidency Towns Act, as otherwise it would have been repugnant to the other provisions of the Act. As however there is no provision relating to 'power' as distinct from 'property' in the Provincial Act, the word 'property' as used in that Act is to be taken in its general sense as signifying a right which has a money value : *vide* Venkata Subba Rao J. in 49 Mad. 849[4] and also Madgavkar and Barlee JJ. in 55 Bom. 110.[6]

Sen J. who was a party to the Full Bench decision in 53 All. 239,[5] was definitely of opinion that the disposing power exercisable by the father in certain circumstances over the undivided shares of the sons was not 'property' within the meaning of S. 2 (d) and S. 28 (2), Provincial Insolvency Act. But it was held by the learned Judge that though the right of the receiver to attach and sell the son's share was not supported by express provisions of the Insolvency Act, yet having regard to the son's undoubted liability for the untainted debts of the father and to the unbroken current of authority on the point, the right in question should be affirmed. It appears that the consideration which weighed with most of the learned Judges who decided the above cases was that as under general law an individual creditor could realise the debts due to him, from the coparcenary property belonging to the debtor as well as to his sons, it would be quite fit and proper to allow the assignee who represents the general body

4. ('26) 13 A.I.R. 1926 Mad. 994 : 97 I.C. 825 : 49 Mad. 849 : 51 M. L. J. 269 (F. B.), Balavenkata Seetharama Chettiar v. Official Receiver, Tanjore.
5. ('31) 18 A.I.R. 1931 All. 162 : 135 I. C. 119 : 53 All. 239 : 1931 A.L.J. 122 (F.B.), Anand Prakash v. Narain Das.
6. ('31) 18 A.I.R. 1931 Bom. 50 : 129 I.C. 153 : 55 Bom. 110 : 32 Bom. L. R. 1362, Haridas Himmat Lal v. Lallu Bhai Mulchand.
7. ('26) 13 A. I. R. 1926 Lah. 41 : 89 I. C. 1022 : 6 Lah. 493 : 26 P. L. R. 848, Khem Chand v. Narain Das.
8. ('26) 13 A. I. R. 1926 Pat. 438 : 98 I. C. 364 : 5 Pat. 476 : 8 P. L. T. 278, Chairman, District Board, Monghyr v. Sheodutt Singh.

of creditors to seize the interest of the sons also for the satisfaction of their debts. Reliance was placed in this connexion upon S. 60, Civil P. C. This we venture to say is a wrong way of approach. As was pointed out by the Judicial Committee in 52 I. A. 22,[2] the question must be decided on the wording of the particular Insolvency Act and on that Act alone. Cases under S. 60, Civil P. C., or provisions of other Acts depend on different considerations and these decisions are likely to mislead a Court which has to construe a particular Insolvency Act.

It is gratifying to note that a Division Bench of the Patna High Court has in a recent case taken a different view and held that the father's power over son's property does not vest in the receiver under S. 28 (2), Provincial Insolvency Act : 15 Pat. 363.[9] It is not necessary for us to decide this matter finally in this case ; for even if we assume that the father's power does vest in the receiver under the Provincial Insolvency Act, that would be of little assistance to the respondent in the present case. In the case before us we have to deal with a joint family governed by the Dayabhaga law, where the rights of the father do not come into the picture at all. There can be no joint family under the Bengal law consisting of the father and the sons, and there is no question of the father having any power over the son's interest, which he can avail of for satisfaction of his just debts.

The question for our consideration is whether on the insolvency of the managing member of a joint Dayabhaga family who is not and cannot be the father, his power to sell or mortgage the interest of other coparceners for satisfaction of joint debts, vests in the receiver under S. 28 (2), Provincial Insolvency Act. It is not disputed that as regards powers of alienation over the family property for purposes of family necessity or benefit, the manager or karta under the Dayabhaga law has the same position as a manager under the Mitakshara law : (Mayne p. 469, Edn. 10). If there are debts binding on the family, a manager would have the right to alienate family property for payment of these debts so as to bind the interest of all the undivided members of the family whether they are adults or minors. There is considerable difference however between the position of a father under the Mitakshara law and that of a manager either in a Dayabhaga or Mitakshara joint family. The capacity of a father to avail himself of his son's interest for satisfying his just debts, is founded on the religious and moral obligation, which Hindu Smriti writers impose upon the son to rescue his father from the penalties arising from non-payment of debts. According to the strict tenets of the Hindu law, the son is bound to discharge the untainted debts of his father whether he received any asset from him or not. A manager on the other hand stands on a different footing altogether. His own debts are not binding on his coparceners, and he cannot make the joint estate liable for any personal obligation incurred by him. As an agent or mouthpiece of the family he has an implied authority to sell or alienate family property for discharging family debts. These debts must be deemed to have been incurred by or on behalf of the other coparceners also. Even if S. 2 (d), Provincial Insolvency Act, be held to include cases where the power of disposal is exercisable within certain limits or conditions, it must be a power that can be exercised for the benefit of the person who holds it. This is also the language of S. 2 (e) and S. 52 (2) (b), Presidency Towns Insolvency Act, as well as of S. 60, Civil P. C. The expression "for his own benefit" has been taken into the Indian Insolvency law from the corresponding English Bankruptcy Statutes, and it has been definitely held in England that a power that can only be exercised for the joint benefit of the bankrupt and another is not a power that can be exercised for his own benefit (1929) 1 Ch. 435[10] and (1927) 1 Ch. 283.[11]

The power of a manager over the joint estate can never be exercised for his own benefit alone. It is exercisable for the benefit of the family as a whole, and it cannot be said that it is a "thing of value" so far as he himself is concerned. As we have said just now, the family debts, even if contracted by a manager, must be deemed to be debts incurred by all the members of the family, who occupy the position of debtors under law, and whose interests in the joint estate are liable to be sold for satisfaction of the same. The creditor has his remedy in law against every one of them but there is no warrant or justification for allowing the receiver in insolvency to seize and sell the share of those coparceners who have not been adjudicated insolvents, simply because the managing member has been so adjudged. As was pointed out by the Judicial Committee in 52 I. A. 22[2] in construing a particular Insolvency Act, we must confine ourselves to its express provisions and should not be guided by considerations of what the creditor could do under the provisions of other laws. There are undoubtedly a number of cases decided by other High Courts, where the view has been taken that even the manager's power of alienating the family property for family debts vests in the receiver on the manager being adjudged a bankrupt. One of the earliest pronouncements on this point is that of the Madras High Court in 19 Mad. 74[12] where the Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who sued for possession. The younger brother of the insolvent contested the suit. It was held, that the Official Assignee could convey the shares of those persons upon whom the debts of the insolvent were binding and reliance was placed among others upon the decisions of the Bombay High Court in 11 Bom. 37[13] and 7 Bom. 438.[14] These were cases relating to the authority of the father under the Mitakshara law, but Subrahmanya Ayyar J. who delivered the judgment was of opinion that the same principle was applicable to the case of a manager. The decision in 19 Mad. 74[12] was followed by the same High Court in 26 Mad. 214.[15] All these cases were decided under the Insolvency Act (11 and 12 Vict., Ch. 21) and their Lordships of the Judicial Committee in 52 I. A. 22[2] expressly distinguished these cases on the ground that the Indian decisions under that Act, could not be regarded as good law under the provisions of the Presidency Towns Insolvency Act.

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9. ('36) 23 A. I. R. 1936 Pat. 115 : 161 I. C. 167 : 15 Pat. 363 : 17 P. L. T. 39, Nilkantha Narayan v. Debendra Nath.

10. (1929) 1 Ch. 435: 98 L.J.Ch. 142 : (1929) B. & C. R. 15: 140 L.T. 553, In re Taylor's Settlement Trusts.

11. (1927) 1 Ch. 283: 96 L.J.Ch. 104 : (1927) B. & C.R. 30:136 L.T. 528: 71 S.J. 18, In re Mathieson.

12. ('96) 19 Mad. 74, Rangayya Chetti v. Thanikachalla Mudali.

13. ('87) 11 Bom. 37, Jagabhai Lalubhai v. Bhukandas Jagjivan Das.

14. ('83) 7 Bom. 438, Fakir Chand Motichand v. Motichand Hurruck Chand.

15. ('03) 26 Mad. 214, Nunna Brahmayya Setti. v. Venkitswamy.

The point again came up for consideration of the Madras High Court in 52 Mad. 246.[16] The case was heard first by a Division Bench consisting of Odgers and Curgenven JJ. The learned Judges differed in their opinion. Odgers J. expressed the view that the manager's power vested in the receiver while Curgenven J. was definitely of opinion that it did not, as the disposing power which the manager has was exercised by him in a representative capacity and not for his own benefit. There was a reference to Devadoss J. under S. 98, Civil P. C. Devadoss J. agreed with Odgers J. simply on the ground that he was bound by previous authorities, though his own views were clearly in agreement with those of Curgenven J. This decision was followed by the Lahore High Court in 15 Lah. 9.[17] In our opinion the view taken by Curgenven J. was right and the decisions by reason of which Devadoss J. felt constrained to take a different view were mostly decisions under other Acts, which were distinguished on that ground by the Judicial Committee in 52 I. A. 22.[2] Happily, in this Court, we are not trammelled by any previous decision, and the view we have taken seems to us to be the only reasonable view, having regard to the observations of the Judicial Committee in the two cases mentioned above. The result is that in our opinion the contention of the learned advocate for the appellant should succeed and the appeal must be allowed. The order of the District Judge is set aside and it is declared that the receiver would have by virtue of the adjudication alone, no power of alienating the share of the appellant in the joint estate. No order as to costs.

G.N./R.K. *Appeal allowed.*

16. ('29) 16 A.I.R. 1929 Mad. 166 : 114 I.C. 345 : 52 Mad. 246 : 55 M. L. J. 721, Official Receiver, Anantapur v. Ramchandrappa.

17. ('33) 20 A.I.R. 1933 Lah. 901: 149 I.C. 693: 15 Lah. 9 : 36 P. L. R. 450, Mt. Champa v. Official Receiver, Karachi.

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R. C. MITTER AND KHUNDKAR JJ.

Surendranath Sarkar and others — *Appellants*

v.

Sree Sree Iswar Laksmi Durga and others established by Harachandra Kundu through their next friend shebait Sailendranath Kundu and others — *Respondents.*

Privy Council Appeal No. 14 of 1941, Decided on 29th June 1942, for leave to appeal to His Majesty in Council from appellate decree No. 269 of 1937.

(a) Civil P. C. (1908), Ss. 110 and 109 — Appellate judgment of High Court not one of affirmance — Leave for appeal to His Majesty in Council— Questions to be determined stated.

Where the appellate judgment of the High Court is not a judgment of affirmance two questions must be determined before leave for appeal to His Majesty in Council can be granted. The first question is whether the value of the subject matter of the suit and of the proposed appeal is over rupees 10,000 and the second is whether the proposed appeal is against a decree or final order of the High Court. [P 537*h*]

C. P. C. —
('40) Chitaley, S. 109, N. 2 (3).
('41) Mulla, Page 392 Note "Construction of the section".

(b) Civil P. C. (1908), S. 109 — Appellate judgment of High Court determining all rights in controversy and directing that plaintiff appellant would be entitled to recover possession of certain suit properties on payment of sum of money to defendant — Amount of that sum left to be determined by Court of first instance according to directions in High Court's judgment and decree — High Court's order held was preliminary decree and decree within S. 109 — Order held also was final order within S. 109.

The High Court by its appellate judgment which was not a judgment in affirmance conclusively determined, as far as it was concerned all the rights in controversy and ordered that the plaintiff-appellant would be entitled to recover possession of certain properties in suit valued at more than rupees 10,000 upon payment of a sum of money to the defendant the amount of which was left to be determined by the Court of first instance according to the directions given in the High Court's judgment and decree :

Held that the order of the High Court was a preliminary decree and a decree within the meaning of S. 109 : ('22) 9 A.I.R. 1922 P.C. 237, *Rel. on.* [P 538*h*]

C. P. C. —
('40) Chitaley, S. 109, N. 3, Pt. 1.
('41) Mulla, Page 387, Pt. (x).

(c) Civil P. C. (1908), S. 109 — Words "final order" in S. 109—Meaning of—Order determining rights of parties to suit — Certain subordinate matters of detail not disposed of—Order is final within S. 109 — Order held final within S. 109 *(Obiter)*.

It cannot be said that an order cannot be regarded as "final" if it does not completely dispose of the suit. It would not be considered as "final" if the rights of the parties were left still to be determined. If the rights of the parties to the suit had been determined and the suit was not finally' disposed of in the sense of its being finally terminated in the Courts of India, because certain subordinate matters of detail have not been disposed of, the order would still be regarded as final within section 109. (Order held final within S. 109) : ('20) 7 A.I.R. 1920 P.C. 86 and ('33) 20 A.I.R. 1933 P.C. 58, *Expl., and Disting.* [P 539 *d,e*]

C. P. C. —
('40) Chitaley, S. 109, N. 4. Pt. 4.
('41) Mulla, Page 388, Pt. (l)

Hiralal Chuckerbutty and Syamadas Bhattacharya — for Appellants.

Atul Chandra Gupta and Satyendra Nath Ghose — for Respondents.

ORDER.—Defendants 1 to 3 are the petitioners before us. They filed this application for leave to appeal to His Majesty in Council under the provisions of S. 109, Civil P. C. The judgment of this Court is not a judgment of affirmance. Besides, the proposed appeal to His Majesty in Council involves substantial questions of law. As it is a judgment of reversal, two questions will have to be determined before we can grant leave. The first question is whether the value of the subject-matter of the suit and of the proposed appeal is over Rs. 10,000; and the second is whether the proposed appeal is against a decree or final order of this Court. On the first

a question a report was asked for from the lower Court and that report is that the subject-matter of the suit and of the proposed appeal, which are three leasehold properties is valued at Rs. 35,000. The plaintiff opposite party does not challenge the report of the learned Subordinate Judge. The first condition, therefore, is satisfied. The only other point for consideration is whether the proposed appeal is against a decree or final order passed by this Court. On that point, the parties, viz., the petitioners to England and the plaintiff opposite party are at issue. The contention of the petitioners is in the first instance that the challenge order amounts to a decree and, secondly that in any event it is a final order. Both these positions are controverted by Mr. Gupta who is appearing for the plaintiff opposite party.

For the purpose of deciding this question, it is b necessary to state in brief the nature of the suit, the contentions of the respective parties therein and the decision arrived at by this Court by Mukherjea and Biswas JJ. The plaintiff instituted the suit as the next friend of a number of deities Sree Sree Iswar Lakshmi Durga and others. The suit was for the recovery of the temple in which those deities were located, for moveable properties belonging to the said deities described in schedule kha and immovable properties which the plaintiff described in schedule 'ka' of the plaint. His case was that he was the sole shebait of the said deities at the time of his suit, inasmuch as the other shebaits had forfeited their rights, that some of the former shebaits had unlawfully alienated the temple and the immovable properties belonging to the deities by granting four leases to the defendants. On a declaration c that those leases were not binding on the deities he prayed for the recovery of the properties covered by those leases, also of the temples and the moveable properties. The defence of the defendants was, first, that the plaintiff was not the shebait of the deities; secondly, that he was estopped from challenging any one of the aforesaid four leases and that in any event the four leases were valid leases and binding on the deities. It is not necessary to state the other defences which were raised in the suit. No question turns upon the first lease now, because the final decision of this Court was that that lease which was for a term of years had spent itself before the suit.

All the three Courts, viz., the Court of the Subordinate Judge who heard the original suit, the Court of the Additional District Judge of the 24 Parganas who heard the first appeal and this Court which d heard the second appeal came to the conclusion that the plaintiff was the sole shebait of the deities and that the fourth lease was inoperative. The learned Subordinate Judge and the learned District Judge, however, held that the second and the third leases were binding on the deities. On that finding both the Court of first instance and the first appellate Court dismissed the plaintiff's claim to possession of the immovable properties covered by the second and the third leases. The second appeal was first heard by a Division Bench consisting of S. K. Ghose and Mukherjea JJ., who kept the appeal on their file but requested the lower appellate Court to determine certain questions of fact and to send the findings on those questions to this Court. The findings on those points which had been remitted to the lower Court were received and another Division Bench of this Court, viz., Mukherjea and Biswas JJ. (S. K. Ghose J. having then retired), heard the case and pronounced their judgment on 19th March 1941, which is reported in 45 C. W. N. 665.[1] The learned Judges came to the conclusion that the second and the third leases were inoperative. A further point which was raised by the defendants in the lower Court but not decided by it was then considered. It was to this effect, namely, whether the plaintiff could recover possession of properties included in the second and third without indemnifying the defendants for the sums of money which they had spent in repairing the temple, in carrying on the deb-sheba or in recovering the immovable properties of schedule 'ka' from persons who were possessing them as trespassers at a time when the defendants obtained their leases from some of the shebaits and which leases were ultimately declared void by this Court. As we have stated above, this Court found that the plaintiff was the sole shebait, that no estoppel operated against him ; that the first lease which was for a term had spent its force ; and that the second, third and fourth leases were void and not binding on the deities.

With regard to the moveables described in schedule 'kha' and the temple, an unconditional decree was passed in favour of the plaintiff. With regard to the rest of the immovable properties, this Court came to the conclusion that the plaintiff was also entitled to get possession of the same after evicting the defendants therefrom. But at the same time this Court came to the conclusion that the defendants were entitled to be indemnified for the monies which they had spent in recovering the properties from the possession of the trespassers. For the purposes of finding out what would be the amount to which the defendants would be entitled to, they gave certain directions in their judgment and decree. Those directions were to this effect, viz., that the Court of first instance would take accounts on certain heads indicated in the judgment and decree. The order which was made by this Court with regard to the immovable properties of schedule 'ka' save and except the temple and its site in respect of which an unconditional decree was made in favour of the plaintiff was that if the plaintiff paid the sum that might be found so due to the defendant, he would get possession of those immovable properties. The order was in effect that if the plaintiff failed to pay according to the directions contained in the judgment of this Court, his claim to those immovable properties was to be dismissed. The defendants in their proposed appeal to the Privy Council challenge principally the findings of this Court relating to the validity of the aforesaid three leases. In these circumstances, the question is whether the order which has been passed by this Court against which the appeal is proposed to be taken to His Majesty in Council is a decree or at least a final order. In our judgment, it is a decree and a preliminary decree. The judgment of this Court has conclusively determined, as far as this Court is concerned all the rights in controversy. Only the amount, the payment of which has been made conditional for the recovery of the properties included in schedule 'ka' save and except the temple and its site, has been left to be determined by the Court of first instance. In the view which we are taking, we are not only supported by the definition of a 'decree' as contained in the Civil Procedure Code but also by the decision of the Judicial Committee in 49 I.A. 108.[2] The list

1. ('41) 45 C.W.N. 665, Iswar Lakshmi Durga Har Tatneswar v. Surendra Nath.
2. ('22) 9 A.I.R. 1922 P.C. 237 : 67 I.C. 124 : 49 Cal 560 : 49 I.A. 108 (P.C.), Sanyasi Charan v. Krishnadhan Banerjee.

of preliminary decrees mentioned in Order 20 of the Code did not exhaust the whole list of preliminary decrees.

In this view of the matter, it is not necessary for us to consider whether the order against which the appeal is proposed would have been a final order or not within the meaning of S. 109, Civil P. C. If that was necessary, we would have been inclined to hold that it was a final order. The two cases cited by Mr. Gupta, namely, 47 I.A. 124[3] and 60 I.A. 76[4] are distinguishable on facts. In the first case, the challenged order was an order refusing the stay of a suit based on a contract. In the second case, the only point that was decided by the High Court related to an order of remand passed by the final Court in India after reversing the trial Judge on a preliminary point. There were thus in those two cases decisions only on issues which were issues in bar. No decision was arrived at by the High Court which related to the rights of the parties and there was no adjudication on their rights. In the last mentioned case, namely, in the case reported in 60 I.A. 76[4] the Right Hon'ble Sir George Lowndes noticed two earlier decisions in 18 I. A. 6[5] and 22 I. A. 1.[6] Those cases were decided under the Code of 1882 where no distinction had been made between a preliminary decree and a final decree. But in referring to those cases, Sir George Lowndes said that there would have been no difficulty in the High Court itself giving leave if those cases had arisen when the Code of 1908 was in force. In the first case above mentioned, it was ruled that if the cardinal points in the case involving the rights of the parties to the suit had been adjudicated upon by the final Court of appeal in India, the matter could be taken on appeal to His Majesty in Council. Keeping in view those observations of Sir George Lowndes in respect of these cases and the fact that he relied expressly upon 47 I. A. 124[3] we have to see what meaning should be attributed to a later observation made by him at the bottom of p. 81 and the top of p. 82 of the report. The observations are to the following effect :

"Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order 'finally disposes of the rights of the parties' and he held that the order then under appeal did not finally dispose of those rights, but left them 'to be determined by the Courts in the ordinary way.' It should be noted that the appellate Court in India was of opinion that the order it had made 'went to the root of the suit, namely, the jurisdiction of the Court to entertain it,' and it was for this reason that the order was thought to be final, and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (a) of the Code."

In our judgment, these observations do not mean that an order cannot be regarded as 'final' if it does not completely dispose of the suit. It would not be considered as 'final' if the rights of the parties were left still to be determined. If the rights of the parties to the suit had been determined and the suit was not 'finally' disposed of in the sense of its being finally terminated in the Courts of India, because certain subordinate matters of detail have not been disposed of, (points of the nature which were not disposed of in 22 I.A. 1[6] above referred to) the order would still be regarded as final. But in the view that we have taken that the proposed appeal is against a decree of this Court, it is not necessary to rest our decision on the ground that the order proposed to be appealed against was a final order. We, accordingly, allow this application for leave and grant the certificate. Let the necessary certificate be drawn up.

G.N./R.K. *Application allowed.*

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3. ('20) 7 A.I.R. 1920 P.C. 86 : 56 I.C. 302 : 47 Cal. 918 : 47 I.A. 124 : 14 S.L.R. 191 (P.C.), Ram Chand Manjimal v. Goverdhandas Vishindas Ratanchand.
4. ('33) 20 A.I.R. 1933 P.C. 58 : 142 I.C. 328 : 11 Rang. 58 : 60 I.A. 76 (P.C.). Abdul Rahman v. D. K. Cassim & Sons.
5. ('91) 15 Bom. 155 : 18 I.A. 6 : 5 Sar. 639 (P.C.), Rahimbhoy Habibhoy v. Turner.
6. ('95) 17 All. 112 : 22 I.A. 1 (P.C.), Syed Muzhar Husein v. Bodha Bibi.

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BISWAS J.

Abdul Majid Mridha — Defendant — Appellant

v.

Amina Khatun d/o Abbas Mridha — Plaintiff — Respondent.

Appeal No. 906 of 1939, Decided on 26th February 1942, from appellate decree of Dist. Judge, Faridpur, D/- 24th January 1939.

(a) Civil P. C. (1908), Ss. 2 (2) (b) and 107(2) —Scope of S. 2 (2) (b) — Order dismissing suit or appeal for non-payment of additional court-fee is not "order of dismissal for default" within S. 2 (2) (b) but decision under Court-fees Act and is appealable as decree.

Section 2 (2) (b) is not meant to apply to any and every dismissal for default, but only where the statute expressly provides for the making of an "order" in that behalf, as in O. 9, Civil P. C. Neither under the Code nor under the Court-fees Act is there any provision for an "order of dismissal" for default in payment of court-fee. The Code does not in terms contemplate a dismissal at all in such a case, but provides, expressly in the case of a suit (under O. 7, R. 11), and impliedly in the case of an appeal (under the said rule read with section 107 (2)) for rejection of the plaint or of the memorandum of appeal as the case may be. If instead of taking the form of rejection of the plaint or memorandum of appeal for default in payment of court-fee the order passed is one of dismissal of the suit or the appeal, it cannot be regarded as an 'order of dismissal for default' within the meaning of S. 2 (2) (b). The order may well be under the provisions of the Court-fees Act (S. 8B (3) or S. 12, para. (ii), cl. (a) of the Act as amended in Bengal). Consequently an order dismissing a suit or appeal for non-payment of additional court-fee is not an "order of dismissal for default" within S. 2 (2) (b), Civil P. C., but is a decision on question of court-fee involving the dismissal of the suit or appeal under the Court-fees Act and is appealable as a decree as being an adjudication which conclusively determines the rights of the parties with regard to a matter in controversy between them. It is wholly immaterial that the appeal is directed not against the adjudication itself on the question of court-fee but against the consequent order of dismissal: ('32) 19 A. I. R. 1932 Cal. 482 and ('36) 23 A. I. R. 1936

a Cal. 804, *Expl.*; ('18) 5 A.I.R. 1918 P. C. 188, *Ref.* [P 541*d*,*e*,*f*]

C. P. C. —
('40) Chitaley, S. 2 (2) N. 16.
('41) Mulla, Page 10 N. "Order of dismissal for default."

(b) Court-fees Act (1870), Sch. 2, Art. 17 (iii) and S. 7 (iv) (c)—Agreement between Mahomedan husband and wife at time of marriage entitling wife to divorce if husband married another woman — Husband marrying other woman—Suit by wife for declaration that there had been talak of her husband by tafweez—Allegations of cruelty made in plaint with view to justify plaintiff's action in exercising her power of tafweez—Suit held was governed by Sch. 2, Art. 17 (iii) and not S. 7 (iv) (c).

b The plaintiff a Mahomedan lady made the case that she had been married to the defendant in 1922 and she definitely asserted that an agreement had been entered into at the time by which it was provided that she would have liberty to divorce herself from her husband, if the latter contracted another marriage. It was alleged that the husband did marry another woman about the year 1926 or 1927. In 1935 the defendant was said to have turned out the plaintiff from his house. The plaintiff thereafter claiming to act in exercise of her authority under the ante-nuptial agreement, purported to repudiate herself, and her case was that the marriage consequently stood dissolved under the doctrine of tafweez which is an essential part of the Mahomedan law of divorce. The plaintiff accordingly prayed for a declaration that there had been such a talak by her of her husband by tafweez. The allegations c of cruelty in the plaint were made with a view to justify the plaintiff's action in exercising her power of tafweez. The prayer clause was expressly limited to asking for a declaratory decree only :

Held that the suit was governed by Sch. 2, Art. 17 (iii) and not S. 7 (iv) (c). [P 542*b*]

(c) Court-fees Act (1870), Ss. 14 and 15 — Apart from Ss. 14 and 15 Court can in proper cases direct refund of court-fee—Court-fee paid under order subsequently held to be wrong — Court can direct refund.

There is no express provision in the Court fees Act which entitles a party to a refund of court-fee as a matter of course, in a case which does not come either under S. 14 or S. 15. But apart from these provisions, the Court in proper cases can make such d an order for refund such as where it is found that the court-fee had been paid under an order subsequently held to be wrong. [P 542*d*]

Surendra Nath Das Gupta — for Appellant.
Nirmal Chandra Chakravarty—for Respondent.

JUDGMENT.—In this case the learned District Judge of Faridpur has dismissed an appeal for non-prosecution on the ground that the appellant failed to pay the additional court fee on his memorandum of appeal which has been demanded of him. The appeal arose out of a suit by a Mahomedan wife against her husband in which she asked for a divorce. At the hearing the defendant, though previously served with summons, failed to appear. One witness was thereupon examined on behalf of the plaintiff, and on this evidence, the learned Munsif holding the claim proved made an ex parte decree on 25th November 1937 declaring the marriage dissolved. There was an application under O. 9, R. 13, Civil P. C., for setting aside the decree, which ultimately failed. The defendant had also taken an appeal to the District Judge, and it is against the dismissal of this appeal on the ground stated that the present appeal is directed. e

It appears that the plaintiff had paid a sum of Rs. 15 as court-fee on her plaint, evidently treating the suit as one for a declaration pure and simple. The defendant paid a similar court-fee on his memorandum of appeal in the lower appellate Court. Having regard to the averments in the plaint, the learned District Judge, however, took the view that the suit came within the category of a suit for a declaration where consequential relief was prayed: in other words, that it came under S. 7, para. (iv), cl. (c), Court-fees Act, so that an ad valorem court-fee was payable both on the plaint and on the memorandum of appeal. He calculated the amount due on the sum of Rs. 1100 at which the plaintiff had valued her suit for the purposes of jurisdiction. On f 16th December 1938 the learned Judge accordingly made order on either party to pay the deficit court-fee on this basis. The plaintiff-respondent duly paid the amount, but the defendant-appellant failed to do so within the time allowed, and thereupon, on 24th January 1939 the Court made the order dismissing the appeal with costs for non-prosecution. A decree was afterwards drawn up in these terms, and the present appeal has been preferred against this decision as an appeal from appellate decree. On behalf of the respondent, Mr. Chakravarty has raised a preliminary objection to the competency of the appeal. His contention is that the dismissal of the appeal by the learned District Judge amounted to a rejection of the memorandum of appeal, and as such, did not come within the definition of a decree under S. 2, sub-s. (2), Civil P. C., and that g in any case, the dismissal was one for default, and this expressly excluded from the definition under cl. (b) of the said sub section.

In support of his argument, Mr. Chakravarty relies on two cases, 59 Cal. 388[1] and 40 C. W. N. 1149.[2] These cases lend some support to his view, but in my opinion, they do not carry him all the way, and it is also doubtful how far they may be regarded as decisions on the particular point in controversy. In the first of these cases, the Court below had made an order rejecting a memorandum of appeal for non-payment of deficit court-fee. Thereafter on the appellant's application, the time for payment was extended and on the court-fee being paid within the extended time, the Court ordered the appeal to be registered. The respondent appeared and objected that the last order was without jurisdiction, but the objection was overruled. Against h this decision the respondent moved this Court, and it was argued on his behalf that by virtue of O. 7, R. 11, read with S. 107, sub-s. (2), Civil P. C., the order rejecting the memorandum of appeal was a decree, and that as it had not been set aside by appeal or review, it had become final. The learned Judges negatived this contention, and it is on the observations which Suhrawardy J. made in this connexion that Mr. Chakravarty relies :

"Section 107 (2) invests an appellate Court with the same powers as are conferred on a Court of original jurisdiction. It does not purport to give the order passed by an appellate Court the same effect as

1. ('32) 19 A. I. R. 1932 Cal. 482 : 138 I. C. 643 : 59 Cal. 388, Jnanadasundari Shaha v. Madhab Chandra.
2. ('36) 23 A. I. R. 1936 Cal 804 : 168 I. C. 203 : I.L.R. (1937) 1 Cal. 103 : 40 C.W.N. 1149, Charusila Dasi v. Abhilas Bauri.

an order passed by an original Court of a like nature. Section 2 expressly says that 'decree' shall be deemed to include the rejection of a plaint. If it was the intention of the Legislature to include within the definition of 'decree' an order rejecting a memorandum of appeal, it would have expressly said so."

It will be seen, however, that the actual decision in the case proceeded on a different ground. In the second case, these observations were quoted with approval, but that was an appeal against the decision of a Special Judge under S. 109A (now S. 115C), Ben. Ten. Act, and on the question of the competency of the appeal, it was sufficient to hold as in fact it was held that under this section an appeal would lie out of a proceeding under S. 105 only when there had been an investigation and determination of a question under S. 105A. Nasim Ali J. who delivered the judgment of the Court, did no doubt also express the view that the order of the Special Judge, dismissing the appeal before him on the ground of the appellant's failure to pay the additional court-fee which had been demanded from him, was in substance an order of rejection of the memorandum of appeal, and as such, not a decree and hence not appealable.

I am still however far from satisfied that, even giving full effect to these decisions, they may be regarded as completely answering the question as to the appealability of such an order as was made in the present case. In my opinion, all that was really held was that though, by virtue of S. 107 (2) of the Code, the Court might reject a memorandum of appeal on a ground analogous to that on which a palint could be rejected under O. 7, R. 11, the rejection of a memorandum of appeal could nevertheless not be held to come within the words "rejection of a plaint" occurring in S. 2, sub-s. (2). But as I apprehend the matter, to say that is not to say that such an order of rejection might not come within the definition of a decree at all. It will doubtless be excluded from the definition, if, as is Mr. Chakravarty's further contention, the order can be said to be an "order of dismissal for default" within the meaning of cl. (b) of the said sub section: otherwise, looking to the substance of the order, I do not see why it cannot be held to be a decree as being an adjudication which conclusively determines the rights of the parties with regard to a matter in controversy between them.

I do not think that where a suit or an appeal is dismissed for non-payment of court-fee, the dismissal can be treated as an "order of dismissal for default" under cl (b), and it is worthy of note that such a view had not been put forward in any of the cases cited by Mr. Chakravarty. For one thing, it is to be observed that cl. (b) does not speak generally of a dismissal for default, but uses the words "any order of dismissal for default", suggesting to my mind that it is not meant to apply to any and every dismissal for default, but only where the statute expressly provides for the making of an "order" in that behalf, as in O. 9, Civil P. C. Neither under the Code nor under the Court-fees Act is there any provision of such an "order of dismissal" for default in payment of court-fee. Secondly, it will be seen that the Code does not in terms contemplate a dismissal at all in such a case, but provides, expressly in the case of a suit (under O. 7, R. 11), and impliedly in the case of an appeal (under the said rule read with sub-s. (2) of S. 107), for rejection of the plaint or of the memorandum of appeal, as the case may be. Whether such rejection may be a decree in one case, but not in the other it seems to me all the same that if instead of taking the form of rejection of the plaint or the memorandum of appeal, the order passed is one of dismissal of the suit or the appeal, it cannot be regarded as an 'order of dismissal for default' within the meaning of S. 2, sub-s. (2), cl. (b). The order may well be under the provisions of the Court-fees Act (S. 8B, sub-s. (3) or S. 12, para. (ii), cl. (a) of the Act as amended in Bengal). These provisions distinctly contemplate a decision by the Court as to the sufficiency of the court-fee paid, and enjoin dismissal for non-compliance with the order which the Court may make as the result of such decision for payment of additional court-fee. It may be as the Judicial Committee observed in 46 I. A. 24[3] at p. 32, that the Court fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State, but that does not mean that a question of court-fee may not be inter partes, so as to constitute a decision thereon an adjudication which conclusively determines the rights of the parties on a matter in controversy in the suit or appeal. I see no reason, therefore, why such a decision involving the dismissal of a suit or an appeal under the Court-fees Act should not be held to be appealable as a decree. In my opinion, it should be wholly immaterial that the appeal is directed, not against the adjudication itself, but against the consequent order of dismissal.

In the present case, it will be observed that rightly or wrongly, the dismissal of the appeal followed upon an adjudication not as to the insufficiency of the court-fee paid, but on a question of the classification of the suit for the purposes of S. 7, Court-fees Act, which, as now clearly stated in the explanation added to S. 12 by the Bengal amendments, is quite distinct from a question relating to valuation only. Such an adjudication should all the more, therefore, attract the definition of a decree. Upon a careful consideration of the matter, I must consequently overrule the preliminary objection, and hold the appeal to be competent. Incidentally, I may point out that though in the memorandum of appeal in this Court the only order referred to is that of 24th January 1939 whereby the learned District Judge dismissed the appeal before him for non-prosecution, the previous order of 16th December 1938 which contained the decision on the question of court-fee, is included in the order sheet a certified copy of which was filed with the memorandum of appeal. To avoid any technical objection, the present appeal may well be regarded as one against the earlier order as well as that passed on 24th January 1939.

Turning to the merits of the appeal, I think the learned Judge was wrong in treating the suit as a suit for a declaratory decree and consequential relief, and demanding court-fee on that basis. He took the view that the plaintiff had not only asked for a declaration that her marriage had already been dissolved, but further asked for a dissolution of the marriage by the Court on the ground of cruelty. I have read the plaint myself, and that is not how I should look at it. The plaintiff made the case that she had been married to the defendant on 16th January 1922 and she definitely asserted that an agreement had been entered into at the time by which it was provided that she would have liberty to divorce herself from her husband, if the latter contracted another marriage. It was alleged that the husband did marry another woman 10 or 11

3. ('18) 5 A.I.R. 1918 P. C. 188 : 50 I. C. 280 : 43 Bom. 507 : 46 I. A. 24 (P.C.), Rachappa Subrao v. Shidappa Venkatrao.

years before suit, that is, about the year 1926 or 1927. In Falgoon, 1341 B. S. (corresponding to February-March 1935) the defendant is said to have turned out the plaintiff from his house. The plaintiff thereafter claiming to act in exercise of her authority under the ante-nuptial agreement, purported to repudiate herself, and her case was that the marriage consequently stood dissolved under the doctrine of tafweez, which, as is well known, is an essential part of the Mahomedan Law of Divorce. The plaintiff accordingly prayed for a declaration that there had been such a talak by her of her husband by tafweez. The learned Judge seemed to think that there was an alternative prayer for dissolution of marriage on the ground of cruelty. There were certainly allegations of cruelty in the plaint, but as I read it, these allegations were made with a view to justify the plaintiff's action in exercising her power of tafweez. The prayer clause was expressly limited to asking for a declaratory decree only. In my opinion, therefore, the suit was governed by Art. 17, cl. (iii) of Sch. 2, Court-fees Act, and only a fixed fee was payable. Assuming that the suit was also for a dissolution of marriage in the alternative, I think such a relief would come under clause (vi) of Art. 17, and not under S. 7, para. (iv), cl. (c) and an additional fee on this basis would be payable under S. 17, Court-fees Act, in respect of this relief. The result is that in my opinion the order of the learned Judge calling for additional court-fees under S. 7, para. (iv), cl. (c) must be set aside, and he should be directed to restore and re-hear the appeal.

At such re-hearing, the learned Judge will consider whether the evidence given on behalf of the plaintiff really establishes the case with which she came to Court. The plaintiff herself was not examined, but the only witness who came into the box on her behalf was her father, who did not however say a word about the alleged agreement for talak by tafweez, but merely spoke about some alleged acts of cruelty. Even if the plaintiff is supposed to have made a case of cruelty in her plaint, it will be for the Court to consider how far the evidence is sufficient to prove such cruelty as would justify a dissolution of a Mahomedan marriage, and in this connexion, it may have also to consider whether Act 8 of 1939 can apply to the case, seeing that the suit was instituted before the Act came into force. The appeal is accordingly allowed with costs, and the case remitted to the lower appellate Court to be dealt with as directed above. I assess the hearing fee at two gold mohurs.

In view of the judgment just delivered, Mr. Chakravarti on behalf of the plaintiff-respondent asks for an order for refund of the additional court-fees which his client had to pay under the order of the learned District Judge. There is no express provision in the Court-fees Act which entitles a party to a refund, as a matter of course, in a case which does not come either under S. 14 or S. 15. But apart from these provisions, the Court has in proper cases made such an order for refund where it has found that the court-fee had been paid under an order subsequently held to be wrong. I accordingly, allow the plaintiff's prayer and direct that the plaintiff be granted a certificate authorizing her to receive back from the Collector the additional court-fees which was realized from her in the lower appellate Court under the order of the learned District Judge of 16th December 1938.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 542

GENTLE J.

Keshrimull and others — Plaintiffs

v.

Meghraj Basdeo — Defendant.

Suit No. 1676 of 1940, Decided on 13th January 1942.

Limitation Act (1908), Art. 178 as amended by Arbitration Act of 1940 — Effect of amendment — Art. 178 applies to applications under Arbitration Act for obtaining filing of award and not to filing of award itself — No application to obtain filing of award — Award actually filed more than 90 days after it was made though sent to Court for that purpose long before actual act of filing — Art. 178 held inapplicable.

The amendment of Art. 178 has made no difference in its effect. The limitation provided by Art. 178 and all other articles in the third division, is in respect of applications for the acts to be done in respect of which the articles provide and is not a period of limitation in respect of the act itself. The limitation period under Art. 178 applies to applications under the Arbitration Act for obtaining the filing of an award and not for the filing of the award itself. Article 178 does not prevent the actual act of filing the award more than 90 days after notice of it having been given : 7 Cal. 333, *Rel. on.* [P 543*e*,*f*]

A suit was filed in August 1940. On 23rd April 1941 it was referred to arbitration and an award was made in the plaintiff's favour by the arbitrator on 16th July 1941 on which date the arbitrator notified the parties that he had duly made his award. The following day the plaintiff requested the arbitrator to file the award in Court, and he sent it for this purpose to the Court together with Rs. 3 in cash for the filing charges. On 19th July by a document the parties were informed by the Court that the award would be filed upon payment of the requisite stamps. On 21st November 1941 stamps of the value of Rs. 3 were affixed and the award was filed :

Held that the award was in fact filed more than 90 days after it was made although it had been sent to the Court for that purpose long before the actual act of filing took place and filing was accomplished without any application being made to the Court for this to be done. Article 178 therefore did not apply and the award must be treated as validly filed. [P 543*g*,*h*]

Limitation Act —

('42) Chitaley, Art. 178 Notes 2, 4.

('38) Rustomji, Page 1620 Pt. 1; Page 1621 Pt. 2.

D. C. Sethia — for Plaintiffs.

B. M. Agarwal — for Defendant.

ORDER. — The matters in dispute in this suit were by agreement referred to arbitration. The present application by the defendants is that the award of the arbitrator which was filed in this Court shall be taken off the file on the ground that filing took place after the period of limitation provided in the Arbitration Act of 1940. The following facts require reference. The suit was filed in August 1940, the claim by the plaintiffs being for a sum of about Rs. 2800. On 23rd April 1941 it was referred to the arbitration, of one Johormull Nopani, who made his award in favour of the plaintiffs for the

sum of Rs. 2173 and costs on 16th July 1941, on which date he notified the parties that he had duly made his award. The following day the plaintiffs requested the arbitrator to file the award in Court, and he sent it for this purpose to the Court, together with Rs. 3 in cash for the filing charges. On 19th July by a document (inadvertently dated 11th July) the parties were informed by the Court that the award would be filed upon payment of the requisite stamps. On 21st November 1941 stamps of the value of Rs. 3 were affixed and the award was filed. The contention on behalf of the defendants is that the award having been published and notification thereof given by the arbitrator on 16th July 1941 it should have been filed within 90 days of that date which period had expired before 21st November 1941 when filing actually took place.

Section 14 (1), Arbitration Act (1940), provides that when an arbitrator has made his award he shall sign it and notify the parties in writing of his making and signing it and of the fees and charges payable. Under sub-s. (2) an arbitrator shall, at the request of any party to the arbitration agreement or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration, cause the award together with other documents to be filed in Court. Article 178, Limitation Act 1908, was amended by the Arbitration Act and it now provides "under the Arbitration Act (1940) for the filing in Court of an award" a limitation period of 90 days from the date of the service of the notice of making the award. Originally this article provided a limitation period of six months from the date of the award, and the article was phrased thus:

"Under the same Code (Code of Civil Procedure, 1908) for the filing in Court of an award in a suit made in any matter referred to arbitration by order of the Court or of an award made in any matter referred to arbitration without the intervention of a Court."

A file has been produced recording the matters which transpired in this Court from the date when the award was sent by and received from the arbitrator on 19th July 1941. No objection was taken to reference being made to it. It would seem that a clerk in the office of the Court did not file the award because he considered some depositions or other documents had not been forwarded but it remained in the Court office. It was not until the month of November that the necessary stamps were purchased with the Rs. 3 sent by the arbitrator and the award was duly filed. It is quite clear that the plaintiffs took all steps which the Arbitration Act required by requesting the arbitrator to forward the award to the Court for it to be filed. The arbitrator complied with the request and remitted with his award the necessary sum for the fees. On account of reasons for which neither party was responsible or to blame the actual act of filing was not carried out until four months after the award had been received, but the defendants make this application on the ground that the award was not formally filed until after the expiration of 90 days when the parties were informed of it being made by the arbitrator. Reliance has been placed upon the wording of Art. 178, Limitation Act as amended by the Arbitration Act, and counsel for the applicant contends that this article prevents the actual act of filing the award more than 90 days after notice of it having been given. Article 178, Limitation Act, is included in the third division of the articles which is headed "applications."

In my view the limitation provided by Art. 178 and all other articles in the third division, is in respect of applications for the acts to be done in respect of which the articles provide and is not a period of limitation in respect of the act itself. This matter was considered by this Court in 7 Cal. 333[1] in the year 1881 when the Limitation Act of 1877 was in force in which Art. 176 corresponded to Art. 178, Limitation Act 1908 prior to its amendment by the Arbitration Act 1940. In 1881 the period of limitation was six months. An award in an arbitration was published on 29th September 1880 and was filed in Court on 29th April 1881, more than six months after the date of publishing the award, and the same objection was taken as is made in this application. It was held that the limitation period applied to applications for the award to be filed and not for the filing of the award itself. Learned counsel on behalf of the applicants sought to distinguish the position which arises now since the amendment of Art. 178, Limitation Act, 1908 inasmuch as the article as previously phrased commenced with the words "under the same Code," namely the Code of Civil Procedure whereas now the article commences with the words "under the Arbitration Act." I can see no difference in the effect of the article now as it was previous to its amendment. Applications can and no doubt will be made under the Arbitration Act to obtain the filing of an award. Section 14 (2) of the Act provides that the arbitrator shall at the request of any party or if so directed by the Court cause the award to be filed. If an arbitrator fails to comply with a request made to him by a party then the obvious remedy for the party is to apply to the Court to obtain an order directing the arbitrator to file the award. That would be an application under the Arbitration Act instead of an application under the Code of Civil Procedure as previously, but the nature of the application would be identical. Article 178, Limitation Act, as it is now worded requires an application of the nature to which I have referred to be made within 90 days of the notification of making the award and it still appears in the third division of the schedule to the Limitation Act, all articles in which division apply to applications.

In my view the period of limitation provided by Art. 178 as now worded refers to applications made under the Arbitration Act. In the present case, there was no application made by either party to obtain the filing of the award. The award was in fact filed more than 90 days after it was made although it had been sent to the Court for that purpose long before the actual act of filing took place and filing was accomplished without any application being made to the Court for this to be done. Having come to the conclusion that the provisions of Art. 178 do not apply to the award which was in fact filed, it is not necessary for me to discuss or consider the further contention by learned counsel on behalf of the applicants that the fee payable to file the award should have been remitted in stamps instead of in cash. Even if I were disposed to accept this contention nevertheless the application would fail inasmuch as there has been no infringement of any period of limitation which prevents the filing of this award. I am gratified that I am able to arrive at the decision which I have inasmuch as the application is entirely devoid of all merits, it will be dismissed with costs.

G.N./R.K. *Application dismissed.*

1. ('81) 7 Cal. 333 : 9 C. L. R. 209, Roberts v. Harrison.

a **A. I. R. (29) 1942 Calcutta 544**

BISWAS J.

Commissioners of Pabna Municipality and another—Defendants—Appellants

v.

Nirode Sundari Dasya Basak w/o Kunja Behari Basak and another — Plaintiffs—Respondents.

Appeal No. 1936 of 1939, Decided on 30th June 1942, from appellate decree of Senior Sub-Judge, Pabna, D/- 18th August 1939.

(a) Provincial Small Cause Courts Act (1887), Sch. 2, Art. 35 (ii)—Suit by plaintiff for damages b for wrongful cutting of trees standing on his land by defendant—Suit falls under Art. 35 (ii).

A suit by the plaintiff for damages for cutting of trees by the defendant standing on plaintiff's land without any legal justification falls under Sch. 2, Art. 35 (ii) as the wrongful cutting of trees for which damages are claimed amounts to an act of mischief or criminal trespass as defined in the Penal Code. [P 544*h*; P 545*a*]

(b) Limitation Act (1908), S. 29 (2) (a)—Words "expressly excluded" in S. 29 (2) (a)—Meaning — Words "and not afterwards" in S. 535 (2), Bengal Municipal Act do not amount to express exclusion within S. 29 (2) (a), Limitation Act—S. 15 (2), Limitation Act applies in computing limitation under S. 535 (2), Bengal Municipal Act.

c The words 'expressly excluded' in S. 29 (2) (a) mean what they say. In order that the exclusion may be express the particular sections of the Limitation Act which are intended to be excluded must be specifically indicated by the special or local law in question. So far as the words 'and not afterwards' in S. 535 (2), Bengal Municipal Act, are concerned, the utmost that can be said is that the exclusion of the sections of the Limitation Act specified in S. 29 (2), Limitation Act, may be easily spelt out therefrom, but they will not amount to an express exclusion. Therefore, S. 15 (2), Limitation Act, applies in computing the special limitation under S. 535 (2), Bengal Municipal Act : ('40) 27 A. I. R. 1940 Cal. 305 and ('29) 16 A.I.R. 1929 Cal. 325, *Rel. on.* [P 545*c,e,f,g*]

Limitation Act —

d ('42) Chitaley, S. 29, N. 4 Pt. 1.
('38) Rustomji, Page 525 Pt. 2.

(c) Bengal Municipal Act (15 of 1932), S. 363 — Cutting of simul trees as noxious undergrowth is outrageous exercise of its discretion by municipality—Civil Court can curb exercise of such discretion.

If the municipality regarded the cutting down of simul trees as the clearance of noxious undergrowth or vegetation, it would be an outrageous exercise of discretion on their part and the hands of the civil Court would not be fettered in order to curb the exercise of such discretion. [P 546*b*]

Amaresh Ch. Roy—for Appellants.

Surajit Ch. Lahiri—for Respondents.

JUDGMENT.—This appeal is on behalf of the defendants, and arises out of a suit for damages. The defendants are the Commissioners of the Pabna Municipality (defendant 1) and its Vice-Chairman (defendant 2). The plaintiff laid his claim at Rs. 50, and the act for which he claimed this compensation e was the cutting down of three simul trees standing in the plaintiffs' land. The suit was resisted on a variety of grounds. On the merits it was alleged that the municipality or any of its officers had nothing to do with the cutting down of the trees, but that this was the work of some enthusiastic volunteers of a body known as the Anti Malaria Society who were operating in the area at the time. The defendants further claimed statutory protection for the act complained of. It appears that sometime in the month of August 1937 the municipality had actually served a notice on the plaintiffs, calling upon them to clear the jungles and other noxious undergrowth and vegetation from their lands on the ground that they were injurious to health and offensive to the neighbourhood. There was no specific requisition by this notice for the cutting down of f the three simul trees. Further objections to the suit were taken by the defendants based on the provisions of S. 535, Bengal Municipal Act (Act 15 of 1932). It was conceded that a notice of suit had been given under this section, but the contention was that the notice was not in proper form and that it had not been proved. It was further pleaded that the suit was out of time, not having been instituted within six months next after the accrual of the alleged cause of action as required by S. 535 (2). The learned Munsif expressly held in favour of the defendants on the question of notice and of limitation. On the merits also, the findings were generally in their favour, and in the result he dismissed the suit. On the question of quantum of damages, however, he recorded a finding to the effect that if the plaintiffs were otherwise entitled to succeed, they could recover damages to the extent of Rs. 30. On g appeal the learned Subordinate Judge reversed the decision of the learned Munsif both on the question of the notice of suit and on that of limitation. As regards the merits, he stated that the cutting down of the trees had been admitted by the defendants, and accepting on that basis the further findings of the trial Court, which were not also challenged before him by the defendants, to the effect that there was no legal justification for the cutting down of the trees and that this had not been done with the consent of anyone on behalf of the plaintiffs, as well as the finding as to the quantum of damages, he made a decree in favour of the plaintiffs for a sum of Rs. 30 with proportionate costs. It is against this decision that the defendants have preferred the present appeal.

The learned advocate for the appellants has h practically argued all the points which his clients had unsuccessfully raised in the Court below. He further took the point that the appeal to the lower appellate Court was without jurisdiction, and it is just as well that I should dispose of this question at once. The contention was that the suit was of a Small Cause Court nature and that, therefore, no appeal lay against the decision of the trial Court. The learned advocate realised that if he was right, he would be shutting himself out from his own appeal to this Court. The suit being valued at Rs. 50, there would be no escape from the bar of S. 102, Civil P. C. Mr. Roy's only answer to this was a petition in the alternative under S. 115, Civil P. C. In the end the learned advocate thought it wise not to press this particular objection, and it is worth while mentioning that the learned advocate on behalf of the respondents, Mr. Lahiri, was only too willing to make a present of this point to his friend on the other side. I might, all the same, state that in my view the suit would come within cl. (ii) of

Art. 35 of Sch. 2, Provincial Small Cause Courts Act, as being a suit for compensation for an act which would be an offence punishable under Chap. 17, Penal Code. The cutting down of the trees in respect of which damages were claimed was undoubtedly an act of mischief or criminal trespass as defined in the Penal Code, and I see no reason why the suit should not accordingly be regarded as falling strictly within the terms of cl. (ii) of the said Article. The appeal to the learned Subordinate Judge would in that view be quite competent, and a second appeal would also lie to this Court.

As regards the other objections raised on behalf of the appellants, the only one which seemed to me to have some substance was that of limitation, and I might deal with it first. The Courts below have found that the trees were cut down on 28th November 1937. This was, therefore, the date of the accrual of the cause of action. The suit was actually instituted on 6th June of the following year, which was more than six months after the said date. Now, S. 535 (2) provides that a suit such as this against the Commissioners of any municipality or any of its officers shall be commenced "within six months next after the accrual of the cause of action, and not afterwards." Clearly, therefore, if this was the only provision which governed the question of limitation, the suit would be out of time. On behalf of the plaintiffs, it was not disputed that S. 535 (2) applied to the case but they claimed to be entitled to deduct the period of the notice which they had to give under sub-s. (1). The period of notice was one month, and if one month was excluded the bar of limitation would be successfully met.

In support of their contention, the plaintiffs relied on the provisions of S. 15 (2), Limitation Act, which specifically lays down that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded. It is pointed out that this provision is applicable not merely to suits for which limitation is prescribed under the various Articles of the Limitation Act, but also in the case of suits for which a different period of limitation is prescribed by a special or local law. Reliance is placed in this connexion on sub-s. (2) of S. 29, which, as is well-known, was added to the Limitation Act in 1922 in order to remove a lacuna in the law to which attention had been drawn in various decisions of the Indian High Courts. Sub section (2) of S. 29, Limitation Act, expressly provides that for the purpose of determining any period of limitation prescribed for any suit by any special or local law, the provisions contained in S. 4, Ss. 9 to 18 and S. 22 shall apply "only in so far as, and to the extent to which, they are not expressly excluded by such special or local law." It follows, therefore, that the plaintiffs will be entitled to the benefit of S. 15 (2) in computing the special limitation under S. 532 (2), Bengal Municipal Act.

Mr. Roy was not slow to appreciate the position, but he still endeavoured to get out of it by relying on the qualifying words of cl. (a) of sub-s. (2) of S. 29 quoted above where it is stated that the specific provisions of the limitation Act therein referred to shall apply only 'to the extent to which they are not expressly excluded by such special or local law.' His argument was that there was express exclusion here by the terms of sub-s. (2) of S. 535, Bengal Municipal Act. As already pointed out, this sub-section ends with the words 'and not afterwards.' It was contended that these words would really have no effect unless they were words of exclusion within the meaning of cl. (a) of sub s. (2) of S. 29, Limitation Act. There is a good deal of force in the contention. It may well be that the Legislature by adding the words 'and not afterwards' did intend to exclude the applicability of those provisions of the Limitation Act which would operate to extend time in various contingencies. Unfortunately, however, if that was the intention of the legislature, they failed to carry it out by using appropriate language for that purpose. The language they used 'and not afterwards,' might possibly operate in the way intended, but by reason of the terms used in S. 29 (2) (a), Limitation Act, I think it fell short of what was thereby required. The words 'expressly excluded' mean what they say. In order that the exclusion may be express, I think that the particular sections of the Limitation Act which are intended to be excluded must be specifically indicated by the special or local law in question So far as the words 'and not afterwards' are concerned, the utmost that can be said is that the exclusion of those sections of the Limitation Act may be easily spelt out therefrom, but, in my opinion they will not amount to an express exclusion. In support of this view, I am fortified by a decision of Henderson J. to which my attention was drawn by Mr. Lahiri, reported in 44 C. W. N. 362.[1] The question was there considered in connexion with S. 146, Bengal Local Self-Government Act, (Bengal Act 3 of 1885), a section which is almost identical in terms with S. 535, Bengal Municipal Act, with which we are concerned here. The relevant provisions there also contained the words 'and not afterwards,' and Henderson J. held that it was difficult to say that this would be anything more than an exclusion by inference. The learned Judge went on to add that the matter had really been settled by the decision of a Division Bench of this Court in 56 Cal. 805.[2] I see no reason whatsoever to differ from the views expressed in this case. I must accordingly overrule the plea of limitation which was raised on behalf of the appellants and hold that the suit was within time.

Turning now to the other points raised in connexion with the notice under S. 535, Bengal Municipal Act, the first point taken was that the notice did not specify the abode of the persons to whom it was addressed. I think it is sufficient to refer to the judgment of the learned Subordinate Judge in this matter. The learned Judge had before him the original notice, and he was satisfied that it was not defective in this particular. It was next urged that the notice had not been proved, though service of the notice was admitted. I was unable to fully appreciate the argument of Mr. Roy in this connexion. The original notice was produced before the appellate Court. Evidence regarding service of that notice had been given in the trial Court, though the original was not available then, but that evidence has got to be read in connexion with the original, because it was evidence regarding service of the original notice. In fact, there was no question so far as I can see regarding service of the notice. That being so, I hold that notice had been proved within the meaning of sub-s. (1) of S. 535, and the Court was under no duty of finding for the defendants, as contended for on their behalf. The next point taken was that on the findings of the Court below there could

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1. ('40) 27 A.I.R. 1940 Cal. 305 : 188 I.C. 705 : 44 C.W.N. 362, District Board, Chittagong v. Maulvi Emdadal Hoque.
2. ('29) 16 A.I.R. 1929 Cal. 325 : 121 I.C. 673 : 56 Cal. 805 : 33 C. W. N. 227, Sati Prosad Garga v. Govinda Chandra.

be no decree against the defendants. This again was an argument which I could not follow. As already pointed out, it was admitted before the learned Subordinate Judge that the defendants had cut the trees. It was, therefore, futile on the part of the learned advocate for the appellants to point out that the trial Court had in a manner found that the trees had been removed not by the officers of the municipality, but by the over-zealous volunteers of the Anti Malaria Society. That finding was not expressed in connexion with the question as to the persons by whom the trees had been cut down. It may well be that although the actual cutting was done by the volunteers, they had set out on their operations under the orders of the municipality. Be that as it may, having regard to the admission made in the lower appellate Court, I am not prepared to hold that the lower appellate Court accepted any contrary finding of the trial Court to the effect that the act complained of had been done by persons other than the defendants concerned. This particular objection must accordingly be also overruled.

The last argument, almost an argument of despair, was that the cutting down of the trees was a matter within the discretion of the municipality, and that it was not for the civil Court to say that the simul trees were not noxious undergrowth, if the municipality had chosen to treat them as such. All that I need say is this that if the municipality regarded the cutting down of simul trees as the clearance of noxious undergrowth or vegetation, it would be an outrageous exercise of discretion on their part, and the hands of the civil Court would not be fettered in order to curb the exercise of such discretion, but I do not think that the municipality ever intended to claim any protection for their act on any such ground. It was further urged that the act of the municipality was not necessarily under S. 242 or S. 369. All that need be said is that on the facts there could be no question of action having been taken by the municipality under any of these other sections. The result is that all the points urged in support of the appeal fail. The appeal is accordingly dismissed with costs. Leave to appeal under Cl. 15, Letters Patent is refused. As I have held that the appeal is competent, the application in the alternative filed under S. 115, Civil P. C., will be dismissed without costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 546

SPECIAL BENCH

EDGLEY, SEN AND MOHAMAD AKRAM JJ.

Surendra Nath Dutt — Petitioner

v.

Malati and another — Respondents.

Divorce Suit No. 47 of 1940, Decided on 29th May 1942.

(a) Divorce Act (1869), Ss. 8 and 45—Suit or proceeding under Act — S. 8 contains express provision regulating transfer—S. 24, Civil P.C., does not apply.

Section 8 contains an express provision regulating the transfer of a suit or proceeding under the Act from the Court of one District Judge to the Court of another District Judge and hence by reason of S. 45 of the Act, S. 24, Civil P. C., can have no application to suits or proceedings under the Act.

[P 549c,d]

C. P. C.—
('40) Chitaley, Preamble N. 2 Pt. 4; S. 24 N. 7.
('41) Mulla, Page 18 Note "Special or local law."

(b) Calcutta High Court (Original Side) Rules, Ch. 35A, Rr. 44 and 46—R. 44 applies not only to cases under first part of S. 8 but also to applications for transfer under second part of S. 8—Judge sitting singly on original side of High Court can transfer case from Court of one District Judge to that of another District Judge.

The general scheme of the Divorce Act and the Rules framed under that Act is that all matters with which the High Court is empowered to deal should come before it in its original jurisdiction and this is emphasised by R. 46. The only Bench in the High Court of competent jurisdiction to hear and determine a suit under the Divorce Act would be a Judge sitting singly on the original side, duly empowered in this behalf by the Chief Justice. The use of the word "withdraw" in the second part of S. 8 also indicates that the withdrawal order must be made by a Judge on the original side who would himself be competent to try the suit under the provisions of the Divorce Act. Rule 44 is intended to apply not only to cases under the first part of S. 8 but also to applications for transfers under the second part of S. 8. Therefore a Judge sitting singly on the original side of the High Court is competent to transfer a case from the Court of one District Judge to that of another District Judge and an application under second part of S. 8 for transfer of a case should be made to him. An application to the Bench on the Appellate Side is not necessary.

[P 549e,f,g,h]

(c) Calcutta High Court (Original Side) Rules, Ch. 35A, Rr. 44 and 46 and Ch. 22—High Court Judge transferring case under second part of S. 8, Divorce Act from one District Court to another can issue commission for examination of witnesses.

Since a High Court Judge is competent to issue commissions for the examination of witnesses if he removes a case to his own file under the first part of S. 8, Divorce Act he would also have jurisdiction to issue such commissions at the time of withdrawing a case from one District Court and transferring it to another District Court. As this matter is not dealt with by the rules contained in Ch. 35A, R. 46 applies and the order with regard to the issue of the writ of commission should be deemed to be merely complementary and consequential to the order of withdrawal and would be governed by the rules relating to commissions contained in Ch. 22.

[P 550a]

(d) Divorce Act (1869), S. 18—De facto marriage under Special Marriage Act contracted between parties—Onus to prove that marriage is invalid by reason of previous marriage between husband and another woman subsisting is on wife.

Where a de facto marriage under the Special Marriage Act was contracted between the parties, the onus to prove that the marriage is invalid by reason of the fact that a previous marriage between the husband and another woman was subsisting is on the wife.

[P 548g]

Surita and B. K. Das — for Petitioner.

Anil Chandra Roy Choudhury and Smriti Kumar Roy Chowdhury—for Respondents.

S. M. Bose and Meyer amicus curiæ.

EDGLEY J. — In this case the learned District Judge of the 24-Parganas by his order, dated 17th September 1941, has directed that the marriage of the petitioner, Surendra Nath Dutt, with his wife, Malati alias Baby Dutt, be dissolved subject to confirmation by the High Court. The matter has accordingly come before us under S. 17, Divorce Act, for confirmation of the order passed by the learned Judge. The admitted facts of the case are as follows : Surendra Nath Dutt went through a form of marriage in 1919 with a lady named Indubala Das. This marriage appears to have been solemnized according to Hindu rites but, in spite of this fact, the petitioner and Indubala went through a further form of marriage on 3rd August 1920, under the provisions of Act 3 of 1872. On 2nd September 1938, Indubala Das, on the allegation that she had become a convert to Islam, filed a plaint in the Court of the third Munsif of Alipore in which she asked for a declaration to the effect that her marriage with Surendra Nath Dutt stood dissolved by reason of her conversion to Islam and disinclination on the part of her husband to be converted to Islam. The case was uncontested before the learned Munsif and, on 21st September 1938, Indubala obtained an ex parte decree which purported to dissolve the marriage relationship between the parties to the suit. Towards the end of 1939 the petitioner was introduced to the respondent and a marriage was arranged between them. On 18th January 1940, the parties went through a form of marriage under Act 3 of 1872 and, on 1st August of the same year, the petitioner filed a petition for divorce in the Court of the District Judge of Mymensingh on allegations to the effect that the respondent had committed adultery on various occasions with the co-respondent, Jyoti Prakash alias Thandu Ghose. In paras. 1 and 2 of his petition he alleged that he had been lawfully married to Malati Dutt on 18th January 1940, and that he was domiciled in British India. These statements were admitted by the respondent in para. 4 of her written statement which was filed on 3rd January 1941.

In the meantime the respondent, Malati Dutt, had applied to this Court in its extraordinary original civil jurisdiction under Cl. 13, Letters Patent, read with S. 8, Divorce Act, to the effect that the pending divorce suit might be transferred to the High Court to be tried with a maintenance suit which had been filed by her against her husband. A rule with reference to this matter was issued by Panckridge J. on 14th August 1940, and this rule was heard by Sen J. on 3rd September 1940. The learned Judge by his order directed that the suit should be transferred from Mymensingh to Alipore to be heard by the District Judge of the 24-Parganas and further ordered that a writ of commission should issue authorising the District Judge of Mymensingh to examine certain witnesses at Mymensingh the commission being made returnable to the Court of the District Judge of the 24-Parganas. Certain objections were raised before the learned District Judge of Mymensingh with reference to the question whether Sen J. had jurisdiction to issue the commission and a complaint was also made to the effect that the respondent's counsel was not allowed a sufficient opportunity to cross-examine the witnesses. These objections were overruled by the learned District Judge and the records of the divorce suit were duly transmitted to Alipore. A further objection was taken at Alipore as regards the jurisdiction of that Court to try the suit and this point was decided against the respondent on 10th February 1941. This Court was then moved under S. 115, Civil P. C., against the order of the learned District Judge of the 24-Parganas, dated 10th February 1941. The matter was heard in due course by Mukherjea and Roxburgh JJ. who held on 22nd May 1941 that " it is not a case of a lack of inherent jurisdiction. The utmost that can be said is that the jurisdiction was not invoked or exercised in the right way."

The learned Judges further expressed the opinion that as no final order had yet been passed in the suit "it would be open to the petitioner to raise this question of jurisdiction if she is so advised if any decree for dissolution of marriage is at all passed in this case and the matter comes up for confirmation before this Court under the provisions of the Divorce Act."

The records were then returned to the Court of the learned District Judge of the 24-Parganas who took further evidence in the matter and pronounced judgment in favour of the petitioner on 17th September 1941. When this matter first came before us for hearing Mr. Roy Chowdhury on behalf of the respondent indicated to us that one of the main points which he proposed to argue was that the petitioner's first marriage was still subsisting and that the decree of the learned Munsif of Alipore, dated 21st September 1938, was not binding on his client. The learned advocate informed us that in support of this argument he proposed to rely on the decision of this Court in the exercise of its original matrimonial jurisdiction in 45 C. W. N. 1047.[1] In that case the main point argued on behalf of the plaintiff in the Court of first instance was that, whatever her domicile might be, after refusal by her husband to adopt Islam after her conversion to that faith, the plaintiff was entitled to a declaration to the effect that her marriage with her husband stood dissolved in accordance with the principles of Mahomedan law which she had adopted as her own. Mr. Mazumdar, who appeared for the plaintiff, admitted that such a declaration would not operate as a judgment in rem having regard to the provisions of S. 43, Specific Relief Act. He also admitted that it would not possess any extra territorial validity. The decision was to the effect that the plaintiff could only obtain a decree for divorce according to the lex fori of her husband's domicile and that the rule of Mahomedan law on which she relied must be regarded as obsolete and contrary to public policy. When *Eugene Tiscenko's case*[1] came before the Court of Appeal on 19th December 1941 (46 C. W. N. 465[2]) their Lordships decided that as the parties were not domiciled in India, this Court had no jurisdiction to entertain the proceedings. It was not therefore necessary to come to any final conclusion with regard to those provisions of the Mahomedan law on which Mr. Majumdar had relied in the first Court.

After Mr. Roy Chowdhury had indicated the position which he proposed to adopt with regard to the decree of the learned Munsif, dated 21st September 1938, we considered that an adjournment should be granted for the purpose of enabling the husband to appear in the further proceedings in this Court if he desired to do so. We also asked Mr. S. M. Bose to appear as amicus curiae in view of the importance of the point of law which had

1. ('41) 28 A.I.R. 1941 Cal. 582 : 199 I. C. 549 : 74 C. L. J. 212 : 45 C. W. N. 1047, Noor Jehan Begum v. Eugene Tiscenko.
2. ('42) 29 A.I.R. 1942 Cal. 325 : 200 I. C. 176 : 75 C. L. J. 242 : 46 C. W. N. 465, Noor Jehan Begum v. Eugene Tiscenko.

been raised. The further hearing of the matter was consequently adjourned until 27th April 1942. On 27th April 1942, Mr. Surita appearing on behalf of the petitioner, Surendra Nath Dutt, contended that, although his client and his first wife had gone through a second form of marriage in 1920, under the provisions of Act 3 of 1872, nevertheless the only effective marriage between them was that which had been contracted in 1919. He argued that the judgment of the learned Munsif of Alipore, dated 21st September 1938, operated as a judgment in rem, that thereafter the petitioner had contracted a lawful marriage with the respondent and that on the facts proved his client was entitled to a decree for the dissolution of the second marriage.

Mr. S. M. Bose as amicus curiae maintained that, on the evidence as it stood, it was difficult to come to a clear finding on the question whether Surendra Nath Dutt and Indubala Das had been lawfully married in 1919 according to Hindu rites or whether the only effective marriage between them was that which had been celebrated on 3rd August 1920, under the provisions of Act 3 of 1872. The position which he adopted was that, if Surendra Nath Dutt and Indubala Das were lawfully married under Act 3 of 1872, the marriage could not be dissolved by a decree passed by a Munsif and any such decree purporting to dissolve the marriage would have to be regarded as a nullity. If, on the other hand, the petitioner and Indubala were lawfully married in 1919, according to Hindu rites he maintained that the decree of the learned Munsif dated 21st September 1938, would not operate as a judgment in rem binding on the respondent, in view of the provisions of S. 41, Evidence Act, and S. 43, Specific Relief Act. The respondent, therefore, would be at liberty to contend that, as far as she was concerned, the first marriage still subsisted and to argue on the basis of the decision in 45 C. W. N. 1047,[1] that no Court can validly dissolve a marriage merely on the ground that the wife had become a convert to Islam and that her husband had refused to adopt that faith after it had been presented to him.

Mr. Roy Choudhury's contention was of a threefold nature. In the first place, he maintained that Sen J.'s order, dated 3rd September 1940, transferring the divorce suit from Mymensingh to Alipore was without jurisdiction. He next contended that no valid marriage had been contracted between Surendra Nath Dutt and Malati Dutt in view of the fact that the learned Munsif of Alipore had no jurisdiction to dissolve a marriage under Act 3 of 1872 and that, if an effective marriage between Surendra Nath Dutt and Indu Bala Das had been performed according to Hindu rites, the decree of the learned Munsif, dated 21st September 1938, could not operate as a judgment in rem. Finally, he contended that he would be in a position to show that the alleged acts of adultery had not been proved. At this stage it may be noted that all the parties concerned expressed their willingness that the question of Sen J.'s jurisdiction to transfer the divorce suit from Mymensingh to Alipore should be decided by this Bench as this question had not been expressly raised at the time when the learned Judge made the order. Having regard to the considerations which had been placed before us on 27th April 1942, we adjourned the further hearing of this matter until 21st May 1942 in order that further evidence might be given by the parties with regard to the first marriage alleged to have been contracted between Surendra Nath Dutt and Indubala Das.

On 21st May 1942, Mr. Surita filed a copy of the Registrar's certificate in respect of the marriage contracted between Surendra Nath Dutt and Indubala Das under Act 3 of 1872 on 3rd August 1920. He maintained, however, that any further evidence should not be taken at the present stage of the proceedings because his client had alleged and proved a de facto marriage in 1919, which had been solemnised according to Hindu rites. This marriage was admitted by the respondent in para. 4 of her written statement which had not been amended and he maintained that the petitioner would be gravely prejudiced if the respondent were allowed now to adopt a position inconsistent with her pleadings. On this point Mr. Roy Chowdhury maintained that the fact of Surendra Nath Dutt's first marriage was only disclosed in the petitioner's evidence before Mr. Lethbridge on 9th September 1941, after she had filed her written statement and that, in any event, he was entitled to raise the question of the illegality of the second marriage as a point of law. On a reference to the record, however, we find that the first marriage was disclosed in Surendra Nath Dutta's evidence before the Commissioner at Mymensingh on 19th September 1940—long before the date of the respondent's written statement which was not filed until 3rd January 1941. Had she desired to impugn the validity of her marriage with the petitioner, she had ample opportunity to do so, but she allowed the case to go to trial with an admission that her marriage with Surendra Nath Dutt was subsisting and lawful. Further, she sued the petitioner for maintenance in this Court on the footing that she had contracted a valid marriage with him. At no stage in the proceedings has she filed an application to the effect that she might be permitted to alter or amend her pleadings in accordance with the provisions of O 6, R. 17, Civil P. C. If she had expressly assailed the validity of her marriage with the petitioner, the latter might conceivably have chosen to sue for a declaration of the nullity of his marriage with the respondent, but for him to do so now would involve him in considerable costs.

In any event, we are satisfied that the evidence already on the record is sufficient to show prima facie that a de facto marriage under the provisions of Act 3 of 1872 was contracted between the parties on 18th January 1940, and, this being the case, the onus would lie on the respondent to show that this marriage was unlawful either by reason of the fact that a marriage contracted in 1919 was still subsisting and had not been legally dissolved or that the subsequent marriage between the petitioner and his first wife which was solemnized on 3rd August 1920, had not been dissolved by a Court of competent jurisdiction. Having regard to these circumstances we are of opinion that the respondent at the present stage of the proceedings cannot be allowed to resile from the position deliberately adopted by her in her written statement in which she had admitted the validity of her marriage with the petitioner. Before the case went to trial the petitioner was entitled to a full knowledge of any intention which the respondent may have had to impugn the validity of her marriage with him. To allow her now to resile from the position which she had adopted in her pleadings would materially prejudice the petitioner's position and we are, therefore, not prepared to allow her to raise any points of law or of fact inconsistent with the admission contained in her written statement to the effect that she had been lawfully married to the petitioner on 18th January 1940. The questions which have been

raised by Mr. Roy Chowdhury are of course of far reaching importance with reference to the law of marriage. Their final solution is a matter of urgency but, on the facts of the present case, further consideration of those questions must be postponed until a more suitable occasion arises.

The next point to be considered is whether Mr. Lethbridge had jurisdiction to try the divorce suit by reason of its transfer to his Court under Sen J.'s order, dated 3rd September 1940. On this point Mr. Roy Chowdhury has adopted the arguments which appear to have been addressed to Mukherjea and Roxburgh JJ., by Mr. S. N. Banerjee when this matter came before this Court in its civil revisional jurisdiction in May 1941 : 45 C.W.N. 916.[3] He maintained that the power to transfer a case from one Court to another Court subordinate to the High Court can only be exercised by a Bench on the appellate side under R. 3, Chap. 3, Part 1 of the Appellate Side Rules, which is to the effect that "civil business arising from the districts of each group shall be laid before the Division Court appointed by the Chief Justice to deal with such business." He also relied on S. 24, Civil P. C., which empowers this Court to transfer suits to any Court subordinate to it and argued that the Court of the District Judge of the 24-Parganas can only be regarded as subordinate to this Court in its appellate jurisdiction. The legal aspect of the question was discussed at some considerable length in Mukherjea J.'s judgment in 45 C. W. N. 916[3] cited above. The learned Judge pointed out that the provision contained in Part 1, Ch. 3, R. 3 of the Appellate Side Rules "is very general in its expression and does not specifically cover a case of this description." He went on to say that :

"Sen J. obviously proceeded upon the assumption that the present case is governed by R. 44, Ch. 35A of the Original Side Rules .... We think that in these doubtful cases where the rules themselves are ambiguous it would not be just or proper on our part to exercise our powers of revision under S. 115, Civil P. C., and treat the proceedings before the District Judge of Alipur as being initiated without jurisdiction."

Section 8, Divorce Act, contains an express provision enabling the High Court, whenever it thinks fit, to remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act and also to withdraw any such suit or proceedings and transfer it for trial or disposal to the Court of any other such District Judge. Section 45 of the Act provides that :

" Subject to the provisions herein contained all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

It, therefore, follows that, as the Act contains an express provision regulating the transfer of a suit from the Court of one District Judge to that of another District Judge, S. 24, Civil P. C., can have no application. Certain rules have been framed by the High Court under the provisions of S. 62, Divorce Act, and these rules are contained in Ch. 35A of the Original Side Rules. Most of these rules relate to cases under the Divorce Act, which are triable by the High Court on the original side in its matrimonial jurisdiction under S. 10, Divorce Act. Rule 44, however, relates to the procedure to be followed in connexion with applications under S. 8 of the Act. It is headed "Removal of Suits, etc," and is in the following terms :

" An application to the High Court to remove a suit or proceeding under S. 8 of the Act shall be made by an ex parte application to the Judge on the original side in open Court for a Rule on the party or parties concerned to show cause against such removal."

Having regard to the express terms of this rule it may of course be argued that it is only intended to relate to a case under the first part of S. 8, Divorce Act, in which the High Court is asked to remove a case pending before a District Judge and try such case as a Court of original jurisdiction. Obviously, such an application would have to be made to a Judge sitting singly on the Original Side. But the heading of the rule "Removal of suits, etc.," indicates that it was intended also to cover applications for transfer under the second part of S. 8, Divorce Act. It is unreasonable to suppose that in framing these rules it was the intention of the High Court that, in a case in which the best interests of the parties would be served by transferring a suit to another district instead of to the High Court, such parties should be compelled to incur additional expenditure by making a further application to a Bench on the Appellate Side of the Court. The general scheme of the Divorce Act and the rules framed under that Act is that all matters with which the High Court is empowered to deal should come before this Court in its original jurisdiction and this is emphasised by R. 46 of the Rules contained in Chap. 35A which is in the following terms :

"In any matter of practice or procedure which is not governed by statute or dealt with by these rules the rules of the original side in respect of like matters shall be deemed to apply."

The only Bench in the High Court of competent jurisdiction to hear and determine a suit under the Divorce Act would be a Judge sitting singly on the original side, duly empowered in this behalf by the Chief Justice. In this connexion, it may be noted that the second part of S. 8, Divorce Act, authorises the High Court to withdraw a suit and then transfer it. The implication of the use of the word 'withdraw' seems to be that this power can only be exercised in order to withdraw a suit in the first instance to the Court of a Judge competent to try it. In other words, the withdrawal order must be made by a Judge on the original side who would himself be competent to try the suit under the provisions of the Divorce Act. We, therefore, think that there can be no doubt that Sen J. had jurisdiction to transfer the suit from the Court of the District Judge of Mymensingh to the Court of District Judge of the 24-Parganas.

Mr. Roy Chowdhury argues, however, that in any event Sen J.'s order for the issue of a writ of commission was without jurisdiction. With regard to this point admittedly no objection was raised before the learned Judge at the time when he made the order to the effect that certain witnesses should be examined on commission at Mymensingh. In fact, this part of the order seems to have been in the nature of a consent order. The rules which have been framed under S. 62, Divorce Act, are silent on the question whether or not a Judge of this Court is authorised to issue commissions for the examination of witnesses when a case has been transferred from one District Court to another under the provisions of the second part of S. 8 of the Act. We do

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3. ('42) 29 A.I.R. 1942 Cal. 32 : 199 I. C. 621 : I.L.R. (1941) 2 Cal. 373 : 45 C. W. N. 916, Malati Dutt v. Surendra Nath Dutt.

not think, however, that either the Act or the rules contain any implication to the effect that such an order would be without jurisdiction and as the learned Judge would certainly have been competent to make such an order if he had removed the case to his own file, it seems to follow that he would also have jurisdiction to do so at the time of withdrawing the case and transferring it. As this is a matter which is not dealt with by the rules contained in Chap. 35A, Original Side Rules, we think that Rule 46 should be applied and this being the case, the order with regard to the issue of the writ of commission should be deemed to be merely complementary and consequential to the order of withdrawal and would be governed by the rules relating to commissions contained in Chap. 22, Original Side Rules. These points must, therefore, be decided against the respondent.

Finally, Mr. Roy Chowdhury in dealing with the merits of the case argues that his client was prejudiced as her counsel had no sufficient opportunity to cross-examine the petitioner's witnesses when they were examined on commission at Mymensingh and further that the charges of adultery have not been proved. With regard to the first of these complaints we do not think that the learned District Judge of Mymensingh adopted an unreasonable attitude as regards the questions put up by counsel to the petitioner's witnesses. Further, even after Mr. B. B. Chatterjee retired from the case, the respondent was still represented by a lawyer who was competent to continue the cross-examination. It follows, therefore that in our opinion she has sustained no prejudice in connexion with this matter. As regards the specific instances of adultery alleged by the petitioner we have perused the evidence and we are entirely in agreement with the findings of the learned District Judge. The evidence was ample and complete and it appears from the record that on 15th September 1941, learned counsel for the respondent stated that he had been instructed by his client to say that she was not in a position either to resist the charges made against her or to make good the counter charges which she had made against the petitioner. In these circumstances he asked leave to withdraw, which was granted to him. We are satisfied that the petitioner has succeeded in proving that the respondent has committed adultery with the co-respondent. He is, therefore, entitled to a decree for the dissolution of his marriage. In view of the considerations discussed in this judgment we confirm the decree under S. 17, Divorce Act. The parties will bear their own costs.

SEN J. — I agree.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Decree confirmed.*

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B. K. MUKHERJEA AND SEN JJ.

Reliance Jute Mills Co., Ltd. —
Decree-holder — Petitioner

v.

Dukhi Shah s/o Dhandraj Shah and another — Judgment-debtors —
Opposite Party.

Civil Rules Nos. 633 and 634 of 1941, Decided on 17th June 1942, for setting aside order of Munsif, First Court, in charge of Munsif, Second Court, Barasat (24-Parganas) in Misc. Cases Nos. 224 and 223 of 1940.

(a) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—"Suit for ejectment for non-payment of rent" explained — Suit for ejectment as well as for recovery of rent—Proceedings for ejectment can be stayed and recovery of rent proceedings continued.

The words "a suit for ejectment for non-payment of rent" as used in S. 3 of the Act refer to cases where non-payment of rent incurs forfeiture of lease. Where, therefore, a suit has been brought by the landlord for ejectment as well as for recovery of rent, the proceedings for ejectment may be stayed under the provision of S. 3 and the landlord may proceed with the suit so far as it relates to recovery of rent: ('41) 28 A. I. R. 1941 Cal. 302 and ('41) 28 A. I. R. 1941 Cal. 528, *Disssent.* [P 551*e*,*g*]

(b) Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940), S. 3—S. 3 is not ultra vires.

Section 3, Bengal Non-agricultural Tenancy Act, is a valid piece of legislation which is covered by item 2 read with item 21 of the Provincial List and is not repugnant to any existing Indian law which makes it void under S. 107, Government of India Act : ('42) 29 A. I. R. 1942 Cal. 49 (S. B.), *Foll.* [P 551*g*]

Amarendra Nath Bose and Pannalal Chatterji — for Petitioner.

Syed Nausher Ali and Md. Asir — for Opposite Party.

B. K. MUKHERJEA J.—The facts giving rise to these analogous cases may be shortly stated as follows: The Reliance Jute Mills, Ltd., which is the petitioner in both these rules brought two suits in the Court of the Second Munsif, Barasat, being Title Suits Nos. 31 and 32 of 1939, for recovery of khas possession of certain lands on the allegation that the defendants who are in occupation of the same were thika tenants whose tenancies had been determined on proper service of demand notices. There were claims also for arrears of rent and mesne profits in both these suits. The suits were decreed by the trial Court and the plaintiffs were declared entitled to recover possession of the lands by evicting the defendants and also to recover rents and mesne profits as claimed by them. There were two appeals taken against these two decrees by the tenants defendants but the appeals were dismissed by the lower appellate Court on 26th April 1940. The plaintiff-decree-holder then put these decrees into execution and the defendants thereupon filed application before the executing Court praying that the proceeding for delivery of the lands of the two suits might be stayed under S. 3, Bengal Non-agricultural Tenancy (Temporary Provisions) Act, 1940. The Court granted this prayer and the order recorded in the two execution cases reads as follows : "The application be allowed in part and the execution case in so far as regards delivery of possession of the disputed land, shall be stayed according to the provisions of the Non-Agricultural Tenancy Act and it shall proceed in respect of the decree for the arrears of rent and cost." Thereafter the plaintiff decree-holder presented certain applications for review of this order under O. 47, R. 1, Civil P. C., and also put in fresh applications for obtaining delivery of possession of the properties. All these applications were dismissed by the learned Munsif and it is against these two sets of orders passed in these two cases that the present rules have been obtained.

The substantial point which was raised by the plaintiff-decree-holder in support of their applications for review and which has been reiterated

before us by Mr. Bose is that the Court below in making the orders for stay of the proceedings for delivery of possession overlooked the provision of S. 3, Bengal Non-agricultural Tenancy (Temporary Provisions) Act, 1940. The argument is that as in the present case the tenants were in arrears as regards payment of rents due by them, there could be no stay of any suit or proceeding under S. 3, Bengal Non-agricultural Tenancy Act. The proceeding for delivery of possession could be stayed only if the entire decretal amount was deposited in Court as prescribed by the proviso to S. 3 of the Act within thirty days from the date of the decree. There are two other points which have been put forward by Mr. Bose in support of his rule. The first is that S. 3, Bengal Non-agricultural Tenancy Act, is ultra vires of the Provincial Legislature and the second is that the defendant in both these two suits does not come within the definition of a non-agricultural tenant as defined in S. 2 of the Act. We shall take up these points one after another. To appreciate the first point that has been raised by Mr. Bose, it is necessary to examine carefully the provision of S. 3, Bengal Non-agricultural Tenancy Act. That section reads as follows :

"Notwithstanding anything contained in any other law for the time being in force, every suit and proceeding in any Court for ejectment of a non-agricultural tenant, other than a suit or proceeding for ejectment on account of the non-payment of rent by such tenant, shall be stayed for the period during which this Act continues in force."

There is a proviso attached to it which says that a proceeding for delivery of possession in execution of a decree for ejectment on account of non-payment of rent by such tenant shall be stayed if, within thirty days from the date of the decree, such tenant deposited into Court the amount of the decree together with the costs of the proceeding. Thus, in order to attract the operation of the section what is necessary is, that the suit or proceeding must be one for ejectment of a non-agricultural tenant and the ejectment must be sought for on a ground other than non-payment of rents. The words "on account of non-payment of rents" are somewhat unhappy and it has been pointed out by our learned brother Mitter J. in 45 C.W.N. 22[1] that mere non-payment of rent could not be a ground for ejectment of a tenant under the substantive law of this country. Our learned brother was constrained to interpret these words as referring to a suit for ejectment of a tenant whose rents were in arrears although the right to sue was based on grounds other than non-payment of rent. This decision was followed by Henderson J. in 45 C. W. N. 791.[2] With great respect to the learned Judges we are bound to say that the interpretation adopted by them is somewhat far-fetched and unnatural. A suit for ejectment of a tenant for non-payment of rent means and implies that the tenant is sought to be ejected on the ground that he has defaulted to pay rent due by him. It is true that mere non-payment of rent is not a ground upon which eviction could be claimed by the landlord but at the same time there may be a condition in the lease under which the lessee would forfeit his tenancy if there is default in the payment of rent for a certain period. Under S. 111, cl. G, T. P. Act, a forfeiture may arise in case the lessee breaks an express condition which provides that on breach thereof the lessee may re-enter; and non-payment of rent may be a condition on the breach of which a forfeiture would be incurred. It is to this class of cases that the words "a suit for ejectment for non-payment of rent" as used in S. 3 of the Act are in our opinion referable. Section 114, T. P. Act, gives the Court power to grant relief in such cases and instead of making a decree for ejectment the Court can make an order relieving the lessee against the forfeiture provided he pays or tenders to the lessor the rent in arrears together with interest and costs. It may be that it was on account of the provision of S. 114, T. P. Act, that the Legislature exempted such cases from the operation of the provision of S. 3, Non-agricultural Tenancy Act. Even when no decree has been made in conformity with the provision of S. 114, T. P. Act, and a decree for ejectment has been passed, the proviso to S. 3, Bengal Non-agricultural Tenancy Act, gives a relief to the judgment-debtor, and there will be a stay of the proceeding for delivery of possession provided the tenant deposits in Court the amount of the decree together with the costs of the proceeding within thirty days from the date of the decree. It may be argued that the view which we are taking may lead to this undesirable result that a suit which has been brought by the landlord for ejectment as well as for recovery of rent may be stayed in its entirety under the provision of S. 3, Bengal Non-agricultural Tenancy Act, and the landlord may have to forego the rent for a certain period of time. We do not think, however, that this was the intention of the Legislature. What the Legislature intended is that only a suit or proceeding for the ejectment of a tenant shall be stayed and there is nothing in S. 3 which prevents the Court from proceeding with the suit so far as it relates to recovery of rent. We believe that a perfectly correct order has been made by the Court in the present case by staying the proceeding for the delivery of possession only and allowing the decree-holder to proceed with the execution of the decree so far as it relates to recovery of arrears of rents and costs. The first point must therefore fail.

So far as the second point is concerned, it seems to us that it is concluded by the decision of a Special Bench of this Court in 46 C.W.N. 174.[3] It was held there by three Judges of this Court that S. 3, Bengal Non-agricultural Tenancy Act, is a valid piece of legislation which is covered by item 2 read with item 21 of the Provincial List and is not repugnant to any existing Indian law which makes it void under S. 107, Government of India Act. The third point raised by Mr. Bose does not appear to us to have any substance. It is true that the defendants in both the suits were originally sub-tenants but the case of the landlord plaintiffs as made in the plaint was that the tenant holding the land immediately under them had surrendered the tenancy and the sub-tenants had become tenants directly under them. It was on this footing that the suits for ejectment were brought, and rents were claimed against them up to the date of the expiry of the period of the notice. Under the circumstances we are unable to say that the defendants were sued as trespassers and not as tenants. The result, therefore, is that the rules fail and are discharged without costs. Certificate for leave to appeal to the Federal Court under S. 205 (1), Government of India Act, 1935, is granted in each case.

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1. ('41) 28 A. I. R. 1941 Cal. 302 : 194 I. C. 581 : 45 C. W.N. 22, Purnendu Nath v. Narendra Nath.
2. ('41) 28 A.I.R. 1941 Cal. 528 : 196 I.C. 697 : 45 C. W. N. 791, Nut Behari Das v. Mahamed Ali.
3. ('42) 29 A. I. R. 1942 Cal. 49 : 198 I. C. 136 : I.L.R. (1941) 1 Cal. 497: 74 C.L.J. 485: 46C.W.N. 174 (S. B.), Sukumari Devi v. Rajdhari Pandey.

SEN J. — I am also of opinion that the rules should be discharged. I desire to say a few words regarding the reasons why I am unable to accept the interpretation put upon S. 3, Non-agricultural Tenancy (Temporary Provisions) Act, by my learned brother Mitter J. in 45 C.W.N. 22.[1] Section 3 is in the following terms :

"Notwithstanding anything contained in any other law for the time being in force, every suit and proceeding in any Court for ejectment of a non-agricultural tenant, other than a suit or proceeding for ejectment on account of the non-payment of rent by such tenant, shall be stayed for the period during which this Act continues in force, provided that every proceeding for delivery of possession in execution of a decree for ejectment on account of the non-payment of rent by such tenant shall be stayed if, within 30 days from the date of the decree, such tenant deposits into Court the amount of the decree together with the costs of the proceeding."

What Mitter J. has said is that a suit for ejectment of a tenant who is in arrears regarding his rent is a suit for ejectment on account of non-payment of rent, although ejectment is claimed on a ground other than that of non-payment of rent. In explanation of this interpretation Mitter J. remarks that under the law a non agricultural tenant cannot be ejected for non payment of rent and that therefore the phrase "ejectment on account of non-payment of rent" appearing in S. 3 is meaningless if words are given their ordinary meaning. In order to give the clause some meaning he is constrained to interpret it as stated above. There can be no doubt that if the words of the above mentioned phrase in the section be given their ordinary meaning the interpretation of my learned brother cannot be supported. This forced and, if I may say so with great respect, unnatural interpretation is based on the view that a non-agricultural tenant cannot be ejected on account of non payment of rent. With great respect I am unable to accept this view. It is true that non-payment of rent is not necessarily a ground for ejectment, but a non-agricultural tenant may in certain circumstances be ejected on account of non-payment of rent. If the lease contains a condition that it will be forfeited for non-payment of rent then if the tenant defaults he may be ejected for non-payment of rent (*vide* S. 111G, T. P. Act). I am not unmindful of the provisions of S. 114, T. P. Act, by which a tenant may obtain relief against forfeiture for non-payment of rent if he complies with certain terms mentioned in the section, but the fact remains that he is liable to be ejected for non payment of rent if he does not comply with these terms. Thus in my opinion there is no necessity for giving a forced meaning to the phrase "ejectment on account of non-payment of rent." The section can be made effective by giving the words their natural and ordinary meaning. If that is done then S. 3, Non-agricultural Tenancy (Temporary Provisions) Act must be construed as providing that a suit or proceeding against a non-agricultural tenant for ejectment on grounds other than for non-payment of rent must be stayed. The fact that rent is also claimed in such a suit would make no difference to the position, the suit or proceeding have to be stayed. For these reasons I am of opinion that the order of the Court below staying proceedings for delivery of possession of the property is correct.

R.K. *Rules discharged.*

A. I. R. (29) 1942 Calcutta 552

HENDERSON J.

Sachirani Biswas w/o Charu Chandra Biswas — Defendant 1 — Petitioner

v.

Nagendra Nath Nath s/o Bani Kanta Nath — Plaintiff — Opposite Party.

Civil Rule No. 885 of 1942, Decided on 2nd July 1942, for setting aside order of Munsif, Bongaon (Jessore), D/- 18th May 1942.

Bengal Agricultural Debtors Act (7 of 1936), Ss. 34, 33 and 20 (as amended by Act 8 of 1940)—Suit for declaration of title and recovery of possession on basis of sale deed — Court is not bound to stay suit on notice under S. 34 even though defence is that sale was really mortgage.

When a suit has nothing whatever to do with any debt such as where the plaintiff seeks a declaration of his title to the suit land on the basis of an alleged sale deed by the defendant and seeks recovery of possession admitting at the same time that nothing is due to him from the defendant a notice issued by the board under S. 34 cannot prevent the Court from trying the suit even though the defence is that the transaction of sale was really a mortgage. Section 33 and also S. 20 as amended by Act 8 of 1940 can have no application. [P 552 *h*]

Birendra Kumar De — for Petitioner.

Surajit Chandra Lahiry for Bireswar Chatterji — for Opposite Party.

ORDER. — This rule has been obtained by the defendant and is directed against an order of the Munsif refusing to stay a suit on receipt of a notice under S. 34, Bengal Agricultural Debtors Act. The suit is one for a declaration of the plaintiff's title and recovery of possession. The title is based upon an alleged sale by the petitioner. The main defence of the petitioner is that the transaction was really a mortgage. Of course if it was a mortgage there is a debt and the petitioner has approached a Debt Settlement Board for settlement of this debt. Before the jurisdiction of the ordinary Courts is excluded, there must be something definite to this effect. I have not been able to find anything in the Act which would prevent the Court from deciding whether the plaintiff has title to the disputed land and ought to be put in possession of it.

Mr. De relied upon Ss. 33 and 34. Section 33 prevents the Court from proceeding with any suit in respect of a debt which is before the board. The present suit has nothing whatever to do with any debt. The plaintiff's case is that he is the owner of certain property and he admits that the petitioner does not owe him anything. A notice issued by the board under S. 34 will, therefore, not prevent the Court from trying this suit. There remains S. 33 which bars certain proceedings in a civil Court. Here again the proceedings barred are proceedings in connexion with debts. The present suit is not a suit in connexion with any debt and there is nothing in S. 33 which bars the Court from proceeding to try it. Section 20, as amended, does not carry the matter any further. There is no question in the present suit whether any liability is a debt or not. The rule is discharged with costs, hearing-fee, one gold mohur.

G.N./R.K. *Rule discharged.*

A. I. R. (29) 1942 Calcutta 553

MOHAMAD AKRAM AND PAL JJ.

Amrita Lal Sen and others —
Plaintiffs — Appellants

v.

Surath Lal Sen and others —
Defendants — Respondents.

Appeal No. 1811 of 1938, Decided on 27th November 1941, from appellate decree of Addl. Dist. Judge, Second Court, Dacca, D/- 28th June 1938.

(a) Hindu law — Joint family — Family property — Nucleus — Acquisition by member — Presumption — Onus of proof.

The mere existence of a nucleus of joint family property will not by itself raise the presumption that the whole of the property of the joint family is joint including any acquisition by a member of the joint family. In order to give rise to the presumption the nucleus must be shown to be such that with its help the property claimed to be joint could have been acquired. Not only should the nucleus be established to be sufficient for the acquisition of the property but it should also be established that it was available to the acquirer. It is only after the possession of an adequate nucleus is shown the onus shifts on to the person who claims the property as self acquisition affirmatively to make out that the property was acquired without any aid from the family estate : ('30) 17 A.I.R. 1930 Mad. 662; ('38) 25 A. I. R. 1938 Mad. 841 and ('37) 24 A.I.R. 1937 Mad. 538, *Rel. on.* [P 554*f*,*g*,*h*; P 555*d*]

The presumption referred to above is not any technical rule of Hindu law. It is merely a rule of procedure affecting the duty of proof and has its basis in the experience and observation of the course of the usages and habits of Hindu society. [P 555*d*]

(b) Evidence Act (1872), S. 114 — Presumption — Meaning of.

Presumption is only an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connexion. [P 555*d*,*e*]

G. C. Sen and Amalendu Sen — for Appellants.

Dr. Sen Gupta and Rabiranjan Das Gupta — for Respondents.

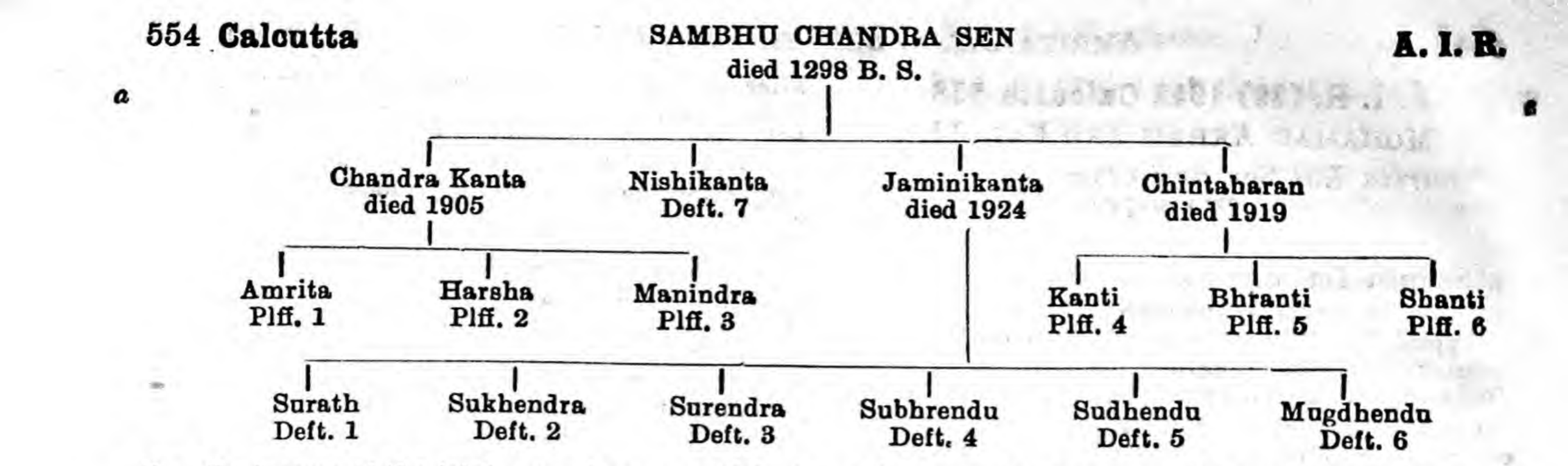
PAL J. — This appeal is by the plaintiffs in a suit for partition of homestead land in the town of Dacca claimed to be the joint land of the parties. The following genealogical table will show the relationship of the parties :

(for pedigree see next page)

The disputed land was acquired in 1893 by a kobala standing in the name of the third brother Jamini Kanta for Rs. 335. The case of the plaintiffs is that Chandra Kanta, father of plaintiffs 1 to 3, was a pleader at Lakshmipur in the District of Noakhali, that Nishikanta, defendant 7, was a Post-master, that Jamini Kanta, father of defendants 1 to 6, was in the service of the Collectorate at Dacca, that the youngest brother Chintaharan, father of plaintiffs 4 to 6, was still young and was a student, that in this state of affairs the land in question was acquired with the joint money of the four brothers for their joint benefit, but as the father of defendants 1 to 6 alone was at Dacca the property was purchased in his name alone, that though the property was thus purchased in one name it was jointly enjoyed and possessed by all the four brothers till their respective deaths and thereafter by their heirs, and that the family continued to be joint in every respect both in estate and mess till 1922 when Jamini separated from the rest. Defendant 7 filed a written statement practically supporting the plaintiffs. Defendants 1 to 6 are the real contesting parties and their defence is that the property was a self-acquisition of their father Jaminikanta. Paragraphs 3, 6, 12 to 16 of their written statement practically completely set out their case. The learned Subordinate Judge who heard this suit decreed the plaintiffs' claim and arrived at the following findings :

(1) The parties have failed to prove beyond the shadow of doubt the source of money with which the disputed property was purchased; (2) At the time of the purchase of the suit land Jamini was living in a mess at Dacca, and both Amrita, plaintiff 1, and Chintaharan, the father of plaintiffs 4 to 6, who were both students at the time were living with Jamini in the same mess while the father of plaintiffs 1 to 3 was then a pleader in the District of Noakhali and defendant 7, Nishi Babu, was employed in the Postal Department and Jamini was employed in the office of the Collector of Dacca on a pay of Rs. 15 or Rs. 20 per month; (3) The parties had at the time of the acquisition of the suit land some landed properties and a joint family dwelling house at village Madhyapara and the income from those landed properties was spent for the worship of the joint idol of the parties at Madhyapara; (4) Both before and after the purchase of the disputed land the brothers used to send money to Jamini at Dacca and Chandrakanta, the father of plaintiffs 1 to 3, used to send Rs. 15 to Jamini regularly every month; (5) There is nothing satisfactory to show that the disputed land was acquired by Jamini alone with his own money; (6) After the acquisition of the property all the four branches of the family treated the property as their own and the suit land was thrown into the common stock of the family (the learned Subordinate Judge relied on Ex. 9, C. S. khatian of 1909, Ex. 6, tenants' ledger in the khas mahal, Ex. 8 of 1921, application by Jamini for Collector's permission to build on the land, Ex.7, the mutation register and Ex.K, Municipal assessment register); (7) The suit land was acquired in the interest of Jamini Kanta Sen and his three brothers as alleged in the plaint and the land belonged to all of them and has since devolved upon the parties to the suit. The plaintiffs and defendant 2 did not erect their respective structures with the permission of Jamini or his sons nor under the conditions stated in para. 12 of the written statement of defendants 1 to 6. The possession of the plaintiffs and defendant 2 is not a permissive one.

On appeal by the defendants, the Court of appeal below reversed the judgment and decree of the Court of first instance and dismissed the plaintiffs' suit. The learned Additional District Judge who heard the appeal in the Court of appeal below enunciated the point for determination in the appeal to be "whether the disputed property was the joint family property of the parties or the self-acquired property of Jamini, the father of defendants 1 to 6." He affirmed the findings arrived at by the Court of first instance, that the parties were members of a joint Hindu family, that they lived jointly till recently and that at the date of the acquisition of the property in question there already was a joint property, however, small. On these findings he formulated the points for his consideration thus : (1) whether there was any nucleus of joint fund sufficient for the acquisition of this property; (2) whe-



ther the income of the joint property was sufficient for the acquisition of the disputed property; (3) whether the incomes of the parties were blended
b into the joint fund; and (4) the nature of the possession of the property by the parties. With regard to the first point he found that there was never any ejmali fund created by contribution from all the cosharers and that there was no nucleus of any joint fund sufficient for acquisition of the disputed property. As regards the second point he found that there was some joint property yielding some income but that certain idols had to be worshipped daily and this exhausted that income. In conclusion he found that it could not be proved that the income from the joint property was such as to leave a surplus after the performance of the daily worship of the family idols sufficient for the purpose of the acquisition of the disputed property. As regards the third point the learned Additional District Judge found that no doubt there was some evidence on record that the cosharers remitted money to Jamini
c occasionally, but that the evidence of such remittances covered a period of 1915-18 only, that is, long after the purchase of the disputed property. Further he took the view that these money orders were sent for the purpose of helping the needy people of the family. He concluded his discussion of the point thus :

"So considering the evidence and probabilities I find that it could not be proved that the income of the cosharers was blended with the joint family funds or that the purchase money came from the joint family funds."

In this connexion he found that at least a part of the purchase money was borrowed by Jamini and that Jamini was in a position to procure the purchase money of Rs. 335 at that time. Coming to
d the fourth point, the learned Additional District Judge practically confined himself only to the period commencing from 1922 when construction of buildings on the disputed land was started. Admittedly the disputed land is in the possession of the plaintiffs as also of defendant 7 and they are possessing the land by constructing buildings thereon with their own money. The case of defendants 1 to 6 was that all these acts of possession were done with the permission of Jamini while he was alive and after his death, with the permission of the defendants themselves. The learned Additional District Judge accepted the case of the defendants, observing "this at first glance seems rather an improbable story but on a consideration of the evidence and circumstances and also the probabilities of the case I find that it is not improbable." Mr. Sen appearing for the appellants contends that the Court of appeal below went wrong in his points 1 and 2 in so far as he required the defendants to establish the sufficiency of the nucleus of joint funds for the acquisition of the property. His contention is that as soon as it is proved that the family was joint at the date of the acquisition of the property and was possessed of a joint fund the presumption will be that the acquired property is a joint property and it will be for the defendants claiming the property to be the self acquisition of Jamini to prove that it was acquired by Jamini with his separate fund. We are unable to accept this contention of Mr. Sen. The law on the point is summarised by Sir Dinshaw Mulla in his treatise on Hindu Law thus :

"When a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including any acquisition by a member of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired. Such being the presumption, if any member of the family claims any portion of the property as his separate property the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. He may do so by showing that the income of the existing ancestral property was employed in other ways." (Principles of Hindu Law, 9th Edn., pp. 255-256).

Similarly, Mayne summarizes the law thus :

"Where the possession of a nucleus of joint family property is either admitted or proved, an acquisition made by a member of the family is presumed to be joint family property. But this is subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. And it is only after the possession of an adequate nucleus is shown, the onus shifts on to the person who claims the property as self-acquisition affirmatively to make out that the property was acquired without any aid from the family estate." (10th Edn., pp. 373-374).

In I. L. R. (1937) Bom. 708[1] (Beaumont C. J., and N. J. Wadia J.), Beaumont C. J. observed as follows :

"In my opinion the nucleus of joint family property necessary to give rise to the presumption must be family property from which the purchase money for the property in suit might have been derived wholly, or at any rate in considerable part. It is not in my opinion enough to prove . . . . that the mere possession of joint family at the date of the purchase of the property in suit is enough to raise the presumption that the property in suit is itself joint

1. ('37) 24 A.I.R. 1937 Bom. 446 : 171 I. C. 623 : I.L.R. (1937) Bom. 708 : 39 Bom.L.R. 846, Babubhai Girdharlal v. Ujamlal Hargovandas.

family property. It would, I think, be unfortunate if the Court was bound to presume that something had occurred, which on the evidence could not possibly have occurred, and if it be shown that the only joint family property existing at the date of the acquisition of the property in suit was of such a nature that it could not possibly have been the means of acquiring the property in suit, then in my opinion the presumption that the property in suit is joint family property does not arise."

In A. I. R. 1930 Mad. 662,[2] Ananta Krishna Ayyar J., after discussing the various decided cases on the point, summed up as follows :

"In some cases, it is mentioned that mere possession of joint family property by a joint Hindu family would raise a presumption of law that all the property in the possession of a coparcener is joint family property. I should like to observe that the above position would be strictly correct only if the joint family property possessed by the joint Hindu family was such as would have enabled and led to the acquisition of the other property. If having regard to the nature of the income from the admitted joint family property or otherwise, the same could not have possibly helped in or led to the acquisition of subsequent property, then there is no presumption that the subsequent property is joint family property. Either the presumption should be raised only when the property possessed by the joint family was yielding such income as could have enabled the acquisitions of the subsequently acquired property or the presumption if raised from the mere position of the joint family property should be taken to have been counterbalanced by proof that such property yielded no income and could not have otherwise helped in or led to the acquisition of other property."

In I. L. R. (1938) Mad. 696[3] (Madhavan Nair and King JJ.) it was held that the mere existence of a nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties of a member are joint family properties. The nucleus must be shown to be of such a character as, taking into consideration the surrounding circumstances, would have led to the subsequent acquisition with its help. The ancestral nucleus must be shown to be of such substantial value that it might well have contributed to the acquisition of the property in question. In I. L. R. (1937) Mad. 1012,[4] Varadachariar and King JJ., took the same view. I respectfully agree with the views expressed in cases referred to above and in my judgment, in order to raise the presumption that the acquired property is a joint family property not only should the nucleus be established to be sufficient for the acquisition of the property but it should also be established that it was available to the acquirer. The presumption considered above is not any technical rule of Hindu law. It is merely a rule of procedure affecting the duty of proof and has its basis in the experience and observation of the course of the usages and habits of Hindu society. Presumption is only an inference as to the existence of one fact from the existence of some other fact founded upon a previous experience of their connexion. It may be pointed out in this connexion that if any rule of procedure in this respect can be said to be indicated by the texts dealing with self-acquisitions, it is perfectly consistent with the views taken by the learned Judges whose judgments have been referred to above. Chapter 6 of the Dayabhaga, while dealing with property liable or not liable to partition, deals with self-acquisitions, and on the authority of Manu and Vishnu declares that to be not liable to partition which is gained without expenditure of patrimony—

अनुपघातोपात्तमविभाज्यमाहतुर्मनु विष्णू ।
(Verse 3)
"अनुपघ्नन पितृद्रव्यम् श्रमेण यदुपार्जयेत् ।
स्वयमार्हितलब्धम् तन्नाकामो दातुमर्हति ॥"
(Verse 3)

"What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent, for it was gained by his own exertion." (Manu, IX, 208 and Vishnu, XVIII, 42).

Consistently with his theory that one can become owner only on the strength of his own exertion—

"अर्जयितृव्यापारोऽर्जनम् अर्जनाधीन स्वामीभावश्च अर्जयिता"

Jimutabahana says :

"Since the patrimony is not used there is no exertion on the part of the others, through the means of the common property; and, since it was obtained by the man's own labour there is no physical effort on the part of the rest; it is therefore the separate property of the acquirer alone."

"पितृद्रव्योपघाताभावेन द्रव्यद्वारेण नेतरेषां व्यापार:, स्वचेष्टा लब्धत्वेन शारीरोऽपि व्यापारो नेतरेषामिति अर्जकस्यैव तत् असाधारणम्"

After much discussion Jimutabahana ultimately declares that property alone to be liable to partition which is acquired by means of joint stock used for the express purpose of acquisition and no other :

तस्मात् धनोद्देशेनैव साधारण धनोपघातेनार्जितम् साधारणम्, न अन्यत् । (Verse 51)

In conclusion of the section he says :

तस्मात् अविभक्तार्जित त्वमात्रेण अविभक्त भात्रन्तरस्य भवति इति असंगतं वचनम्

"Consequently it was an inaccurate assertion that another unseparated brother participates on the mere ground of the acquisition being made by an unseparated brother."

In my judgment the formulation of points 1 and 2 by the learned Additional District Judge was not erroneous and his judgment is not affected by any error in this respect. As regards point No. 4 Mr. Sen contends that the judgment of the learned Additional District Judge is vitiated by the fact that it fails to take into consideration the several material documents relied on by the Court of first instance and that it ignores altogether the treatment of the property by the parties concerned during the period from the date of acquisition to 1922 when the construction of buildings commenced. Mr. Sen contends that this omission has vitiated the entire judgment inasmuch as the conduct of the parties

2. ('30) 17 A.I.R. 1930 Mad. 662 : 126 I. C. 609, Sankaranarayana Mudaliar v. Tangaratna Mudaliar.
3. ('38) 25 A.I.R. 1938 Mad. 841 : 179 I. C. 344 : I. L. R. (1938) Mad. 696 : (1938) 1 M. L. J. 216, Vythianatha Iyer v. Varadaraja Iyer.
4. ('37) 24 A.I.R. 1937 Mad. 538 : 170 I. C. 107 : I. L. R. (1937) Mad. 1012, Venkata Ramayya v. Seshamma.

during this period as found by the Court of first instance would have an important bearing both on the question whether the original acquisition was for the family benefit and whether the story of permissive user since 1922 is unacceptable. Mr. Sen further contends that the treatment of the property during this period would have an important bearing on the question whether the acquirer threw the property into the joint stock. The judgments of both the Courts below were placed before us and after carefully considering them we are of opinion that this contention of Mr. Sen must prevail. The Court of first instance took into consideration the documentary evidence showing that in the khas mehal all the members of the family were recorded as joint owners, that at the Cadastral Survey also the property was recorded as joint property with specification of the shares of the members, that Jamini was alive over 12 years after these records and never raised any objection to these entries. On the other hand, nearly 12 years after the publication of the C. S. Khatian he in his application to the Collector for permission to build on the land referred to the C. S. Khatian and even during his lifetime acts of possession by construction of separate buildings on the land by the plaintiffs' party commenced. Dr. Sen Gupta appearing for the respondents, contends that all the above records and acts can be explained by the evidence on the record. That may be so. But the difficulty is that the final Court of fact did not at all consider this portion of the case, and we sitting on second appeal do not feel inclined to enter into the evidence in this case. In our judgment this contention of Mr. Sen appearing for the appellants must be given effect to. The result is that this appeal is allowed. The judgment and decree of the Court of appeal below are set aside and the case is remitted to it for the rehearing of the appeal on the evidence already on record. Costs of this appeal as also further costs will abide the result.

MOHAMAD AKRAM J. — I agree.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 556

B. K. MUKHERJEA AND SEN JJ.

Bhowanipur Banking Corporation, Ltd. — *Petitioner*

v.

Bejoy Kumar Addy and others — *Opposite Party.*

Civil Rule No. 741 of 1942, Decided on 15th July 1942, issued in matter of application for setting aside order of Sub-Judge First Court, 24-Parganas (Alipur), D/- 22nd May 1942.

(a) Banker and Customer—Suit for partition of joint estate between members of family — Bank which was creditor of family for considerable amount appointed receiver—Court directing receiver to keep all realisations from estate in its current account — Money thus kept in current account amounting to Rs. 69,926 — Bank starting proceedings under S. 153, Companies Act — Bank held could not be its own creditor—Amount of Rs. 69,926 did not become bank's money but remained money of family in hands of bank as receiver — Even if bank invested aforesaid amount in its business it could not lose its character as trust money so long as it was capable of being ascertained.

Pending the hearing of a suit between the members of a family for partition of the joint estate, a bank which was a creditor to the family for a considerable sum of money was appointed a receiver to the joint estate of the family. By an order of the Court dated 17th April 1939 it was directed that all realisations made by the receiver from the estate of the family, with the exception of certain sums of money that were necessary to meet the immediate expenses, were to be kept in the current account of the bank and disbursements were to be made in accordance with the directions which the Court might give from time to time. The balance lying in the said account to the credit of family estate was Rs. 69,926-7-6. Subsequently the bank started proceedings under S. 153, Companies Act, with a proposal for composition with its creditors :

Held that it was an elementary proposition of law that there must be two persons to make a contract. No person either an individual or a body corporate could be his own creditor: 154 E. R. 628 and (1910) 1 Ch. 529, *Rel. on.* [P 558*a*,*b*]

The bank in its capacity as a bank was appointed a receiver to the estate of the family. There was no splitting up of the personality and it was not a case where one person who in his individual capacity had been appointed a receiver held in another capacity the position of a Banker. The receiver and the bank were the same person both in fact and in law and the bank for the purpose of facilitating the realisation of its dues became a receiver of the debtors' estate. Consequently in whatever form the money of the family might have been kept by the bank it did not become the bank's money but remained the money of the family in the hands of the bank as receiver : (1883) 23 Ch. D. 75 and 55 E. R. 34, *Disting.* [P 558*e*,*f*]

Held further that the direction in the order was a convenient form of keeping accounts and nothing more and since in law the bank could not become its own creditor the order of the Court could not alter that position. [P 558*g*]

Held also that even if the order of the Court dated 17th April 1939 could be construed as authorising the bank to invest the money of the family in its own business for which interest was payable from time to time so long as the money was capable of being ascertained it did not lose its character as a trust money : ('33) 20 A. I. R. 1933 P. C. 148, *Rel. on.* [P 558*h*]

(b) Banker and Customer — Bank receiving money from customer — Bank is debtor of and not trustee for customer.

The receipt of money by a banker from or on account of its customer constitutes it merely a debtor to the customer, it is not in any sense a trustee for the latter. [P 558*a*]

(c) Receiver — Suit for partition of joint estate between members of family—Bank creditor of family appointed receiver—Title remains vested in family—Family executing conveyance in favour of bank for liquidating its debts — Fact that bank qua receiver joins in conveyance does not substantially alter nature of transaction.

Where in a suit for partition of joint estate between members of a family, the bank which is a creditor of the family is appointed receiver, the title remains vested in the family and if the parties had got to execute a conveyance in favour of the bank for the purpose of liquidating their debts the

bank qua receiver might be called upon to join in the conveyance because he is in possession of the property, but that fact cannot substantially alter the nature of the transaction. [P 558*g*,*h*]

Sushil Ch. Sen and Mahendra Kumar Ghose — for Petitioner.

Dr. S. C. Basak, Gour Mahan Dutt, Satya Charan Pain, Jnanendra Nath Bakshi and Anilendra Nath Roy Choudhuri — for Opposite Party.

B. K. MUKHERJEA J. — This rule was obtained by the Bhowanipur Banking Corporation against two orders of the Subordinate Judge, First Court, Alipur directing the petitioner to deposit in Court the entire amount held by it in its current account as receiver to the estate of the opposite parties. The material facts are not in controversy and may be shortly stated as follows : The opposite parties are all members of the Addy family of Chetla. One of them, viz., opposite party No. 1 instituted a suit for partition in the Court of the First Subordinate Judge at Alipur against his other cosharers and this suit was registered as T. S. No. 55 of 1937 of that Court. On 18th September 1937, the petitioner who was and is a creditor to the Addys for a considerable sum of money was appointed a receiver to the joint estate of the Addys pending the hearing of the partition suit. By an order of the Court dated 17th April 1939 it was directed that all realisations made by the receiver from the estate of the Addys, with the exception of certain sums of money that were necessary to meet the immediate expenses, were to be kept in the current account of the bank and disbursements were to be made in accordance with the directions which the Court might give from time to time. The balance lying in the said account to the credit of the Addys' estate on 6th May 1942 was Rs. 69,926-7-6. On the afternoon of 6th May 1942 the bank which was in financial difficulties from sometime past temporarily suspended payment to its depositors until further orders. On 8th May following, the opposite party No. 2 made an application to the Court for a direction on the receiver to deposit all monies, belonging to the Addys' estate which was held by it, either in the Government Treasury or in some other safe place. The Court called for a report from the receiver which was submitted on 11th May 1942. On the same date the petitioner Bank filed an application in the original side of this Court under S. 153, Companies Act, with a proposal for composition with its creditors. That application was admitted on that very date and orders were passed for holding the meetings of the share-holders and depositors for the purpose of approval of the scheme. On 13th May 1942 the Bank reported to the Court that as it had already made an application under S. 153, Companies Act, and the matter was fixed for hearing on 26th June next it was not possible for it to bring into Court the money lying in its current account to the credit of the Addys' estate. The Court on hearing all the parties made an order on 18th May 1942 directing the petitioner to deposit all monies belonging to the Addys' estate either in some Government Treasury by challan or in the Reserve Bank of India, Calcutta, within a week from that date. It is said that after this order was passed the Supervisor who was managing the estate under the receiver and who was also one of the directors of the Bank, wrote a formal letter to the Bank requesting it to pay the sum of Rs. 69,926 and annas odd mentioned above. To this the Accountant of the Bank replied by saying that till the final determination of the proceedings under S. 153, Companies Act, the Bank was not legally competent to make any preferential payment to any of its creditors. This matter was reported to the Court and the Subordinate Judge by his order dated 22nd May 1942, confirmed the previous order made by him on 18th May 1942. The receiver was directed to deposit the money either in the Government Treasury or in the Imperial or Central Bank of India within the time already fixed failing which the premises where the Bank holds its office was directed to be attached and sold. It is the propriety of this order that has been challenged before us in this rule.

Mr. Sushil Ch. Sen who appears in support of the rule has contended before us that although the monies realised by the Bank as receiver, from the estate of the Addys, and held by it would ordinarily remain the monies of the Addys, yet under orders of the Court it opened a current account with itself in its capacity as receiver the legal position was that the Bank qua receiver became its own creditor. The money deposited in the current account no longer remained the money of the Addys and it became the Bank's money which the Bank was only bound to repay in accordance with the usual terms under which it held the depositor's money. If therefore the Bank embarked upon a scheme of composition with its creditors under S. 153, Companies Act, and the scheme was approved by this Court the receiver to the Addys' estate would be in the same position as any other creditor to the Bank and would be bound by the scheme. It is true that at the date when the Subordinate Judge made the order, the meeting of the depositors was not yet held but as the Bank had already started a proceeding under S. 153, Companies Act, it could not very well frustrate the scheme by giving preference to one of the creditors. It is contended that in these circumstances the receiver is legally incompetent to withdraw any money from the Bank and it can only recover the money in terms of the scheme as might be finally sanctioned.

Dr. Basak who appears for the opposite party has argued on the other hand that whatever the position might have been if the Bank as receiver had opened a current account with another Bank and that Bank had entered into a composition with its creditors under the Companies Act, the position was quite different when the Bank opened an account with itself. It is said that as monies were obtained by the Bank in its capacity as a receiver to the Addys' estate, then so long as they were retained by it they would remain the money of the Addys' estate in its hand and it was immaterial whether it was kept in its current account or not or in any other manner. Dr. Basak's contention substantially is that the money would not become the assets of the Bank and would not be divisible among its creditors in the event of a winding up proceedings. If the Bank wants to enter into a composition with its creditors it should frame a scheme on the footing that this sum of money does not form part of its assets.

The controversy thus centres round the short point whether the money deposited by the Bank qua receiver in its current account still remains the money of the Addys held by the receiver on behalf of the latter or it belonged absolutely to the Bank and the Bank qua receiver occupied the position of a creditor or depositor in respect to this amount. It is not disputed on the petitioner's side that if the Bank had kept the money in it's own vault without opening any current account it would undoubtedly retain its character as a trust money. But the posi-

a tion is said to have been altered as soon as the current account was opened. Then the Bank qua receiver became its own creditor and as a creditor it could not have preferential rights over the other creditors. In support of this contention, Mr. Sen has placed reliance on the well known decision in (1844-48) 2 H. L. C. 28.[1] The proposition enunciated in that case cannot possibly be disputed. It is perfectly well settled that the receipt of money by a Banker from or on account of its customer constitutes him merely a debtor to the customer, he is not in any sense a trustee for the latter. But the primary question that arises for determination in the present case is whether the Bank as receiver did and could become in law its own creditor by going through the formality of opening a current account with itself. It is an elementary proposition of law that there must be two persons to make a contract. No person either b an individual or a body corporate can be his own creditor. In the old English case in 154 E. R. 628[2] there was an action on a covenant by *C* to pay money to *A*, *B*, and himself. A plea of demurrer was raised that no action lay on the covenant which was in effect a contract by the defendant to pay money to himself. This plea was allowed and it was observed by Pollock C. B. that the contract was senseless. The same principle was applied in (1910) 1 Ch. 529[3] and (1911) 1 Ch. 361[4] and it was held that when the covenantor and the covenantee were the same person the contract was void and the action must be dismissed.

Mr. Sen has argued that a person in one character might enter into a contract with himself in another character and he has cited in support of his contention the cases in (1883) 23 Ch. D. 75[5] and c 55 E. R. 34[6] at p. 38. In the first of these cases the receiver of a business had advanced money of his own to the business. Jessel, M. R. pointed out that the practice in the Chancery Division was that the receiver should apply to the Court for sanction before advancing any money and if he had obtained such sanction interest could be allowed to him at the rate of 5 per. cent upon his advance. This case in my opinion, has got no application to the facts of the present one. The position of a receiver may be taken to be that of a trustee. He may occupy a fiduciary position in relation to the estate of which he is appointed a receiver but the trustee and the *cestui que trust* are not the same person in law and there is nothing in law which prevents the trustee from lending money to the *cestui que trust*. The only disability as recognised by Equity Courts is that he must not make any profit as a trsutee. In d the other case three trustees two of whom were Bankers were empowered to carry on a business and to "borrow money from any Bank or other persons for that purpose". The bankers made advances of money to the trust on compound interest. It was held that having regard to the fiduciary position occupied by them they must not make profit out of these advances but were entitled to simple interest only. This decision also does not help the petitioner in the least. One person who is appointed a receiver or trustee in his individual capacity may in another capacity hold the position of a banker. As a Banker e he might advance money to the estate in respect of which he was appointed a trustee and such transaction might be quite legal and effective subject to the rule that the person occupying a fiduciary position would not be entitled to make any profit by taking advantage of his position as a trustee. In the present case however the Bank in its capacity as a Bank was appointed a receiver to the estate of the Addys and made realisations from the properties of which it was put into possession. There was no splitting up of the personality and it was not a case where one person who in his individual capacity has been appointed a receiver holds in another capacity the position of a banker. The receiver and the Bank were in our opinion the same person both in fact and in law and the Bank for the purpose of f facilitating the realisation of its dues became a receiver of the debtors' estate.

We hold therefore that in these circumstances in whatever form the money of the Addys might have been kept by the Bank it did not become the Bank's money but remained the money of the Addys in the hands of the Bank as receiver. Stress is laid by Mr. Sen upon the order of the Court dated 17th April 1939 which sanctioned the opening of a current account in the Bank. It appears from the order sheet that a complaint was made by some of the Addys to the effect that all the realisations from their estate were being appropriated by the receiver in payment of the interest due to the Bank and in fact the receiver was taking interest in excess of what was legally due. The direction of the Court was that all monies that might be realised from the estate should in the first instance be put in the g current account of the Bank and then spent in such manner as the Court would from time to time direct. In our opinion, it was a convenient form of keeping accounts and nothing more and if in law the bank could not become its own creditor the order of the Court could not possibly alter this position. Another thing that has been pointed out to us is that the Court below had actually sanctioned the execution of certain conveyances by the bank qua receiver in favour of the bank itself. As a matter of fact, no conveyance had yet been executed and the legality and propriety of these transactions have not been decided as yet. In our opinion, however, that fact does not present any difficulty. The receiver as such has not title to the property which is the subject-matter of the litigation. The title remains vested in the parties and if the parties had got to execute a conveyance in favour of the bank h for the purpose of liquidating their debts the bank qua receiver might be called upon to join in the conveyance because he is in possession of the property, but we do not think that this fact substantially alters the nature of the transaction. At any rate we are not called upon to say anything as to the legal effect of a transaction like that.

The last thing that has been pointed out is that interest was paid by the bank upon the credit balance in the current account opened by the receiver and in all other respects no distinction was made between the receiver's account and the account of any other depositor. But even if we construe the order of the Court dated 17th April 1939 as authorising the bank to invest the money of the Addys in its own business for which interest was payable from time to time we think that so long as the money is capable of being ascertained, it does not lose its character as a trust money. This proposition is supported by the pronouncement of the

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1. (1844-48) 2 H. L. C. 28, Folley v. Hill.
2. 154 E. R. 628, Faulkner v. Richard Lowe.
3. (1910) 1 Ch. 529 : 79 L. J. Ch. 291 : 102 L. T. L. T. 417 : 54 S. J. 307, Ellis v. Kerr.
4. (1911) 1 Ch. 361 : 80 L. J. Ch. 298 : 104 L. T. 380 : 55 S. J. 235, Napier v. Williams.
5. (1883) 23 Ch. D. 75 : 52 L. J. Ch. 678 : 48 L. T. 751: 31 W. R. 418, In re Bushell; Ex parte Izard.
6. 55 E. R. 34, Crosskill v. Bower.

Judicial Committee in 60 I. A. 203.[7] We hold therefore that a sum of Rs. 69,926 and annas odd lying in the current account of the petitioner bank to the credit of the Addys' estate should be regarded not as the assets of the firm but as a money belonging to the Addys in the hands of the bank as receiver of their estate. The Court below was therefore right in directing the receiver to bring that money into Court and deposit in such way as it considers proper. It is represented to us that the bank may not be in a position at the present moment to bring the entire money into Court and it is said that they might very well set off this amount as against the dues of the Addys to them on the mortgage. It is not disputed that the Addys owe a large sum of money to the bank but it is not disputed at the same time that the members of the family also want money for their maintenance expenses and for meeting other immediate demands. In these circumstances we leave it to the Court below to decide whether the entire amount should be brought into Court forthwith or not. The Court may give suitable directions in this matter as it thinks proper. The question of attachment and sale of the bank premises may be taken up after the Court has considered this matter. Subject to the observations made above the rule is discharged with costs, hearing fee being assessed at three gold mohurs.

SEN J. — I agree.

G.N./R.K. *Rule discharged.*

7. ('33) 20 A.I.R. 1933 P C 148 : 143 I. C. 162 : 60 I.A. 203 : 56 Mad 570 (P.C.), Official Assignee, Madras v. Krishnaji Bhat.

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* A. I. R. (29) 1942 Calcutta 559

R. C. MITTER AND KHUNDKAR JJ.

Rai Harendra Nath Chaudhury — Defendant 1 — Appellant

v.

Rai Sourindra Nath Choudhury and others — Plaintiffs — Respondents.

Appeal No. 56 of 1939, Decided on 10th June 1942, from original decree of Sub-Judge, Khulna, D/- 30th November 1938.

*** (a) Civil P. C. (1908), O. 8, R. 6 — Set off is available to defendant only — Nature of set off explained.**

Set-off is a plea in defence, a plea available to the defendant only. It is a defence and a counter claim combined, defence to the extent of wiping out the plaintiff's claim and a claim by the defendant in the suit itself for the balance. [P 560*b*]

C. P. C. —

('40) Chitaley, O. 8, R. 6, N. 2.

('41) Mulla, Page 622, Note "Conditions of applicability of the rule."

*** (b) Civil P. C. (1908), O. 8, R. 6 and O. 20, R. 19 —Set off and counter claim distinguished — In former case, it must be within limitation at time of plaint — In case of counter claim, it must be in time at date of written statement.**

Although the word set-off only is used in O. 8, R. 6 and not the word counter-claim also, the claim to the ascertained sum of money which the Code permits the defendant to set up in the plaintiff's action for money may not only be what is strictly termed set-off but what is also a counter-claim. If the claim set up by the defendant is in respect of a debt which is less than or equal to the plaintiff's claim in the suit it is a plea of set-off pure and simple, but if it exceeds the plaintiff's claim it is to the extent of the excess a cross claim for the excess he is to be given a decree against the plaintiff in the same action. [P 561*c*]

Where the set-off is merely defensive (for the defendant does not claim a sum in excess of the plaintiff's claim), the relevant enquiry would be whether it was a dead claim at the date of the plaintiff's suit. Where however the defendant pleads for a sum of money which is in excess of the plaintiff's claim he occupies to the extent of the excess the position of a plaintiff in a cross suit, and in such a case and for the excess amount time is to be reckoned not from the date of the plaintiff's suit but from the date when he files his written statement : *Case law referred.* [P 561*f*]

C. P. C. —

('40) Chitaley, O. 8, R. 6, N. 15.

('41) Mulla, Page 629, Note "Counter-claim."

(c) Practice — New plea.

Plea depending upon facts which were not put in issue in the lower Court cannot be allowed at appellate stage. [P 561*g*]

C. P. C. —

('40) Chitaley, O. 41, R. 1, N. 12, Pt. 1.

('41) Mulla, Page 1155, Pt. (l).

Hira Lal Chakravarty and Surendra Nath Basu (Sr.) — for Appellant.

Jatindra Nath Sanyal, Kamjit Mukherji and Sibakali Bagchi — for Respondents.

R. C. MITTER J. — The plaintiffs are the sons and heirs of Rai Satindra Nath Choudhury of Nakipore. Rai Harendra Nath Chowdhury, the defendant-appellant and his cousin Rai Dhirendra Nath Chowdhury of Taki jointly held under Rai Satindra a number of ganti tenures. Later on some of those tenures were split up and Rai Harendra Nath became the sole tenant under Rai Satindra in respect of the four tenures which are the subject-matter of the suit in which this appeal arises. The plaintiffs have sued him for arrears of rent and cesses together with damages for the years 1341 to 1344 B.S. The claim as laid in the plaint is for Rs. 9271-13-1. The suit was filed on 19th April 1938.

The plaintiffs in their turn hold five tenures under Rai Harendra and others. The total rent annually payable for them is Rs. 8715 odd. In his written statement filed on 5th August 1938 Rai Harendra states that in respect of the said five tenures the sum of Rs. 8106-6-1 is due to him from the plaintiffs for the years 1341 to 1344. He claims a set-off for the said amount. At the time when the plaint was filed his claim for none of these years was barred by time, but at the date when he filed his written statement the claim for his share of the rent for the year 1341 B.S. was so barred. In a rejoinder filed by the plaintiffs on 15th August 1938, they stated that the mutual claims of themselves and of Rai Harendra Nath up to the year 1332 B.S. had been set off against each other but there had not been any adjustment after that year. They further stated that by reason of the assurances given by Rai Harendra to the plaintiff's father, Rai Satindra, the latter desisted from suing the former for arrears of rent for the four tenures in suit for the years 1333 to 1340 B.S. with the result that their claim for that period became barred by time. They accordingly prayed that the claim of Rai Harendra Nath for rent against the plaintiffs for

the years 1341 to 1344 may be set off not against their claim as made in the suit, that is against the arrears for 1341 to 1344, but against their claim for rent for those years, namely 1333 to 1340 B.S.

The learned Subordinate Judge held that on the assurance of Rai Harendra Nath the plaintiffs' father, Rai Satindra Nath, did not sue the former for the arrears of rent due to him for the years 1333 to 1340 with the result that his claim for that period became barred by time. This finding of the learned Subordinate Judge has not been challenged by the appellant. The learned Subordinate Judge further held that the plaintiffs were entitled to "claim equitable set-off of their admitted time-barred rent dues against the defendant." He accordingly took accounts of what was due to the plaintiffs from the defendants on account of rent and cesses from the year 1333 to 1344 and set off against the said amount the arrears of rent and cesses due from the plaintiffs to the defendant for the years 1341 to 1344 B. S. and passed a decree for the balance in favour of the plaintiffs. This part of the judgment only is challenged by the defendant appellant. In our judgment, the learned Subordinate Judge is not right in this respect. The expression used by the learned Subordinate Judge "that the plaintiff is entitled to claim equitable set-off" is unhappy. The claim of the plaintiff's to the arrears of rent for the years 1333 to 1340 can on no account be taken to arise out of the same "transaction" out of which arose the claim of the defendant for the rent of the years 1341-1344 to which he laid claim in his written statement. Moreover set-off is a plea in defence, a plea available to the defendant only. In its original and strict sense it is a defence pure and simple, which by adjustment would either wipe off or reduce the plaintiff's claim for money as made in the suit. In its enlarged sense, and that is of statutory creation, it is a defence and a counter-claim combined, defence to the extent of wiping out the plaintiff's claim and a claim by the defendant in the suit itself for the balance. We accordingly take it that the learned Subordinate Judge meant that in equity the plaintiff was entitled to say that the claim of the defendant was to be adjusted not against the money claimed by the plaintiffs in their plaint but against what they had not claimed in the plaint and what they could have claimed as plaintiffs, if the defendant had not lulled them to inaction by his assurance that he would not set up the plea of limitation. Even if this be the meaning of the learned Subordinate Judge we do not think that he is right. The learned Subordinate Judge has in effect given the plaintiffs a decree for a sum not only not included in their plaint but the claim at the date of their suit to which was barred by limitation. Even if that claim had been included in the plaint he would have been under a duty to dismiss it in view of S. 3, Limitation Act.

The claim to set-off as made by the defendant comes within O. 8, R. 6, Civil P. C. The defendant was entitled to claim set-off, if the money was legally recoverable. The only way in which the plaintiffs could have met the defendants' claim was by pleading and showing that the money was not legally recoverable by the defendant, either by reason of some legal bar or by reason of facts which if established would have been an answer on the merits. For instance they could have pleaded that the claim was barred by time or that the sum claimed was not due, or it was paid up before or adjusted in fact against other claims of theirs or there was an agreement to adjust the same against other claims of theirs. They have not, however, in their rejoinder taken defences of the nature indicated above. Moreover, in the evidence led by them they have expressly stated that the rent of 1341-1344 due to the defendant was never adjusted against their claim for rent for the years 1333 to 1340 nor was there an agreement to adjust the same in that manner. We accordingly hold that the plaintiffs are not entitled to have the defendant's claim adjusted towards their claim for rent for the years 1333 to 1340 B. S. The arrears claimed by the defendants are admitted. The only material question therefore is whether any portion thereof is barred by time.

At the date when the plaintiffs filed their suit no portion of the defendant's claim was so barred. At the time when the defendant filed his written statement his claim for the arrears for 1341 B. S. was barred by time. The question is what date, the date of the presentation of the plaint or the date of the written statement in which set-off was pleaded, would be the material date. Order 8, R. 6, Civil P.C., does not deal with this point. By enacting in sub-r. (1) that the money claimed by the defendant must be "legally recoverable" the Legislature indicated among others the question of limitation. The claim of the defendant which is sought to be set-off must not be a dead claim. Sub-rule (2) enacts that the written statement shall have the effect of a plaint in a cross suit, the object being, as is expressed in the sub-rule itself and in O. 20, R. 19, to confer power on the Court to adjudicate also upon the claim to the sum of money made by the defendant in his written statement and to pass a decree in his favour in case the balance turned in his favour. There being thus no clear indication on the point in the rule itself we will have to decide the question in accordance with principles and precedents. We have already stated that in its origin set-off was purely a weapon of defence and not of attack. Both set-off and counter-claim are creatures of statute. They are, however, essentially different. In (1881) 5 Q.B.D. 569[1] Cockburn C. J. dealing with set-off in its original sense thus observed :

"In my opinion it is altogether a mistake to treat a counter-claim and set off as standing on the same footing, or a counter-claim as equivalent only to a set-off. Set-off and counter-claim may be, and commonly are, essentially different; and it becomes necessary, therefore, to see in each case whether a counter-claim amounts in effect to no more than a set-off, or whether it is in effect a cross action. . . . . The plea (of set-off) can only be used in the way of defence to the plaintiff's action, as a shield, not as a sword. Though the defendant succeeded in proving a debt exceeding the plaintiff's demand, he was not entitled to recover the excess; the effect was only to defeat the plaintiff's action, the same as though the debt proved had been equal to the amount of the claim established by the plaintiff and no more."

The learned-Chief Justice after quoting with approval the following observations of Brett, L. J. made in (1878) 3 Q. B. D. 324;[2]

" A counter-claim is sometimes a mere set-off, sometimes it is the nature of a cross action; sometimes it is in respect of a wholly independent transaction," finally observed thus :

" I am therefore of opinion that, while under the special enactment of the statutes relating to set-off a plaintiff recovers no more than the amount of his

1. (1881) 5 Q.B.D. 569 : 49 L.J.Q.B. 857 : 43 L.T. 200 : 29 W.R. 49 : 44 J.P. 748, Stooke v. Taylor.
2. (1878) 3 Q. B. D. 324 : 47 L. J. Q. B. 270 : 38 L. T. 250 : 26 W. R. 742, Winterfield v. Bradman.

claim as reduced by the set-off, the effect of a counter-claim is altogether different, and where such a claim is set up as a cross action, each party recovers the amount of his claim, although by a wise and salutary provision the party establishing his claim for the larger amount, whether plaintiff or defendant, obtains judgment for the excess only of his claim over that of the other."

In this passage the learned Chief Justice was obviously referring to O. 19, R. 3 of the Supreme Court Rules which runs thus :

" A defendant in an action may set off, or set up by way of counter claim against the claims of the plaintiff, any right or claim, whether such set-off or counter claim sound in damages or not, and such set-off or counter-claim shall have the same effect as the statement of a claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

The first part of this rule is wider than O. 8, R. 6, sub-r. (1), Civil P. C., for the counter-claim may be in respect of a debt, i.e., an ascertained sum of money, as also in respect of damages. But the last part of this rule, corresponds substantially to sub-r. (2) of O. 8, R. 6. Although the word "counter-claim" is not used in our statute and although generally speaking a counter claim is incompetent under the procedure laid down in the Code of Civil Procedure and such a claim by the defendant must be enforced in a separate suit (60 I. A. 297[3] at p. 303) O. 8, R. 6 read with O. 20, R. 19 does permit what is in essence a counter claim of a specific kind, namely where the counter claim is in respect of an ascertained sum of money exceeding the plaintiff's demand and in that case it is permissible for the Court to pass a decree in favour of the defendant for the excess sum over the plaintiff's demand. Although the word set-off only is used in O. 8, R. 6 and not the word counter-claim also, the claim to the ascertained sum of money which the Code permits the defendant to set up in the plaintiff's action for money may not only be what is strictly termed set-off but what is also a counter claim. If the claim set up by the defendant is in respect of a debt which is less than or equal to the plaintiff's claim in the suit, it is a plea of set-off pure and simple, but if it exceeds the plaintiff's claim it is to the extent of the excess a cross claim, for the excess he is to be given a decree against the plaintiff in the same action.

In the case before us what has been pleaded is pure set-off, for the defendant claims an ascertained sum of money which is less than the plaintiff's demand in the suit. On general principles there would have been no question of limitation, for a defence is not barred by lapse of time. But a plea of set off urged by way of defence and only as a defence to the plaintiff's claim for money being of statutory creation must be regulated by the provisions of the statutes which creates it. By the terms of O. 8, R. 6 of the Code the claim must be legally recoverable, that is, must not be a dead claim. As the set off we are considering is merely defensive (for the defendant does not claim a sum in excess of the plaintiff's claim)—an answer to the plaintiff's claim, on principle the relevant enquiry would be whether it was a dead claim at the date of the plaintiff's suit. If the other view be taken, namely that the material date is to be the date of the written statement, it would lie in the power of the plaintiff to defeat such a plea of the defendant by simply delaying the service of the summons on the defendant. In (1850) 15 Q. B. 1046 = 117 E. R. 755,[4] the view we take was adopted and though the judgment does not give any reason the argument of the counsel that "any other view would lead to this injustice; that the defendant might not bring an action on his claim, knowing that the plaintiff had a claim, whereas the plaintiff by issuing his writ and not declaring till the defendant's right of action was barred, might avail himself of his own claim and get rid of the demand against him," is worth consideration.

In such a case, duty requires, that the plaintiff should himself deduct from his demand the debt which was due from him to the defendant and which was not dead at the time of his suit and sue the defendant for the balance, and if he does not act in that manner, the Court will place him in the same position in which he ought to have placed himself. The view we are adopting is supported by a long series of decisions of all the High Courts, 7 All. 284[5] at p. 287, 56 All. 821,[6] 48 Cal. 817[7] at pp. 823, 824, A. I. R. 1936 Cal 277,[8] A. I. R. 1923 Bom. 113[9] and A. I. R. 1920 Mad. 819 = 42 Mad. 873.[10] Where, however, the defendant pleads for a sum of money which is in excess of the plaintiff's claim he occupies to the extent of the excess the position of a plaintiff in a cross suit and in such a case and for the excess amount time is to be reckoned not from the date of the plaintiff's suit but from the date when he filed his written statement. On the facts of this case, we hold that the claim of the defendant for the rent of 1341 also can be set off against the plaintiffs' demand.

A new point was raised before us for the first time by the plaintiff's advocate, namely, that the claim of the defendant cannot be set off against the plaintiffs' demand, inasmuch as the debt due by the plaintiffs was not due to the defendant alone, but to the defendant and others. In the written statement, the defendant distinctly alleged that the sum claimed by him by way of set-off was due to him alone. In the rejoinder of the plaintiffs that fact was not denied. We cannot, accordingly, allow the plaintiffs to raise the said plea at this stage, it depending upon facts which were not put in issue in the lower Court. The result is that this appeal is allowed. The defendant is allowed set-off to the extent of Rupees 8106-0-3 from the plaintiffs' demand of Rs. 9272-13-1. The plaintiffs will accordingly get a decree for the balance, namely for rupees 1166-10-1. The plaintiffs would get proportionate costs of the lower Court, but the parties will bear their respective costs of this Court, except that the

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3. ('33) 20 A.I.R. 1933 P. C. 29 : 141 I. C. 209 : 60 Cal. 980 : 60 I. A. 297 (P.C.), Currimbhoy & Co. Ltd. v. Creet.

4. (1850) 15 Q. B. 1046 : 81 R. R. 882 : 117 E. R. 755, Walker v. Clements.

5. ('85) 7 All. 284 : 1885 A. W. N. 40, Pragi Lal v. Maxwell.

6. ('34) 21 A. I. R. 1934 All. 427 : 150 I. C. 105 : 56 All. 821 : 1934 A. L. J. 286, Bharta v. Chet Ram.

7. ('21) 8 A. I. R. 1921 Cal. 67 : 66 I. C. 209 : 48 Cal. 817 : 25 C. W. N. 800, Narendra Lal v. Taru Bala Dassi.

8. ('36) 23 A. I. R. 1936 Cal. 277 : 167 I. C. 265, Jitendra Nath v. Jnanada Kanta Das.

9. ('23) 10 A.I.R. 1923 Bom. 113 : 77 I.C. 943 : 24 Bom. L. R. 998, Najan Ahmed-Haji Ali v. Sale Mohamed Peermahomed.

10. ('20) 7 A.I.R. 1920 Mad. 819 : 53 I.C. 234 : 42 Mad. 873 : 37 M. L. J. 276, Narasimha Rao v. Sri Rajah Vellanki Srinivasa Jagannatha Rao.

defendant would get from the plaintiffs-respondents the costs of the court-fee stamp paid on the memoramdum of appeal. The cross-objection is dismissed. We make no order as to costs in the cross-objection.

KHUNDKAR J. — I agree.

R.K. *Appeal allowed.*

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* A. I. R. (29) 1942 Calcutta 562

DERBYSHIRE C. J. AND MCNAIR J.

Bank of Baroda Ltd. — *Appellants*

v.

Punjab National Bank Ltd. and others — *Respondents.*

Appeal No. 42 of 1940, Decided on 17th March 1942, from original decree of Panckridge J., *Reported in* ('41) 28 A.I.R. 1941 Cal. 372.

(a) Negotiable Instruments Act (1881), S. 5 — Post dated cheque is bill of exchange.

Although there is no provision in the Negotiable Instruments Act specifically allowing post dated cheques, there is nothing forbidding them; and para. 2 of S. 5 contemplates the making of a bill of exchange payable at a future date. [P 563*c*]

*** (b) Negotiable Instruments Act (1881), S. 7 — Marking of cheques as good for payment by bank amounts to acceptance.**

The marking or certification of a cheque by a bank as good for payment amounts to an acceptance by the bank. And the banks in Calcutta which certify and mark cheques regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and they honour their obligations: *English cases referred.* [P 565*g*, *h*]

(c) Stamp Act (1899), S. 36 — Objection cannot be raised in appeal for first time.

Where no objection has been raised in the trial Court as to admissibility of an instrument on the ground of its not being stamped, its admissibility cannot be questioned in appeal. [P 565*h*; P 566*a*]

C. P. C. —

('40) Chitaley, O. 41 R. 1 N. 12 Pt. 6.

('41) Mulla, Page 1155 N. "Grounds of objection which may be taken for the first time in appeal."

Advocate-General and S. Choudhury — for Appellants.

S. M. Bose, S. C. Ray and P. K. Sen — for Respondents.

DERBYSHIRE C. J. — The appellants appeal from a decree made against them on 28th June 1940* by Panckridge J. in favour of the respondents for Rs. 2,75,000 with interest at 6 per cent. per annum. The facts are shortly as follows: One Ghose was a customer of the Baroda Bank and one Mitter purported to guarantee his account there. One Amin was the manager or agent of the Baroda Bank in Calcutta. Mr. Bhagwandas was the manager of the Calcutta branch of the Punjab Bank where Mitter had an account which in June 1339 was overdrawn. On 13th June 1939 Mitter took to the Punjab Bank two cheques drawn by Ghose on the Baroda Bank both in favour of Mitter and both dated 13th June 1939; both cheques were marked on the face of them "good for payment upto 20th June 1939" and signed by Amin on behalf of the Bank of Baroda, Limited. One was for Rs. 1,40,000 and the other for Rs. 1,35,000.

Mitter asked Mr. Bhagwandas if he could allow him to draw Rs. 2,40,000 against them. Mr. Bhagwandas said he wanted a cheque the date of which should be the same as the date on which payment was to be made. Thereupon, Mitter went away taking the two cheques and returned a little while after on the same day with one cheque dated 20th June 1939 drawn on the Bank of Baroda by Ghose in favour of Mitter or order for Rs. 2,75,000. The cheque was crossed "//& Co." and on the face of it were written crosswise these words: "Marked good for payment on 20-6-39 for the Bank of Baroda, Limited, M. P. Amin, Manager." It is not denied that the signature was that of Amin, the Manger of the Bank of Baroda, Ltd., at Calcutta. There is no direct evidence as to how this cheque came to be so marked, because Ghose, Mitter and Amin were prosecuted by the Baroda Bank for fraud, etc., but not, we are told, in respect of this particular transaction. Ghose has since been discharged, but the prosecution of the two others—Amin and Mitter — is still going on. Mitter endorsed this cheque generally, handed it over to Mr. Bhagwandas and wrote two letters to the Punjab Bank. The first asked the Punjab Bank to credit the Rs. 2,75,000 to his account "on realisation on due date." The second requested "an overdraft of Rs. 2,40,000 besides the previous balance which I promise to adjust on 20th June 1939." The Punjab Bank the same day drew a cheque on the Imperial Bank of India at Calcutta for Rs. 2,40,000 in favour of Mitter who cashed it the same day. There were certain transactions by Mitter with another person who about the same time paid a large sum of money into his (that other person's) account with the Bank of Baroda, but these matters have not been pursued in this case and we are not concerned with them.

Shortly before 13th June, the head management of the Baroda Bank at Bombay had become suspicious of Amin's doings and on 12th June, a Mr. Jokhakar arrived at the Calcutta branch to assume joint managership with Amin. Mr. Jokhakar, however, had nothing to do with the above marking and did not know of it at the time. On 19th June, the head management caused letters to be written to all the big Calcutta banks stating that Amin's power of attorney (the authority under which he managed the Calcutta branch) had been terminated. The Punjab Bank at Calcutta received this notice the next day, 20th June, early after opening. In the meantime evidently Mr. Bhagwandas got anxious about the cheque and after endorsing it "payment received for the Punjab National Bank, Ltd., D. P. Bhagwandas, manager" sent his accountant and his cashier to present it over the counter as soon as the Baroda Bank opened its doors. The cheque was dishonoured; the reasons given were "not arranged for." There is a bankers' clearing house in Calcutta, but it will be noted it was not presented there. The Punjab Bank sued the Bank of Baroda together with Ghose as drawer and Mitter as endorser of the cheque. Ghose and Mitter did not defend the suit, but the Bank of Baroda did. Panckridge J. gave judgment against all three defendants for the amount of the cheque Rs. 2,75,000. The Bank of Baroda denied that Amin had authority to mark the cheque, but the learned Judge on an examination of the evidence and, in particular, Amin's power of attorney rejected this defence.

The Bank of Baroda also alleged that the Punjab National Bank did not act with due care or caution

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* *See* ('41) 28 A. I. R. 1941 Cal. 372.

and did not act in good faith. The trial Judge on the evidence decided these two issues against the defendants and I agree with him for the reasons he has given. The Judge found that the marking amounted to an acceptance of a bill of exchange and that the Bank of Baroda were liable as acceptors. Further he said "I would say however that even if there were no acceptance the evidence shows that bankers are by usage liable on cheques certified by them when presented by parties entitled to present them." On appeal, the contest was substantially on the two issues last mentioned. Apart from the words "marked good for payment on 20th June 1939 for the Bank of Baroda, Ltd., M. P. Amin, Manager", it was not contended that the Bank of Baroda could be liable on the instrument. The facts as found are within a small compass. The relevant provisions of law also appear to be short. The Negotiable Instruments Act of 1881 defines "bill of exchange" in S. 5 thus :

"An instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument :

A promise or order to pay is not "conditional", within the meaning of this section and S. 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain."

Section 6 provides : "A 'cheque' is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

Section 7 provides : "The maker of a bill of exchange or cheque is called the 'drawer;' the person thereby directed to pay is called the 'drawee.'" Also "after the drawee of a bill has signed his assent upon the bill . . . . . and delivered the same or give notice of such signing to the holder or to some person on his behalf, he is called the 'acceptor.'"

The cheque in question although dated 20th June was clearly drawn and 'marked' on 13th June 1939. It was a post dated cheque as every one concerned knew. Although there is no provision in the Negotiable Instruments Act specifically allowing post dated cheques, like S. 17 (2) of the English Bill of Exchange Act of 1882, there is nothing forbidding them, and para. 2 of S. 5 contemplates (as indeed it must) the making of a bill of exchange payable at a future date. The cheque as drawn, therefore, was a cheque in proper form and, therefore, a bill of exchange within the meaning of the Negotiable Instruments Act. If the marking was a representation that the Bank of Baroda would pay the cheque on 20th June, there would seem to be no reason why such marking should not be an acceptance within the meaning of S. 7. There is no Indian case on the point, and the difficulty in coming to a decision has arisen because of certain dicta of English text book writers. Grant on Banking, Edn. 7 at p. 43 states :

"In the absence of English authority it is difficult to say what is the exact legal effect in this country of marking cheques; but it is submitted that such marking is not equivalent to an acceptance by the banker, and that notwithstanding S. 75, Bills of Exchange Act, 1882, the customer who has requested his banker to mark a cheque cannot countermand its payment. It has been suggested that 'the banker would be bound to honour the cheque on the ground of estoppel, if any one dealt with his client on the faith of the marking and were thereby damnified.' It is submitted that this view is correct."

Hart on Banking, Edn. 4, Vol. 1 at p. 341 dealing with marked cheques states :

"At Common law there is no objection to the acceptance of a cheque, if the holder likes to take it in lieu of payment, but the Bank Charter Acts would in many cases render this illegal.

However, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another. As between the bankers themselves accordingly, this marking has an effect analogous to that of the acceptance of a bill, but it does not give the holder of the cheque a right against the banker who has marked it."

Halsbury's Laws of England, Edn. 2, Vol. 2 at page 610 states :

"Occasionally cheques are marked or certified by the bankers on whom they are drawn. Doing so does not convert the banker into an acceptor or make him liable on the instrument, but it does constitute a representation by him, on which he may be held liable, that the cheque will be paid as drawn if presented within a reasonable time."

In Paget on Banking, Edn. 4 at page 164 the learned author devotes a short chapter to the subject of marking cheques. He treats the case in (1899) A. C. 281[1] as a case from a country where the law of marking or certifying cheques cannot be assumed to be the same as in England. He says :

"And in any event marking is, neither in form nor effect, an acceptance of which the payee or holder can avail himself. Nor does such marking, at the instance of the customer, render the bank liable to the payee or holder for money received to his use."

Sir Malcolm Chalmers in his book "the Bills of Exchange Act, 1882," Edn. 9 at p. 291 dealing with marking cheques and *Gaden's case*[1] says :

"It is clearly not an acceptance that the holder can take advantage of : *see* S. 17, sub-s. (2)." Then he mentions that under the New York Negotiable Instruments Law, "the certification of a cheque is equivalent to an acceptance, but when procured by the holder, discharges the drawer and indorsers. It further operates as an assignment of funds."

In Byles on Bills, Edn. 20 at p. 21 the learned author writes :

"Cheques, being intended for immediate payment on presentment are never in the ordinary course accepted, though, as being bills of exchange, they are capable of being accepted if the banker so chooses. In practice however cheques may be marked as good by the banker on whom they are drawn. There is a usage amongst bankers of so marking cheques for the purposes of clearance, the banker on whom the cheque is drawn becoming bound, by marking it, to the collecting banker, and this usage has been judicially recognized. Occasionally a cheque may be marked as good at the instance of a customer, the object of the marking being to show on the face of the cheque that there are sufficient funds in the banker's hands to meet it. It was formerly the practice in this country to use marked cheques for making payments against documents of title, but, though the practice cannot be said to be obsolete, it is more usual at the present day to make such payments by means of transfer-cheques on the Bank of England, or bankers' drafts. If the marking satisfies

1. (1899) 1899 A.C. 281: 68 L. J. P. C. 57: 80 L.T. 329 : 15 T.L.R. 228, Gaden v. Newfoundland Savings Bank.

the requirements of S. 17, Bills of Exchange Act, a it will amount to an acceptance, and the banker will be liable to the holder of the cheque accordingly. If, however, the marking is not an acceptance, it is difficult to see upon what grounds the banker can be held liable. No usage in favour of the holder of a marked cheque has ever been established in this country; and the marking, if intended to be a binding representation as to the drawer's credit will not impose any liability upon the banker, unless signed by him, in which case, of course, it will amount to an acceptance."

The practice of banks marking in this fashion cheques drawn on them has been observed at different times in different parts of the world where cheques are used. In Calcutta it is clear from the evidence that some banks do mark cheques so that the drawers can take them to merchants to obtain b delivery of goods or to other banks to obtain securities and other documents of title. The "exchange" banks in Calcutta and in particular the Imperial Bank of India, however, do not so mark cheques, but some of them issue to the customer their own "pay orders" for the same purpose. We have not been referred to any Indian case on the effect of such marking. In England at one time the practice just referred was to some extent used, because on 7th December 1905, the Committee of London Clearing Bankers resolved :

"That this Committee strongly recommend the Clearing Bankers to discontinue the practice of marking or certifying at the request of a customer his cheques or drafts upon themselves, and to adopt instead the practice of issuing to each customer in exchange for his cheque their own transfer cheque c on the Bank of England. This resolution does not in any way affect the existing practice of marking after business hours cheques presented by another clearing bank." (Hart on Banking, Edn. 4, Vol. 1, page 341.)

The exception clause of the resolution just quoted evidently refers to a practice noticed in 1810 by Lord Mansfield C. J. in (1810) 2 Taunt at p. 388.[2] The facts are interesting and the remarks of Lord Mansfield are helpful. The plaintiff sold coals to the defendant who gave in payment a cheque (check) for the balance of the account. The cheque was drawn on Bloxams, the defendant's bankers. The plaintiff took the cheque to his own bankers Harrisons at once who took it to the bankers' clearing house after the usual time for payment—four o'clock in the afternoon. The clerk of Bloxams marked the d cheque and in accordance with usage, Harrisons took it to the clearing house next day for payment, but Bloxams were absent — they had failed. The plaintiffs then sued Bennett the drawer of the cheque for payment of the goods. Lord Mansfield gave a judgment which I will quote in full :

"The whole question amounts merely to this : a man who has bought goods and given a draft on a banker, contends that he has paid for those goods, though the plaintiff has never received the money. A draft was drawn on 11th September : on that day it was carried to the house of the drawee, and, in the language of those persons, was marked : the effect of that marking is similar to the accepting of a bill; for he admits thereby assets, and makes himself liable to pay. It is the practice of bankers not to pay bills of this description which are presented after four o'clock, but to mark them; and it is usual that bills marked on one day, are carried to the clearing house where their clerks meet, and paid e there on the next day. Therefore it is the same thing as if a banker had written on a check, — We pay this tomorrow at the clearing house. On the next day after marking the cheque the banker stops payment : the holder's clerk goes to the clearing-house, where no clerk attends from Messrs. Bloxams, and the bill is not paid; and the first question is, whether there is any laches as to the time of presentment : as to that, the case of *Appleton* v. *Sweetapple* (B. R. M. 23 G 3) decides, that a cheque need not be presented on the day on which it is drawn; now this bill was in fact presented and accepted on the very day on which it was drawn : the reason of that haste probably was, in order to fix the banker, lest the drawer should be insolvent before the next day, bankers being usually persons of great substance; whereas the drawer may be of less credit. The mark on the cheque is an engage- f ment to pay at a particular place : is not then the presenting it at that place equivalent to presenting at the banking house? It seems that it is, and that it therefore is no laches; consequently, the surplus of the money for the coals remains due, and judgment must be entered for the plaintiff."

This is the only English case bearing on the point I have been able to discover. Cockburn C. J. referred to the same practice in his judgment in (1875) 10 Ex. 337[3] at pp. 351 to 352. In (1899) A.C. 281[1] the Privy Council considered a Canadian case where a marked cheque was in question. The plaintiff had an account with the Commercial Bank at St. John's, Newfoundland. One Saturday she drew a cheque for 3850 dollars (the balance of her account) in favour of herself or bearer, presented it to the ledger keeper, who, by direction of the manager of the bank, certi- g fied it in the usual manner by writing his initials across it, and delivered it thus initialled to the plaintiff. The cheque was charged to the appellant's account in the books of the bank, and her account at the Commercial Bank balanced. The plaintiff immediately took this cheque to the Savings Bank and there, without endorsing it deposited it. The Savings Bank entered 3850 dollars in the plaintiff's account as a deposit. The same day the Savings Bank deposited the cheque with the Union Bank who presented it to the Commercial Bank on the following Monday. The Commercial Bank by then having failed the cheque was dishonoured. The plaintiff demanded the 3850 dollars from the Savings Bank who refused to pay it; she thereupon sued for it as money deposited with the Savings Bank and credited to her by such bank. She failed h in her suit in Canada and in her appeal to the Privy Council. The Privy Council held that the cheque was presented within a reasonable time. Then followed this passage in the judgment delivered by Sir Henry Strong :

"It was contended on behalf of the appellant that the initialling of the cheque had the effect of making it current as cash. It does not, however, appear to their Lordships, in the absence of evidence of such a usage, that any such effect can be attributed to this mode of indicating the acceptance of a cheque by the bank on which it is drawn. A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. The only effect of the certifying is to give the cheque additional currency by shewing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by ad-

2. (1810) 2 Taunt 388, Robson and Vaugh v. Bennet.

3. (1875) 10 Ex. 337:44 L.J. Ex. 157:32 L.T. 199 : 23 W.R. 915, Goodwin v. Roberts.

ding to the credit of the drawer that of the bank on which it is drawn."

The real *ratio decidendi* in the case appears to be given on pp. 286 and 287, and is summed up at the bottom of page 287 in these words : "The cheque had never ceased to be the property of the appellant, i. e., the plaintiff." The dictum of Sir Henry Strong quoted above was cited and affirmed by the Privy Council in the later Canadian case in (1903) A. C. 49.[4] A decision of the Supreme Court of the United States of America—(1870) 10 Wallace at p. 604[5] contains an interesting statement of the American law in this matter. The facts of the case are involved and need not be dealt with here. Swayne J. delivered the opinion of the Court and at p. 647 said :

"By the law merchant of this country, the certificate of the bank that a cheque is good is equivalent to acceptance. It implies that the cheque is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the cheque is presented for payment. It is an undertaking that the cheque is good then and shall continue good and that this agreement is as binding upon the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume . . . ."

This view of the marking of cheques by the drawee bank appears to have been embodied in the New York Negotiable Instruments Law above referred to. In England the practice of marking cheques by drawee bankers has largely been discontinued for many years (except in clearing houses) and that probably accounts for the lack of English decisions on the question as well as the attitude of English text book writers. In (1810) 2 Taunt 388[2] Lord Mansfield had no hesitation in speaking of the initialling of a cheque by the drawee bank at the clearing house as being the acceptance of the cheque. In Canada today (or at any rate recently) the initialling of the cheque by the drawee bank was described by Sir Henry Strong as "the mode of indicating the acceptance of a cheque by the bank on which it is drawn." In America as Swayne J. said above "the certificate of the bank that a cheque is good is equivalent to acceptance." The marking of cheques by drawee banks in England is not practised much outside bankers' clearing houses whereas it is in Calcutta outside the "exchange" banks. The conditions so far as they prevail in Calcutta in this respect are more similar to those in Canada and the United States of America, and I see no reason to regard the opinion of the English text book writers, written with respect to English conditions, as a bar to holding the certification or marking of cheques as "good" by the drawee bankers in Calcutta to be acceptances provided the nature of the marking or certifying and the accompanying circumstances warrant it.

In the present case the marking of the cheque by the Baroda Bank was clearly intended to give the cheque a value beyond what it had when originally drawn, and it clearly did give it such additional value because the Punjab Bank advanced Mitter (who was already overdrawn with them) Rupees 2,40,000 on the cheque being deposited with them. Was such additional value added to the cheque because the words of the marking meant that seven days after the date of marking Ghose would have Rs. 2,75,000 to his credit at the Bank of Baroda or because the words meant that seven days later the Bank of Baroda would definitely pay Rs. 2,75,000 to the holder of the cheque on presenting it ? I am of the opinion that the latter is the correct view. The words of the marking are "marked good for payment." It is the bank that makes payment, and it was the bank that marked it good for payment. If there is any doubt as to the meaning of the words, those words must be construed against the Bank of Baroda which used them. I am therefore of opinion that the words "marked good for payment on 20th July 1939 for the Bank of Baroda, M. P. Amin, Manager" meant that the Bank of Baroda would pay the amount stated in the instrument, i. e., Rs. 2,75,000 on 20th June 1939. I therefore hold that the Bank of Baroda as the drawee of the bill of exchange signed its assent upon the bill. I draw the inference from the known facts as to the drawing of the cheque and the certifying thereof and the handing of the same after certification to the drawer Ghose and/or Mitter that the Bank of Baroda delivered the bill of exchange to the holder or some person on his behalf within the meaning of S. 7, Negotiable Instruments Act, and became on 13th June 1939, the acceptor of the bill of exchange.

At the time of acceptance the instrument in question which was in form a post-dated cheque was in law a bill of exchange at seven days date, which on 20th June, became a bill of exchange payable on demand and so a cheque : *see* (1867) 2 Ex. 163[6] at pp. 166 and 167. Having regard to the view I have arrived at, viz., that the marking or certification in this case was an acceptance by the Bank of Baroda, the question of usage does not arise. Before agreeing with the learned Judge that a usage such as he mentions has been established I should require further evidence. The usage alleged was alleged in respect of scheduled banks in Calcutta. It was stated in argument that there are 22 scheduled banks in Calcutta, some of which are "exchange" banks. Four witnesses were called by the plaintiffs to prove usage, and of those two were from "exchange" banks, which do not certify cheques whilst a third was Mr. Bhagwandas. The defendants' witnesses were from the defendant bank. It is true that Mr. d'Souza, one of the defendants' witnesses said that he had never heard of another case where a bank which had certified a cheque had not paid it. I prefer to regard the evidence as showing that banks in Calcutta which certify and mark cheques regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and that they honour their obligations. The instrument in question was not stamped in any way. By the Stamp Act cheques are not required to be stamped but bills of exchange are to be stamped ad valorem. The appellants have contended that as the instrument was, when accepted, a bill of exchange, it ought to have been stamped "before or at the time of execution" as provided by S. 17, Stamp Act, that as it has never been stamped it was inadmissible in evidence by reason of S. 35, Stamp Act, and therefore the plaintiffs' case must fail. It must be noted that no objection to the instrument's admissibility was ever taken at the trial. The answer to this contention of the appellants

4. (1903) 1903 A. C. 49 : 72 L. J. P. C. 1 : 87 L.T. 457 : 51 W. R. 289, Imperial Bank of Canada v. Bank of Hamilton.

5. (1870) 10 Wallace 604, Merchants National Bank of Boston v. The State National Bank of Boston.

6. (1867) 2 Ex. 163 : 36 L.J.Ex. 94 : 16 L. T. 23 : 15 W.R. 747, Forster v. Mackreth.

is to be found in S. 36, Stamp Act, which provides that:

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Section 61 provides for the payment under an order of Court of the duty escaped, and for the punishment of deliberate evasion. However in the proviso to S. 61 it is specifically provided that "except for the purpose of such prosecution no declaration made under this section shall affect the validity of any order admitting any instrument in evidence." The appellants' contention as to the admissibility of the cheque therefore fails. For the above reasons I am of the opinion that the Bank of Baroda, Ltd., were legally liable to the Punjab National Bank, Ltd., as acceptors of a bill of exchange or cheque for Rs. 2,75,000 and that this appeal fails and must be dismissed. The appeal will be dismissed with costs. Certificate for two counsel.

McNAIR J. — I agree.

K.S./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Calcutta 566

PANCKRIDGE J.

Johurimull Jugalkishore — Applicant

v.

Kashiprosad Jhajharia — Respondent.

Application in the matter of Arbitration, Decided on 23rd March 1942.

Arbitration Act (1940), S. 17—Notice of filing of award served on 21st November 1941—Judgment pronounced under S. 17 on 22nd December 1941 — Application to set aside award made on 22nd December 1941 as 21st December 1941 was Sunday — Because applicant had under S. 4, Limitation Act, right to apply to set aside award on 22nd December 1941 it did not, held, follow that period of 30 days for filing application to set aside award had not expired —Judgment under S. 17 held valid.

The notice of filing the award was served on 21st November 1941 and on an application under S. 17 judgment was pronounced on 22nd December 1941. An application to set aside the award was made on 22nd December 1941. It was contended that by reason of S. 4, Limitation Act, the time for making an application to set aside the award under S. 17, Arbitration Act, had not expired since 21st December 1941 being Sunday was a day on which the Court was closed and therefore the judgment pronounced under S. 17 was without jurisdiction :

Held that because the applicant had the right to make an application to set aside the award on 22nd December 1941, it did not follow that the time for making that application had not expired within the meaning of S. 17 on 21st December 1941. The privilege which S. 4, Limitation Act, conferred upon the applicant did not prejudice the right of the other party to obtain judgment in terms of the award on the expiry of 30 days from the date of the service of the notice ; ('35) 22 A. I. R. 1935 P. C. 85, *Rel. on.* [P 567*b*,*c*]

Limitation Act —

('42) Chitaley, S. 4, N. 7, Pt. 3.

('38) Rustomji, Page 74, N. "Scope of section."

S. N. Banerjee (Jr.) and B. M. Agarwalla — for Applicant.

S. R. Das and A. K. Sircar — for Respondent.

ORDER. — This application raises an interesting and a not unimportant point of limitation. The petitioner was a party to arbitration proceedings before the Tribunal of Arbitration of the Bengal Chamber of Commerce. On 29th July 1941 an award was made, under which the petitioner was ordered to pay to the respondents a sum of Rs. 2531 together with a sum of Rs. 313 as costs of the arbitration. On 22nd August, the award was filed in this Court. The petitioner at one time alleged that the notice of the filing of the award was never effectively served upon him, but he now concedes that this application must proceed on the basis that he was effectively served with the notice on 21st November 1941. On 22nd December 1941, the respondents made an application under S. 17, Arbitration Act, 1940, for judgment upon the award. The matter was in the list, and, when it was called, no one appeared on behalf of the petitioner to oppose. Accordingly judgment was pronounced in terms of Section 17.

Later in the day learned counsel for the present petitioner presented a petition asking that the award should be set aside on various grounds. Learned counsel stated that that day, that is to say 22nd December 1941, was the last day on which he could make the application. I directed that it should be noted as made on that date. There is an endorsement on the back of the petition which is as follows : "Noted as made today. Notice returnable on 12th January 1942." I will assume that the petitioner was not aware that judgment had been pronounced in terms of the award before the petition to set aside the award was presented. He has now applied for an order that the decree and judgment passed on 22nd December 1941 be recalled or set aside. His notice of motion is dated 19th January 1942, and made returnable on 16th February 1942. The petitioner admits that, unless he succeeds in setting aside the judgment and the decree made on 22nd December 1941, he cannot proceed with his application which is still pending, to have the award of 29th July 1941 set aside.

The only ground on which he asks that the judgment should be set aside is that it was made without jurisdiction. Under S. 17 of the Act, it is a condition precedent to pronouncing judgment that the time for making an application to set aside the award has expired, or alternatively that, such application having been made, the Court has refused it. The question is whether on 22nd December 1941 the time for making an application to set aside the award had expired. The period for making such an application is prescribed by Art. 158, Limitation Act, as amended by Sch. 4, Arbitration Act, 1940. The article now prescribes 30 days from the date of service of the notice of filing the award. It is now conceded that the notice of filing the award was served on 21st November 1941. It is also conceded that the last day of the prescribed period would ordinarily be 21st December 1941. It would seem therefore that on 22nd December 1941, when the Court pronounced the judgment, the period had expired. However, counsel for the petitioner says that because of the provisions of S. 4, Limitation Act, the period had not expired, since 21st December 1941, being a Sunday, was a day on which the Court was closed. Section 4, Limitation Act, is as follows :

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

Mr. S. R. Das for the respondents concedes that the noting of the application as made on 22nd December may be regarded as tantamount to its having been made on that day, but he says that the application was an incompetent one, as under the rules made by this Court under the Arbitration Act an application of this nature can only be made upon notice to the other party. I am not going to decide this point, because having regard to the view which I take on the point of limitation, there is no necessity for me to decide it. It may be Mr. Das is correct. On the other hand, the Court may have inherent power to entertain an application made without notice, if it is made within the prescribed period. Mr. S. R. Das's main point however is that the time for making the application to set aside the award had expired within the meaning of S. 17. He admits that by reason of the provisions of S. 4 the petitioner's application to set aside the award, assuming it to have been in order, could not have been dismissed as being out of time, but he points out that S. 4 does not extend the period in cases where the last date of the period is a day on which the Court is closed, but only gives to the party concerned the right to make the application on the day that the Court re-opens, although the period has in fact expired.

Mr. Das in this connexion calls attention to the difference between the scheme of S. 4 and the scheme of S. 14 of the same Act. Under S. 14 in certain circumstances certain periods are to be excluded in computing the period of limitation, and the distinction between the language used in the two sections has been commented on by the Judicial Committee in 39 C. W. N. 640.[1] Therefore it by no means follows because the petitioner had the right to make an application to set aside the award on 22nd December 1941, that the time for making that application had not expired within the meaning of Section 17.

In my opinion Mr. Das' contention is correct, and the privilege which S. 4 confers upon the petitioner did not prejudice the right of the respondents to obtain judgment in terms of the award on the expiry of 30 days from the date of the service of the notice. I accordingly consider that the Court had jurisdiction to pronounce judgment in terms of the award, and it is conceded that, if this is so, there are no grounds upon which I should be justified in recalling the order made in favour of the respondents on 22nd December 1941, or set it aside. The two applications, therefore, namely the application to set aside the award, and the application to recall the judgment and decree, must be dismissed with costs.

G.N./R.K. *Applications dismissed.*

1. ('35) 22 A. I. R. 1935 P. C. 85 : 155 I. C. 205 : 57 All. 242 : 62 I. A. 80 : 39 C. W. N. 640 (P.C.), Maqbul Ahmad v. Onkar Pratab Narain Singh.

A. I. R. (29) 1942 Calcutta 567

HENDERSON J.

Saha Samsuddin alias Shah Shamsuddin Ahamed—Decree-holder—Appellant

v.

Serajal Haq—Judgment-debtor — Respondent.

Appeal No. 202 of 1940, Decided on 3rd March 1942, from appellate order of Sub-Judge, 2nd Court, Chittagong, D/- 21st August 1940.

(a) Bengal Tenancy Act (8 of 1885), S. 107— Decree passed by Revenue Officer under Act can be executed by civil Court.

The words "his decision in every such proceeding shall have the force and effect of a decree of a civil Court" in S. 107 are sufficiently wide to include the procedure for transferring decrees for execution and there is no reason to cut down the words to mean that such a decree can only be sent to another Revenue Officer. Hence a decree passed by a Revenue Officer under the Act can be transferred to a civil Court for execution : 9 Cal. 295 (P.C.), *Disting.*; ('14) 1 A.I.R. 1914 Cal. 678 and 36 Cal. 252, *Ref.* [P 568*a*]

(b) Bengal Tenancy Act (8 of 1885), S. 107— Order for costs passed by Revenue Officer amounts to decree.

An order for costs passed by a Revenue Officer under the Act has the effect of an order for costs passed by a civil Court and hence amounts to a decree and can be executed as such. [P 568*a*,*b*]

Abdul Quasem (No. 2)— for Appellant.

Bholanath Roy and Nurul Huq Chowdhury — for Respondent.

JUDGMENT.—This appeal is by the decree-holder. The question at issue between the parties is whether the Munsif had jurisdiction to execute the decree in question. The respondent brought a suit under S. 106, Bengal Tenancy Act. The appellant was defendant 3. The suit was dismissed by the Assistant Settlement Officer. The respondent appealed : but instead of prosecuting his appeal on the merits he applied to the Special Judge for leave to withdraw the suit with liberty to institute a fresh suit on the same cause of action. This prayer was allowed: but a sum of Rs. 64 was awarded to the appellant as costs. The appellant prayed for execution to the Collector who was the ex-officio settlement officer and the Collector sent the case to the Munsif for execution.

The contention of the respondent before the Munsif was that the Munsif had no jurisdiction to execute a decree for costs passed by the Special Judge. The Munsif overruled the objection and the respondent appealed. The Subordinate Judge held that the Munsif had no jurisdiction to execute the decree for costs but did not decide the other points which arose for his consideration. My attention has been drawn to some decisions dealing with execution proceedings in an ordinary civil Court in the case of decrees passed by a Revenue Officer. None of them, however, is directly in point. In the well-known Privy Council decision in 9 Cal. 295,[1] their Lordships had to consider the question of rent suits tried by a Revenue Officer under Act 10 of 1859. It was held that such decrees can be executed by civil Courts to whom they are transferred in another district. The decision turned upon the interpretation of the term "civil Court" in that Act, and is of no direct help. In 16 C. L. J. 555,[2] it was certainly laid down that some decrees passed by a Revenue Court may be executed in a civil Court. I may also refer to 9 C. L. J. 125.[3]

1. ('83) 9 Cal. 295 : 9 I. A. 174 : 4 Sar. 392 : 12 C. L. R. 361 (P.C.), Nilmoni Singh Deo v. Taranath Mukherjee.
2. ('14) 1 A.I.R. 1914 Cal. 678 : 15 I. C. 614 : 18 C.W.N. 92 : 16 C. L. J. 555, Jit Lal Singh v. Kamaleswari Prosad.
3. ('09) 36 Cal. 252 : 1 I. C. 933 : 9 C. L. J. 125 : 13 C. W. N. 791, Ram Lochan Singh v. Kumar Newaz Prosad Singh.

In the present case the question depends upon the terms of S. 107, Bengal Tenancy Act. In addition to providing for the procedure to be adopted by the Revenue Officer, it also provides that his decision in every such proceeding shall have the force and effect of a decree of a civil Court. In my judgment those words are sufficiently wide to include the procedure for transferring decrees for execution and, if that is so, there is no reason to cut down the words to mean that such a decree can only be sent to another Revenue Officer. One special argument advanced by Mr. Roy is based on the fact that the order made in this particular case did not amount to a decree, that is to say, even if the decree for costs made by the Assistant Settlement Officer could be transferred to a civil Court, the decree for costs made by the Special Judge could not, as his order does not amount to a decree. In my judgment there is no substance in this distinction. The decision shall have the effect of a decree of a civil Court and the decision that the respondent is to pay costs to the appellant has the effect of an order for costs made by a civil Court. The order of the lower Appellate Court is accordingly set aside and the case is remanded to him for determination on the other points raised in the appeal. Costs in this Court will abide the result—hearing fee one gold mohur.

G N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 568

DERBYSHIRE C. J. AND GENTLE J.

Abdul Waheb Howladar and another — Judgment-debtors — Petitioners

v.

Sukumari Debi w/o Jonardan Mookerjee — Decree-holder—Opposite Party.

Civil Rule No. 1648 of 1941, Decided on 20th March 1942, for setting aside order of Sub-Judge, Second Court, Bakarganj (Barisal), D/- 24th May 1941.

(a) Bengal Money-Lenders Act (10 of 1940), S. 2 (22) — Application by mortgagee decree-holder under O. 34, R. 6 for decretal balance — Application stayed under S. 34, Bengal Agricultural Debtors Act — Execution pending on 1st January 1939 — Mortgage suit held one to which Bengal Money-Lenders Act applied.

On 15th July 1938, the mortgagee decree-holder applied to the Court under O. 34, R. 6, Civil P. C., asking for the decretal balance. Those proceedings were stayed under S. 34, Bengal Agricultural Debtors Act, as the result of a petition by the judgment-debtor to the Debt Settlement Board. The result was that on 1st January 1939, the application for execution of the mortgage decree was pending :

Held that since the proceedings in execution of the mortgage decree were pending on 1st January 1939, the mortgage suit was one to which the Bengal Money-Lenders Act applied. [P 568*f*]

(b) Bengal Money-Lenders Act (10 of 1940), S. 36—Mortgage decree allowing interest more than 8 per cent. — Court must reopen transaction and grant such relief to debtor as he is entitled to under Act.

Where interest more than 8 per cent. has been allowed under a mortgage decree it is the duty of the Court to reopen the transaction between lender and the borrower and to take an account of what has been paid and also what ought to have been paid according to the Act, and on such reopening and taking of accounts to give the debtor such relief as he is entitled to under the Act. [P 568*h*]

Jitendra Nath Guha — for Petitioners.

Abinash Chandra Ghose and Amarendra Nath Roy Chowdhury — for Opposite Party.

DERBYSHIRE C. J. — The petitioners—the borrowers—executed a mortgage bond in favour of the lender—the opposite party on 26th February 1931 promising to pay interest at 12 per cent. per annum with annual rests. The borrowers paid a certain amount on account, but on 20th July 1936, a preliminary decree was passed in respect of this. The final decree was passed on 13th January 1937 for Rs. 4138-12-3. It was put into execution and the mortgaged properties were sold and bought in by the decree-holder for Rs. 3150. The sale was made absolute on 12th August 1937 and possession delivered to the auction purchaser, that is the plaintiff, on 11th and 12th September 1938. On 15th July 1938, the plaintiff applied to the Court under O. 34, R. 6, Civil P. C., asking for the decretal balance, namely, Rs. 1000. Those proceedings were stayed under S. 34, Bengal Agricultural Debtors Act, as the result of a petition by the present petitioners to the Debt Settlement Board. The result was that on 1st January 1939, there was a proceeding in execution for the recovery of the loan advanced before the commencement of the Bengal Money-Lenders Act and such loan comes within the prohibitions of the Act. The consequence is that this is a suit to which the Act applies. The present petitioners have asked for relief under the Bengal Money Lenders Act. It is clear that the rate of interest is above the permitted rate; such interest has been paid for some time. How much has been paid beyond what is allowed by the Act it is impossible to say without an account being taken. It was therefore the duty of the learned Judge to reopen the transaction between lender and the borrowers and to take an account of what has been paid and also what ought to have been paid according to the Act, and on such reopening and taking of accounts to give the present petitioners such relief as they are entitled to under the Act. The learned Judge, however, has dealt with it rather summarily. He says :

"A decree cannot be reopened simply for the purpose of making it payable in instalments. I hold that unless the judgment-debtors can satisfy me that the new decree will be for a less sum of money than that for which the decree sought to be reopened was passed, the decree cannot be reopened and a new decree passed."

With all respect to the learned Judge, when he saw that the rate of interest was more than 8 per cent., he should have reopened the transaction to see how much, if anything, the plaintiff had received more than she was entitled to under the provisions of the Bengal Money-Lenders Act. The result is that the matter must go back to the learned Judge for him to deal with it in accordance with the provisions of the Bengal Money-Lenders Act in the light of what I have said. The rule is made absolute. The petitioners are entitled to their costs in this rule—the hearing fee being assessed at two gold mohurs.

GENTLE J. — I agree.

G.N./R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 569

B. K. MUKHERJEA AND SEN J.

Asmaboo Kurban Hossain and others — *Petitioners*

v.

Province of Bengal — *Opposite Party.*

Civil Rule No. 659 of 1942, Decided on 30th June 1942, issued in application for setting aside order of President Calcutta Improvement Tribunal, D/- 10th April 1942.

(a) Civil P. C. (1908), S. 82 — Applicability— Award made by Calcutta Improvement Trust Tribunal is not decree and S. 82 does not apply.

Section 82 is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80. The object of the section undoubtedly is to allow time and opportunity to the Crown or Public Officers to satisfy the decree amicably before execution proceedings are allowed to be started against them. This provision cannot be applied to an award made by the Calcutta Improvement Trust Tribunal. An award made by the Tribunal is not a decree at all for purposes of the Civil Procedure Code. It simply specifies the amount of compensation that is allowed to the claimant under several heads and the grounds of awarding the said amount. Power is given to the Calcutta Small Causes Court to enforce the award as if it were a decree of that Court : but as a matter of fact, it is not a decree of that Court or of the Court which actually made it. Even assuming that an award made by the Tribunal is a decree, it is not a decree to which S. 82 is applicable, when there is no suit against the Crown or any Public Officer as such as contemplated by Part 4, Civil P. C., and which could only be instituted after service of notice under S. 80 of the Code. [P 570*b*,*d*,*e*]

C. P. C. —

('40) Chitaley, S. 2 (2) N. 5 Pt. 7.
('41) Mulla, Page 6 Note "In the suit."

(b) Land Acquisition Act (1894 as amended in 1921), S. 26 (2) — Scope of sub-s. (2).

Sub-section (2) of S. 26 which was introduced by the amending Act of 1921 cannot be taken as a part of the Calcutta Improvement Act of 1911 : ('31) 18 A.I.R. 1931 P. C. 149, *Rel. on.* [P 570*e*]

(c) Calcutta Improvement Act (5 of 1911), S. 77 (2)—Small Cause Court is not transferee Court — Award has to be enforced as if it were decree made by Small Cause Court itself.

Under S. 77 cl. (2), Calcutta Improvement Act, the award of the Tribunal is to be executed by the Small Causes Court as if it were a decree made by that Court. This clearly shows that the Small Causes Court is not to be deemed to be a transferee Court within the meaning of S. 38, Civil P. C., and the procedure laid down in O. 21, R. 6 of the Code would have no application to such cases, and therefore no application for transmission of a certificate of non-satisfaction could be made. The award has to be enforced as if it were a decree made by the Calcutta Small Causes Court itself. [P 570*f*,*g*]

S. M. Mullick and Arunendra Nath Tagore — for Petitioners.

Khan Bahadur Sharfuddin Ahmed and Abul Quasem (No. II) — for Opposite Party.

B. K. MUKHERJEA J.—This rule is directed against an order of the President of the Calcutta Improvement Trust Tribunal dated 10th April 1942, passed in connexion with an application made by the petitioners, in whose favour an award was made by the Tribunal, for transmission of a certificate of non-satisfaction of the award to the Calcutta Small Causes Court, under the following circumstances : The petitioners were the owners of premises Nos. 1-A and 1-B, Pollock Street in the town of Calcutta which were acquired by the Board of Trustees for the Improvement of Calcutta and the Land Acquisition Collector made an award for a sum of about Rs. 95,000 as compensation for the said premises. There was a reference taken to the Calcutta Improvement Tribunal at the instance of the petitioners who were not satisfied with the award and the Tribunal by its order dated 6th August 1940, enhanced the award of the Collector by Rs. 59512-8-0. There is no dispute that the original sum given as compensation by the Collector has been paid to the petitioner : but as they were not paid as yet the additional amount allowed by the Tribunal, they made an application to the President of the Tribunal on 24th March 1941, praying for an order directing the Province of Bengal to deposit the said additional amount in Court. In the alternative, it was prayed that a certificate of non-satisfaction of the award together with a copy of the same might be transmitted to the Calcutta Small Causes Court with a view to enable the petitioners to execute the award under S. 77 (2), Calcutta Improvement Act. This application was disposed of by the President by an order dated 6th June 1941, and the material portion of that order stands as follows :

"Heard Mr. P. K. Mukherjee, Pleader, appearing for the petitioners as well as Mr. L. M. Bakshi, Advocate, appearing for the Province of Bengal. Under S. 77 (2), Calcutta Improvement Act, Mr. Mukherjee's clients have got ample remedy in the Calcutta Small Causes Court to have the award of the Tribunal executed through that Court. Accordingly, this application is dismissed. In case of any difficulty arising in the execution proceedings before the Small Causes Court Mr. Mukherjee on behalf of his clients will be at liberty to apply to this Court for necessary orders."

On 18th March 1942, the matter was again brought to the notice of the President, Calcutta Improvement Tribunal, and it was represented on behalf of the petitioners that unless a certificate of non-satisfaction together with a copy of the award was sent by the Tribunal of the Calcutta Small Causes Court, no steps could be taken for execution of the award in that Court as contemplated by S. 77 (2), Calcutta Improvement Act. The matter was heard by the President in the presence of the Government Advocate on 10th April 1942, and it was held by him that in the matter of realising the money payable under the award, the procedure laid down in S. 82, Civil P. C., ought to be followed. Accordingly, it was ordered that the amount awarded should be paid within three months from that date and if the Province of Bengal did not pay the amount within the time aforesaid, the Court would under S. 82 of the Code report the matter for orders of the Local Government. The application of the petitioners for a certificate under O. 21, R. 6, Civil P. C., was dismissed as being premature. It is against this order that the present rule has been obtained.

It seems to me, on hearing the learned advocates on both sides, that S. 82, Civil P. C., has got no application to an award made by the Improvement

Trust Tribunal on a reference made to it by the Land Acquisition Collector of Calcutta. Section 82 occurs in Part 4, Civil P. C., which deals with suits in particular cases, and Ss. 79 to 82 of that Chapter are devoted to suits by or against the Crown or public officers in their official capacity. Section 79 lays down how the authorities are to be described in a suit by or against the Crown. Section 80 provides that no suit shall be instituted against the Crown or any public officer in respect of any act purporting to be done by such officer in his official capacity until the expiration of two months next after a notice in writing, in terms of the section, was served upon the Crown or the public officer as the case may be. Section 81 exempts a public officer who is thus sued from arrest and personal appearance. Section 82 then lays down that when the decree is against the Crown or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for orders of the Provincial Government. It further provides that execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report. Thus it seems clear that S. 82 is confined to decrees passed in suits which are referred to in previous sections and which can only be instituted after service of notice under S. 80, Civil P. C. The object of the section undoubtedly is to allow time and opportunity to the Crown or public officers to satisfy the decree amicably before execution proceedings are allowed to be started against them.

I do not think that this provision can be applied to an award made by the Improvement Trust Tribunal. Under S. 71, cl. (d), Calcutta Improvement Act, the award of the tribunal shall be deemed to be the award of the Court under the Land Acquisition Act, 1894. Section 26 of that Act prescribes the form of an award to be made by the Court. It lays down that the award shall be in writing signed by the Judge and shall specify the amount awarded by cl. (i) of sub-s. (1) of S. 23 and also the amounts respectively awarded under each of the other clauses of the same sub-section. Section 77, cl. (2), Calcutta Improvement Act, provides that every award of the tribunal and every order made by the tribunal for the payment of money shall be enforced by the Court of Small Causes of Calcutta as if it were a decree of that Court. I am inclined to think that an award made by the tribunal is not a decree at all for purposes of the Civil Procedure Code. It simply specifies the amount of compensation that is allowed to the claimant under several heads and the grounds of awarding the said amount. Power is given to the Calcutta Small Causes Court to enforce the award as if it were a decree of that Court; but as a matter of fact it is not a decree of that Court or of the Court which actually made it. It is true that by Act 19 of 1921, sub-s. (2) was added to S. 26, Land Acquisition Act of 1894, and this sub-section provides that every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of S. 2, cl. (ii) and S. 2, cl. (ix) respectively, Civil P. C., 1908. But as was held by their Lordships of the Judicial Committee in 35 C. W. N. 794,[1] the Calcutta Improvement Act is a self contained Act and it merely incorporates certain provisions from the Land Acquisition Act, 1894, and it was only for convenience of drafting that the reference was so made instead of setting out in extenso the provisions which it was desired to adopt. Sub-section (2) of S. 26 which was introduced by the amending Act of 1921 cannot therefore be taken as a part of the Calcutta Improvement Act of 1911.

But even assuming for the sake of argument that an award made by the tribunal is a decree, it is not a decree to which S. 82 is applicable. Here there was no suit against the Crown or any Public Officer as such as contemplated by Part IV, Civil P. C., and which could only be instituted after service of notice under S. 80 of the Code. The Collector made an award allowing compensation for land compulsorily acquired under statutory powers and the party aggrieved exercised his right of having a reference to the tribunal, which has the right of making the final award. There was no suit and no decree against the Crown, though the award could be enforced as if it was a decree. But though I hold that S. 82 is not applicable to the present case, I think at the same time that the petitioners have no right to ask the tribunal to transmit a copy of the award together with a certificate of non-satisfaction to the Calcutta Small Causes Court. Under S. 77, cl. (2), Calcutta Improvement Act, the award of the tribunal is to be executed by the Small Causes Court as if it were a decree made by that Court. This clearly shows that the Small Causes Court is not to be deemed to be a transferee Court within the meaning of S. 38, Civil P. C., and the procedure laid down in O. 21, R. 6 of the Code would have no application to such cases. The result, therefore, is that the rule is made absolute in part. I hold that the provisions of S. 82 of the Code have got no application in the case of an award made by the Improvement Trust Tribunal. I hold at the same time that no application for transmission of a certificate of non-satisfaction could be made by the petitioners and the award has to be enforced as if it were a decree made by the Calcutta Small Causes Court itself. The rule is disposed of in these terms. We make no order as to costs in this rule.

SEN J. — Two questions arise for consideration in this rule, viz.: (1) Is an award made by the tribunal constituted by the Calcutta Improvement Act governed by S. 82, Civil P. C.? and (2) Is it necessary for a party in whose favour an award has been made to obtain a certificate of non-satisfaction before he can get the award executed by the Court of Small Causes? In my opinion both questions must be answered in the negative. The questions have arisen out of the following circumstances. Property belonging to the petitioners was acquired by the Calcutta Improvement Trust. The amount of compensation awarded by the Collector did not satisfy the petitioners. The case was accordingly referred to the tribunal and the compensation was enhanced by that body. The petitioners now seek to realize the amount awarded. They applied for a certificate of non-satisfaction with a copy award. The President of the tribunal refused to issue such a certificate holding that the petitioners under S. 77 (b), Calcutta Improvement Act could get the award executed by the Court of Small Causes without such certificate. The petitioners were given liberty to apply for further orders if necessary. They applied again for a certificate and this application was heard on notice to the Province of Bengal who appeared. When this application was heard it was urged on behalf of the Province of Bengal that the

1. ('31) 18 A. I. R. 1931 P. C. 149 : 132 I.C. 748 : 58 I.A. 259 : 59 Cal. 55 : 35 C. W. N. 794 (P. C.), Secy. of State v. Hindustan Co-operative Insurance Society Ltd.

award could not be executed inasmuch as S. 82, Civil P. C., was a bar to its immediate execution. Section 82, Civil P. C., is as follows :

"(1) Where the decree is against the Crown or against a pubic officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Provincial Government."

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report."

It was argued on behalf of the Province of Bengal that the award must be deemed to be a decree against the Province of Bengal and that it was therefore b necessary for the Tribunal to specify a period in the award within which it had to be satisfied and that until that was done the award could not be executed. This view was accepted by the learned President of the Tribunal and the award was amended by inserting therein a statement that the money should be paid by the Province of Bengal within three months from the date of the amendment. The learned President also decided that if the money was not paid within that time the Tribunal would report the matter for the orders of the Local Government. The learned President did not decide whether a certificate of non-satisfaction was necessary or not; but said that the application for a certificate 'at the present stage' was dismissed.

On behalf of the petitioners, it is contended that the Code of Civil Procedure does not apply to an award and even if it did, S. 82, Civil P. C., had no c application to it as the award was not a decree. It was also urged that a certificate of non-satisfaction was necessary. On behalf of the Province of Bengal our attention was drawn to provisions of Ss. 69, 70 and 71, Calcutta Improvement Act, and it was argued that the provisions of these sections clearly indicate that the Tribunal constituted a Court which was bound to follow the procedure which the Court constituted by the Land Acquisition Act was directed to follow by that Act, with this exception that S. 54 of the aforesaid Act did not apply to an award of the Tribunal. Next it was pointed out that by reason of the provisions of S. 53, Land Acquisition Act, the Court under that Act was bound to follow the procedure laid down in the Civil Procedure Code. The result of these provisions, according to learned advocate for the Province of Bengal was d that the Civil Procedure Code applied to the proceedings before the Tribunal and the award constituted a decree which was affected by the provisions of S. 82 of the Code, it being an award or decree against the Province of Bengal.

It is not necessary to decide the wide question whether the Code of Civil Procedure applies to proceedings before the Tribunal, inasmuch as, in my opinion, S. 82 of the Code can have no application to this award. Section 82 is a section which appears in Part. 4 of the Code which is headed "Suits in particular cases". Part 4 of the Code is sub-divided into three parts under three distinct headings, viz. (a) Suits by or against the Crown of Public Officers in their official capacity. (b) Suits by aliens and by or against foreign and native rulers. (c) Inter pleader suits. Sections 79 to 82 deal with suits under part (a), Ss. 83 to 87 with suits under part (b) and S. 88 with suits under part (c).

It is thus clear that S. 82 applies only when there is a suit against the Crown or Public Officer and a decree is passed against the Crown or Public Officer e in that suit. In the present case there has been no suit against the Crown or Public Officer or against anybody at all. The Collector has awarded compensation for land acquired under the Calcutta Improvement Act. This award has not been accepted and he has referred the matter for determination to the tribunal which has now made its award. The award is executable as a decree but it is certainly not a decree made in a suit against the Crown or a Public Officer. Section 82 therefore has no application to this award and the learned President of the tribunal was wrong in amending it in the way that he has done.

I next turn to the question whether a certificate of non-satisfaction is necessary. Order 21, R. 6 deals with this matter. It says that when one Court sends a decree for execution to another it shall send that Court a copy of the decree, a certificate of non- f satisfaction and a copy of any order for the execution of the decree or if no such order has been made a certificate to that effect. These certificates and particulars are required when a decree is transferred from the Court which passed it to another Court for execution. The reason for issuing these certificates is this. The Court which sends the decree for execution had the power to execute it, it is therefore necessary to apprise the transferee Court either that the decree has not been satisfied at all by execution within the jurisdiction of the Court which sends the decree or if it has been satisfied in part by execution to what extent it has been so satisfied. If this is not done mistakes may arise. But in the case of this award no such mistake can arise; the tribunal which made the award is not competent to execute it at all. The only Court that can execute it is the Court of Small Causes; no necessity therefore g arises for the tribunal to send any certificate of non-satisfaction to that Court. Again the award is not sent by the tribunal to the Court of Small Causes for execution. The tribunal makes the award and the law provides that the Court of Small Causes shall enforce it as if it were a decree passed by it: *vide* S. 77 (2), Calcutta Improvement Act. Order 21, R. 6 has no application and the petitioners' prayer for a certificate of non-satisfaction must be rejected. I agree with the order which has been passed by my learned brother for the reasons stated above.

K.S./R.K. *Rule partly made absolute.*

A. I. R. (29) 1942 Calcutta 571

R. C. MITTER AND KHUNDKAR JJ.

Nawab Khajeh Habibullah and others h
— Plaintiffs — Appellants

v.

Babu Ananga Mohan Roy, Defendant and others — Respondents.

Appeal No. 122 of 1938, Decided on 1st April 1942, from original decree of Sub-Judge, First Court, Tippera, D/- 3rd January 1938.

(a) Hindu law—Will—Widow—Life estate—Hindu testator excluding son from his properties — His entire estate to pass to his widow and after her to his son's sons — Testator in defining widow's and grandson's interest using words sufficient to confer absolute estate upon them—Widow held took only life estate.

The dominant intentions of a Hindu testator as expressed in his will were (1) exclusion of his son from his properties which was made effective by

the disposition of his entire estate to persons other than his son and (2) that his estate in its entirety was to pass intact to his widow and after her to his grandsons (son's sons) in succession and on the death of grandson or grandsons to the objects specified in the will. In defining the interest of the widow and after her of the grandson the testator had used words in the will which would have been sufficient to confer absolute estate :

Held that the second dominant intention was inconsistent with a series of absolute interests, and, therefore, the widow took a life estate only though the words used by the testator would by themselves have conferred an absolute estate on the widow : ('32) 19 A. I. R. 1932 P. C. 172, *Rel. on.* [P 573*h*; P 574*a*]

Hindu law —
('40) Mulla, Page 447 Pts. (p) and (q).
('38) Mayne, Page 893 Pt. (b); Page 894 Pt. (b).

(b) Civil P. C. (1908), S. 11 — Court which tried previous suit not having pecuniary jurisdiction to try subsequent suit — Decision in previous suit cannot operate as res judicata.

Where the Court in which the previous suit was instituted would have had no pecuniary jurisdiction to try the subsequent suit, the decision in previous suit cannot operate as res judicata. [P 574*e*]

C. P. C. —
('40) Chitaley, S. 11, N. 73 Pts. 1 and 2 ; S. 11, N. 79 Pt. 1.
('41) Mulla, Page 72 Pt. (j); Page 74 Pt. (t).

(c) Succession Act (1925), S. 227 — Executor can sue without probate—But executor who has not obtained probate can be sued only when he has intermediated with testator's estate—S. 227 does not apply to cases of representation in suits.

No doubt an executor who has not obtained probate can file a suit as plaintiff but he must obtain probate before the decree or even earlier if he is called to prove his representative character at an earlier stage : ('16) 3 A.I.R. 1916 P.C. 202, *Rel. on.* [P 574*g*]

But an executor who has not obtained probate can be effectively sued as defendant only when he had intermediated with the estate of the testator : (1894) A. C. 437 and ('15) 2 A. I. R. 1915 Cal. 599, *Rel. on.* [P 574*g*]

No doubt under S. 227 an executor derives his title from the will and probate is the only effective evidence of his title and he can act before probate and subsequent probate validates the intermediate acts. But the provisions of that section do not apply to cases of representation in suits: 14 C. W. N. 256, *Rel. on* ; ('31) 18 A. I. R. 1931 Cal. 782, *Not approved.* [P 574*g*,*h*]

(d) Civil P. C. (1908), O. 22, R. 4—Defendant dying pending suit leaving will — Under will persons other than heir at law who would have been defendant's legal representative if he had died intestate appointed as executors — Heir at law cannot be brought on record merely because probate of will was not granted then — Procedure to be followed by plaintiff indicated.

Where the defendant dies during the pendency of a suit leaving a will in which he appoints persons other than his heir at law who would have been his legal representative if he had died intestate, the heir at law cannot be brought on the record as the defendant's legal representative merely because probate of the will was not granted then: 12 C.L.J. 561, *Rel. on.* [P 575*b*]

In such circumstances the plaintiff should either apply for postponement of the case till probate was granted to the defendant's will and after that event substitute the executor or executors who obtained probate, or if that is not feasible or desirable he should apply for the appointment of an administrator ad litem under S. 251, Succession Act, and substitute the person so appointed in defendant's place. [P 575*b*,*c*]

C. P. C. —
('40) Chitaley, O. 22 R. 4, N. 13 Pt. 2.
('41) Mulla, Page 935 Pt. (l).

Ramaprosad Mukherjee — for Appellants.

Hemendra Kumar Das, Nripendra Chandra Das, Manindranath Ghose and Devabrata Mitra — for Respondents.

Surjya Kumar Aich — for Deputy Registrar.

R. C. MITTER J. — The subject-matter of the suit and the appeal is eight annas share of a permanent gar-mukorari tenure called taluk Biswanath Roy. The plaintiffs-appellants are the superior landlords of that tenure to which admittedly the Bengal Tenancy Act applies. Two persons, Abinash Chandra Roy Chowdhury and Kiranbala Chowdhurani were the tenure holders. Abinash executed a will (Ex. 11, II-1) on 10th July 1909 and died shortly thereafter. He had married twice. By his first wife, who predeceased him, he had a son named Abani. Ananga is the only son of Abani. His second wife who survived him was Kumudini. She was childless. By his will Abinash disinherited his only son Abani, and made his second wife executrix. He gave the whole of his estate, moveable and immovable including his eight annas share in the tenure taluk Biswanath Roy to her in the first instance and made provisions for the devolution of his whole estate after her death. His grandson, Ananga, was to take that estate, according to the terms of the will, after Kumudini's death. The most important controversy in the suit and the appeal is about the nature of the estate conferred by the will on Kumudini, namely, whether it was a life estate or an absolute estate. The probate of the will was granted to Kumudini on 21st February 1911. Kumudini administered the estate and it is admitted by the parties that in 1921 she was in possession of the eight annas share of the tenure, taluk Biswanath Roy, in her capacity as beneficial owner under the terms of her husband's will. The other eight annas share of the tenure was then vested in Kiranbala. That tenure fell into arrears and the plaintiffs filed a suit to recover the arrears of rent on 1st July 1921. This suit which was numbered as Rent Suit No. 8 of 1921 of the Court of the Subordinate Judge of Tipperah was instituted against Kumudini and Kiranbala. During the pendency of this rent suit Kumudini died on 19th September 1921. On 16th September 1921 she executed a will by which she appointed five persons as executors, namely her step-grandson Ananga, her brothers Lalit Mohan Ghosh, Biraj Mohan Ghosh, Bhuban Mohan Ghosh and one Jitendra Mohan Bose. The beneficial interest in all her properties was given to a deity named Kumudeswar Mahadev. The probate of this will was granted to Ananga only on 9th May 1924, the other four executors having in the end renounced. On the application of the plaintiffs, Abani and Ananga were substituted in the place of Kumudini in the rent suit on 22nd November 1921. The plaintiffs proceeded upon the footing that Ananga became the tenure-holder of that tenure to the extent of eight annans on Kumudini's death on the basis of Abinash's will, but for greater caution they

brought Abani on the record also. At that time they *a* had no knowledge of Kumudini's will.

The four other executors of Kumudini's will however made an application in the rent suit on 12th January 1922. In that application they disclosed Kumudini's will and made a statement that they only were the executors under that will. They claimed to be substituted in the place of Kumudini as her legal representatives, and prayed for such substitution. In the body of the application (Ex. A-II-30) they stated that Abani and Ananga were not necessary parties. The plaintiffs' pleader asked for and obtained time to consider his position in regard to that application. Ultimately that application was lost sight of and the Court granted a decree for rent against the parties then on record, namely Abani, Ananga and Kiranbala on 23rd March 1923. Abani was admittedly not a necessary *b* party. The tenure was sold in execution of this decree under the procedure of Chap. 14, Ben. Ten. Act, and was purchased by the plaintiffs on 5th April 1923. After an unsuccessful application by Abani and Ananga to set aside that sale, the sale was confirmed on 21st July 1924 and the sale certificate was issued to the plaintiffs on 27th September 1924. The decree in the rent suit and the sale in execution thereof was held before the probate of Kumudini's will had been granted. The probate of that will was granted to Ananga on 9th May 1924.

The question on which this appeal hinges is whether all the tenure holders of the said tenure were parties to the rent decree and in the execution proceedings. If that was so the entire tenure has passed to the plaintiffs by their purchase at the court sale. If not, that rent decree would not have the effect of a rent decree in terms of the Bengal *c* Tenancy Act, but would have the effect of a money decree, effective only against Kiranbala and the right, title and interest of that judgment-debtor only would pass to them. If the will of Kumudini was operative to pass eight annas share of the tenure to the deity Kumudeswar Mahadev, the plaintiffs would then get by their purchase at the said auction sale only the eight annas interest of Kiranabala. These positions are admitted by the parties and are also in accordance with law. If, however, by the will of Abinash a life-estate only had been conferred on Kumudini she would have then no power to give the tenure to the said idol and her executors would not be necessary parties to that rent suit on her death. On her death the same would vest in Ananga by the terms of Abinash's will and no matter whether Ananga had a life-*d* estate or an absolute estate therein he would represent after Kumudini's death the eight annas share of the tenure which belonged to Abinash. The decree passed in the rent suit would be then effective against the tenure and the court sale held in execution thereof would consequently pass to the purchasers the whole tenure and the plaintiffs would be entitled to succeed in this suit. If however Kumudini had an absolute estate in that tenure under her husband's will further questions would arise. We would therefore take up the question of the construction of Abinash's will.

The will consists of 13 paragraphs. Paragraph 5 is subdivided into three parts. We will designate these sub-paragraphs as 5 (a), 5 (b) and 5 (c). Paragraph 6 is subdivided into four sub-paragraphs which we will designate as 6 (a), 6 (b), 6 (c) and 6 (d) and para. 12 into two sub-paragraphs which we designate as 12 (a) and 12 (b). The material paragraphs are 3, 5, 6, 7, 11 and 12. In para. 3 the testator expresses his displeasure at the conduct of his son, Abani and purports to disinherit him. By paras. 5 (a) and 5 (b) he gives all his properties to *e* his wife Kumudini in the first instance. Paragraph 5 (b) defines her interest. There are three expressions used there, each one of which would ordinarily be sufficient to confer an absolute estate on her. If that sub-paragraph stood alone there could not have been any doubt about the estate she took under her husband's will. Sub-paragraph 5 (c) states that after the death of his wife his grandson, Ananga would take all his properties, if he did not forsake his religion. In that paragraph words are also used which would confer an absolute estate on him. Paragraph 6 contemplates other sons being born to Abani. In that event those grandsons of the testator would take equally with Ananga, if they did not forsake their religion. Paragraph 6 (d) states that his grandsons would have an estate of the same nature as was conferred on his wife. Para- *f* graph 7 confers a power on his widow to take sons in adoption. Paragraph 11 deals with his insurance money and his share separately. His wife is to take first and on her death his grandson. Paragraph 12 contemplates the case of the death during the lifetime of his widow of his grandson or grandsons or of the son that may be adopted to him. In that event his estate is to be divided into eight equal parts, four of which are to be devoted to the worship of the idol established by him at Benares and to such other purposes as would be of spiritual benefit to the soul of his deceased father and mother. One part is to be given to his spiritual guide and the remaining three parts were to be utilized for establishing and maintaining a charitable dispensary in his village. It is quite clear that if the estate conferred on his wife be an absolute estate the provisions made in paras. 5 (c) and 6 (b) *g* for his grandsons would be invalid, as also the dispositions made in para. 12. On reading the whole of the will the dominant intentions of the testator as expressed therein appear to be two—(1) exclusion of his son, Abani, from his properties which was made effective by the dispositon of his entire estate to persons other than his son and (2) that his estate in its entirety was to pass intact to his widow and grandsons in succession and on the happening of the event mentioned in para. 12 to the objects specified therein, namely, 7/8ths of his estate was to be devoted to objects of a permanent nature, the remaining 1/8th being given to his spiritual guide. The first dominant intention is made effective by the disposition of his entire estate to persons other than his son, Abani. The second dominant intention, as Lord Tomlin observed in *h* 59 I. A. 268[1] at pp. 278 and 279 "is inconsistent with a series of absolute interests and could only be given effect to with such a series if each taker voluntarily denied himself the exercise of all powers of alienation, inter vivos, and disposed of the property testamentarily to the next taker in accordance with the testator's scheme." In that case before the Judicial Committee the testator gave his property first to his nephew Nawab Sir Fateh Ali Khan and used terms which would have been sufficient to confer on him an absolute estate. He further provided that on the death of Nawab Sir Fateh, his (testator's) son Nawab Mohammad Ali Khan and on the latter's death his nephew Nawab Hidayat Ali Khan would take the properties in the same interest in which Nawab Sir Fateh Ali Khan

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1. ('32) 19 A. I. R. 1932 P. C. 172 : 137 I. C. 539 : 59 I. A. 268 : 7 Luck. 324 (P. C.), Nisar Ali Khan v. Mohammad Ali Khan.

a was to take; their Lordships of the Judicial Committee held that each one of these persons, Nawab Sir Fateh Ali Khan, Nawab Mohammad Ali Khan ane Nawab Hidayat Ali Khan took successive life estate only, though the words of limitation used by the testator would by themselves have conferred on each one of them an absolute estate. Relying on the principle enunciated in 59 I. A. 268[1] we hold that Kumudini had only a life estate notwithstanding the terms of para. 5 (b) of the will. She had therefore no power to make a will in respect of the tenure, Taluk Biswanath Roy or to dedicate it to the deity. On her death Ananga became the owner of eight annas of that tenure by the terms of his grand-father's will. He was therefore rightly brought on the records of the rent suit on the death of Kumudini. As the tenure was fully represented in the rent suit, at the date of the decree, that is to b say, as the rent decree was passed against all the tenure holders and the execution proceedings were taken against the tenure holders, the whole tenure passed to the plaintiffs at the rent sale by reason of provisions of Chap. 14, Ben. Ten. Act.

Shortly after the plaintiffs' purchase at the rent sale disputes arose as to whether they could get 16 annas rent from the Subordinate tenants. At that time Ananga had obtained probate of Kumudini's will. He backed the tenants who resisted the plaintiffs' claim to 16 annas of the rent. The result was that many rent suits were brought some by the plaintiffs in which they claimed 16 annas rent and some by Ananga in which he claimed 8 annas of the rents from the subordinate tenants. In the plaintiffs' suits they made Ananga also a defendant and in Ananga's suits the plaintiffs were also made c defendants. All these rent suits were instituted in the Court of the Munsifs, who would have had no pecuniary jurisdiction to try the suit which we have before us. In some cases appeals were carried from the Munsif's decisions to the Court of the Subordinate Judge and in some cases second appeals were filed in this Court. Two judgments of two Subordinate Judges passed on appeals have been exhibited. They are Exs. K and H (II-156 and 164). Two questions were considered by the said Subordinate Judges namely (1) whether Kumudini got an absolute estate under her husband's will and (2) whether after Kumudini's death the proper legal representative had been brought on the record of Rent Suit No. 8 of 1921. Both the learned Subordinate Judges held that the said will had conferred an absolute estate on Kumudini and that there was no proper substitution in that rent suit on Kumu- d dini's death. Two of the judgments passed by this Court in second appeals (which were not appeals against Exs. H and K, but in other rent suits) are reported. They are : 53 C. L. J. 415[2] and 53 C.L.J. 421.[3] The will of Abinas was not construed by this Court. It was assumed that an absolute estate had been conferred on Kumudini by her husband's will. This Court on the sole finding that proper legal representatives had not been brought on the records of Rent Suit No. 8 of 1921 on the death of Kumudini held that the whole tenure had not passed to the plaintiffs, the Nawab and his cosharers, but only eight annas thereof, namely, the interest of Kiranbala Choudhurani. There is no decision on the question of construction of Abinash's will which e is binding on us. The decision in those two second appeals on the question of representation in the said Rent Suit No. 8 of 1921 after Kumudini's death is not res judicata, on the ground that those rent suits had been instituted in the Courts of Munsifs who would have had no pecuniary jurisdiction to try the suit which we have before us. But the decision in 53 C. L. J. 421,[3] being by a Division Bench is binding on us as a precedent. On the view we have taken of the interest that had been conferred on Kumudini by her husband's will this appeal must succeed. But as the question of representation in Rent Suit No. 8 of 1921 has been argued before us at length on the hypothesis that Kumudini had got an absolute estate by her husband's will we proceed to express our views on that point on that hypothesis.

We have stated before that by her will Kumudini f had appointed five executors. While Rent Suit No. 8 of 1921 was pending four of her executors, Jitendra Mohan Bose and the Ghoshes applied for probate and the other executor, Ananga, was at first opposing the grant. The said four executors ultimately renounced, and probate was granted to Ananga only. This was after the decree had been passed in Rent Suit No. 8 of 1921 and the tenure had been sold in execution thereof. At all material stages of that rent suit and the following rent execution none of the executors named in her will had obtained probate. Though in their application filed in the rent suit by the four executors Jatindra Nath Bose and the Ghoshes on 12th January 1922 (Ex. A) they had stated that they were in possession of the estate of Kumudini there was no evidence before the Court in support of that statement, as that application was g not supported by an affidavit. The question therefore is whether the executors could at that stage be substituted in that suit as the legal representatives of Kumudini. In our opinion they could not. If they had been substituted and a decree obtained that decree would not have bound the estate of Kumudini as they had not then obtained probate. It is well settled that an executor who has not obtained probate can file a suit as plaintiff, 43 I. A. 113,[4] but he must obtain probate before the decree or even earlier if he is called to prove his representative character at an earlier stage (Williams on Executors, Vol. I, p. 192, Edn. 12). But an executor who has not obtained probate can be effectively sued as defendant only when he had intermediated with the estate of the testator: 1894 A. C. 437,[5] 22 C. L. J. 266[6] and 14 C. W. N. 256.[7] No doubt an executor derives his title from the will and probate is the h only effective evidence of his title. He can act before probate and subsequent probate validates these intermediate acts. (Section 227, Succession Act, 39 of 1925.) But the provisions of that section do not apply to cases of representation in suits: 14 C.W.N. 256[7] at page 258.

For these reasons we cannot agree with the observations in 53 C. L. J. 421[3] that the four executors who had made the application, Ex. A, in the

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2. ('31) 18 A. I. R. 1931 Cal. 673 : 134 I. C. 305 : 53 C. L. J. 415, Ananga Mohan Roy v. Khajeh Habibulla.
3. ('31) 18 A. I. R. 1931 Cal 782 : 134 I. C. 311 : 53 C. L. J. 421, Cherag Ali Sarkar v. Nawab Khajeh Habibulla.
4. ('16) 3 A.I.R. 1916 P. C. 202 : 35 I. C. 323 : 43 I. A. 113 (P. C.), Mayappa Chetty v. Supramanian Chetty.
5. (1894) 1894 A. C. 437 : 63 L. J. P. C. 90 : 6 R. 510 : 71 L. T. 99, Mohamadin Mohideen Hadjiar v. Pitchey.
6. ('15) 2 A. I. R. 1915 Cal. 599 : 16 I. C. 690 : 22 C. L. J. 266, Lal Behari v. Nagendra Nath.
7. ('10) 14 C. W. N. 256 : 2 I. C. 818, Lakhya Dassya v. Uma Kanta.

rent suit ought to have been brought by the plaintiffs on the records of the rent suit on Kumudini's death as her legal representatives. We do not also feel the force of the observations made therein that the deity Kumudeshwar Mahadev ought to have been made a party. The right of the deity could not be established without probate, and at all material times in the progress of that rent suit probate had not been granted. Besides that, there was no evidence that the executors had given their assent to the legacy in favour of the deity. The deity was therefore out of the picture at that stage. We cannot therefore hold that the estate of Kumudini was not represented in the rent suit simply because the executors named in her will had not been substituted in her place in that suit. On her death her son Abani and her grandson Ananga were substituted in her place. Ananga had no status except in his character as her executor and we have already held that not having obtained probate while the rent suit was pending he could not be substituted in that suit in Kumudini's place. The same reasons apply to his being made a party in the resulting execution proceedings. Abani was Kumudini's heir-at-law and would have been her legal representative if she had died intestate. Could he then have been brought on the record of the rent suit as her legal representative seeing that although she had left a will by which she had appointed other persons as executors, probate of the will had not been granted then. We are of opinion that he could not, and this view of ours is supported by the decision of a Division Bench in 12 C. L. J. 561.[8] In these circumstances two courses were open to the plaintiffs in the rent suit when Kumudini died, either to apply for postponement of the case till probate was granted to Kumudini's will and after that event to substitute the executor or executors who obtained probate, or if that was not feasible or desirable, to apply for the appointment of an administrator ad litem under S. 251, Succession Act, (39 of 1925) and to substitute the person so appointed in Kumudini's place. As they did not follow either of these courses the decree obtained by them would not bind the estate of Kumudini and accordingly 8 annas share in the tenure taluk Biswanath Roy would not have passed to them at the court sale.

If we had held that the estate taken by Kumudini under her husband's will was an absolute estate we would have dismissed this appeal, but as on the construction of that will we have held that she took a life-estate only, the appeal must succeed. The plaintiffs must have the costs of this appeal and also the costs of the lower Court for the first party defendant. The result is that the plaintiff's title to 8 annas share in taluk Biswanath Roy as described in Sch. 1 of the plaint is declared and that they do recover possession from the first party defendant. The plaintiffs would also get a decree for mesne profits from the first party defendant from three years prior to the institution of the suit till recovery of possession or restoration of possession or three years from the date of this judgment, whichever occurs earlier. We direct an enquiry by the Court into mesne profits in terms of O. 20, R. 12, sub-r. (1), cl. (c), Civil P. C. As prayer No. (6) of the plaint has not been pressed by the learned advocate for the appellants the same is refused.

KHUNDKAR J.—I agree.

G.N./R.K. *Appeal allowed.*

8. ('10) 12 C. L. J. 561 : 6 I. C. 627 : 14 C. W. N. 1041, Harish Chandra Biswas v. Puridas Das.

* A. I. R. (29) 1942 Calcutta 575

LODGE AND BLAGDEN JJ.

Daityari Tripatty—*Accused*—*Petitioner*

v.

Subodh Chandra Chowdhury — *Complainant* — *Opposite Party.*

Criminal Revn. Petn. No. 388 of 1942, Decided on 18th June 1942.

(a) Criminal P. C. (1898), S. 179 — Criminal breach of trust—S. 179 does not apply.

Section 179 applies only to those offences which by their very definition consist of an act and its consequence (e.g. culpable homicide, which, omitting matters immaterial for this purpose, consists in "causing death"), and not, therefore, to criminal breach of trust. A loss to anybody forms no part of the statutory definition of that offence : ('30) 17 A.I.R. 1930 Bom. 490 (F.B.), *Ref.* [P 577*b*,*c*]

Cr. P. C.—
('41) Chitaley, S. 179 N. 4 Pt. 2 ; N. 5 Pt. 1.
('41) Mitra, Page 570 N. 555.
Penal Code—
('40) Ratanlal, Page 1011 Pt. 24.
('36) Gour, Page 1372 Pts. 11, 12.

(b) Penal Code (1860), S. 405—Place of failure to account or dispose of property as per contract does not give jurisdiction for trial of offence under S. 405.

Neither failure to account nor breach of contract, however dishonest, is actually and in itself the offence which S. 405, Penal Code defines, but merely evidence of that offence. Hence S. 181 (2), Criminal P. C., does not confer jurisdiction on a Court at a place where the accused has failed to account or to dispose of property as per contract. [P 577*c*,*d*]

Penal Code—
('40) Ratanlal, Page 1010 Note "Venue."
('36) Gour, Page 1372 Pt. 9.

*** (c) Penal Code (1860), S. 405 — Criminal breach of trust — Place neither of entrustment nor of conversion—Offence is not triable at such place.**

An offence of criminal breach of trust is not triable at a place where neither the entrustment nor any positive act of conversion of the monies entrusted took place because an offence of criminal breach of trust always consists in an act and not in an omission : ('38) 25 A.I.R. 1938 Rang. 94 and ('31) 18 A.I.R. 1931 Cal. 521, *Foll.*; ('36) 23 A.I.R. 1936 All. 193 ; ('25) 12 A.I.R. 1925 Cal. 613 and ('31) 18 A.I.R. 1931 Cal. 528, *Not approved* ; ('30 17 A.I.R. 1930 Bom. 490 (F.B.), *Ref.* [P 576*c*,*e*]

Penal Code—
('40) Ratanlal, Page 1011 Pts. 21, 22.
('36) Gour, Page 1372 Pt. 12.

S. C. Talukdar — for Petitioner.
D. N. Bhattacharjee and Bonbehari Sarkar— for Opposite Party.

BLAGDEN J.—On 27th April 1942, this Court granted a rule nisi against the Chief Presidency Magistrate, Calcutta, and a Mr. S. C. Choudhury to quash certain proceedings pending before the former in which, on the complaint of the latter, a charge had been framed against the petitioner. Omitting formal facts, this charge reads as follows :

" That you being a servant of the Chandbali Steamer Service Co., Ltd. of 29, Strand Road, Calcutta, and in that capacity being entrusted with property to wit the monies received and realised by

a you on behalf of the said company and being bound under the contract of service to deposit the said monies in the Head Office at 29, Strand Road, Calcutta, dishonestly disposed of between 8th October 1941 and 23rd November 1941, the total gross sum of Rs. 7800-4-0 the property of the said Chandbali Steamer Service Co. Ltd., in contravention of the terms of contract of service and thereby committed an offence punishable under S. 408, Penal Code and within my cognizance."

The petitioner challenges the jurisdiction of the learned Magistrate, who frankly tells us that he only decided he had jurisdiction after some doubt : nor, in view of the state of the authorities, is this surprising. The question was ably argued before us by counsel for and in opposition to the rule. To determine it at this stage of the proceedings we must look and look only at the charge as framed. b We must assume every fact therein alleged to be proved—it is perhaps unnecessary to state that we do so for present purposes only, and that nothing we now say must be taken in any way to prejudice the defence of the petitioner on the merits whenever or wherever he is ultimately tried. Lastly, we must draw every inference consistent with the facts so assumed which tells in the petitioner's favour. So acting, we have to deal with an offence under S. 408, Penal Code, which incorporates S. 405. The latter section provides as follows :

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, c which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

On the foregoing assumptions it appears that neither the entrustment nor any positive act of conversion of the monies entrusted took place in Calcutta, and such, we are told, the fact is. Indeed, even after a verbal amendment of the charge it could only be argued that the offence took place in Calcutta if either a breach of contract by pure nonfeasance or a failure to account takes place, necessarily and as a matter of law at the contractual place of performance or at the place where the accounting party ought to account. Apart from any relevant statute or authority neither of these hypotheses appears to us tenable. The actual crime created by S. 405 consists of any one of four acts— d "misappropriation" "conversion", "user" or "disposal" of property. Certainly, the act of one individual may have repercussions anywhere on the earth or in the surrounding atmosphere, but, since the number of positions in space which a single body can simultaneously occupy is strictly limited to one, it seems to us on principle that a man can personally do an act at that place only where at the material time he physically is. We are fortified in this conclusion by the decision of Mackney J. in 39 Cr. L. J. 529[1] and entirely agree with his reasoning.

As against this, we have been referred to a number of sections in the Code, of which S. 174 is as good an example as any, in which an offence consists in a mere omission; and learned counsel for the opposite party says, no doubt correctly, that the offences they create have always been tried at e the place where the omitted act ought to have been performed. But he could refer us to no reported case in which the present question was discussed — for example in which a witness, physically in the Punjab, was duly summoned and failed to attend this Court and was tried for his offence in Calcutta. The question may well never have arisen. It appears to us at least open to doubt if he could be so tried. But, however this may be, the offence in each of the sections cited itself consists in an omission, whereas criminal breach of trust always consists, as already stated, in an act. True, failure to account is often convincing evidence of that act: but we must be careful not to confuse evidence of a particular act — in the form of an omission — with the act itself. Section 179, Criminal P. C., however provides as follows :

"When a person is accused of the commission of any offence by reason of anything which has been f done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

If this matter were res integra (which it certainly is not) it might be grammatically possible so to construe this section as to permit a prosecution for any offence consisting of an act as opposed to an omission either at the place of the act or that of its consequence (even though the consequence formed no necessary ingredient in the offence) provided that there would not in fact have been any prosecution for the act but for its consequence. On this construction, in the unlikely event of child-birth following rape and the perhaps more likely one of the prosecutrix being prepared to forgive the latter if it had g not been for the former the child's birth place would be a legitimate venue for its father's trial, a result which is, to say the least, startling. But no High Court, so far as we are aware, has ever taken so wide a view of this section, and it might suffice to say of it that our own High Court has consistently held, for reasons which seem to us convincing, that it is wholly inapplicable to the offence of criminal breach of trust. Be that as it may, this much has not been denied, namely, that to bring the section into operation the consequence referred to must, at the very least, be in fact a necessary consequence of the act constituting the crime : *see* for example 55 Bom. 59[2] and in particular the judgment of Beaumont C. J. with whose reasoning on this particular point we must respectfully agree.

In that case a Full Bench decided that S. 179 is inapplicable to criminal breach of trust because loss h "to the principal" is not even a necessary consequence of still less a statutory ingredient in the offence. Regard being had to the nature of a trust, we venture with all deference to think that the introduction of the words "to the principal" has occasioned a little confusion and, while agreeing in the result, cannot altogether concur in the reasons given for it. If by "the principal" is meant only "the creator of the trust," we should agree that loss to him does not even necessarily follow from the offence, the dishonest messenger who puts in his own pocket and keeps money entrusted to him by a charitable person as and for a gift to an indigent third party leaves his employer not one anna the poorer by what he does. But if it is meant to include "the beneficiary" we reluctantly disagree : at

1. ('38) 25 A. I. R. 1938 Rang. 94 : 175 I. C. 175 : 39 Cr.L.J. 529 : 1938 R. L. R. 1, Vasanji Khimjee v. Kanji Tokersey.

2. ('30) 17 A. I. R. 1930 Bom. 490 : 129 I. C. 385 : 55 Bom. 59 : 32 Bom. L. R. 1195 (F. B.), In re Jivandas Savchand.

all events we can imagine no case in which the beneficiary — often the same person as the creator of the trust — is not at least momentarily poorer by reason of the offence. Even in the case put by Beaumont C. J. at page 76, in which the dishonest agent repents and makes good his defalcation before it is discovered, the loss has, we respectfully think, been suffered when the offence was committed, although it is repaired before any one but the criminal knows of it. To hold otherwise, is, in our humble judgment, to confuse a fact with knowledge of that fact, and, therefore, fallacious.

A painful sensation to the victim, though an almost invariable incident of the offence, forms no necessary part of the statutory definition of "hurt" since S. 319, Penal Code, provides for two other alternative ingredients. If *A* is lying dead drunk in a highway and *B* cuts off his thumb without breaking his sleep, it is surely no defence for *B* to prove that *A* was run over by a casual steam-roller and killed before he ever recovered consciousness. Nor, we think, is it reasonable, or the true construction of S. 179, Criminal P, C., to hold that it could add to the number of places where *B* could be tried, if, instead of being run over, *A* were kidnapped and carried away, still comatose, by a third party to another district. We, therefore, think that the narrowest view of S. 179 to which this Court has always adhered, is correct, namely, that it applies only to those offences which by their very definition consist of an act and its consequence (e. g., culpable homicide, which, omitting matters immaterial for this purpose, consists in "causing death,") and not therefore to criminal breach of trust. If this be so, it is useless to speculate for cases in which nobody in fact loses by a criminal breach of trust. It is sufficient to say that loss to anybody forms no part of the statutory definition of that offence. If, as we think, S. 179 gives no help to the opposite party, he is driven to contend that the offence is committed by an accounting party who fails to account at the place where he should account, and by a contracting party who disposes of the property in breach of his contract at the place where he has contracted to dispose of it. If this is right, he brings himself directly within S. 181 (2), Criminal P. C., which provides for the trial of alleged criminal breaches of trust in the following terms :

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

But, again, neither failure to account nor breach of contract, however dishonest, is actually and in itself the offence which S. 405, Penal Code, defines, but merely evidence of that offence. The question remains whether the authorities compel us to alter the opinion on this question which we have already expressed, and to dissent from the decision of Mackney J. already cited. Some reliance is placed on observations of Alderson B. in (1855) 7 Cox. C.C. 158,[3] cited in Halsbury's Laws of England, Edn. 1, Vol. 9, p. 583. The learned Baron, in dealing with the English statutory offence of embezzlement, said that "where there is no evidence of fraudulent embezzlement except the non-accounting, the venue may be laid in the place where the non-accounting occurred, because the jury may presume that there the fraudulent misappropriation was made."

But it must be remembered that he was dealing with the Common law of England, which at that date almost wholly regulated English criminal procedure, and our law of procedure is codified. Our Code may be a little obscure on this point and it might be—we do not say that it is—capable of improvement. But unless there is not merely a defect but an obvious gap in it (which there is not) there is no justification under the "justice, equity and good conscience" clause of the Letters Patent for our saying that English law is the law of Bengal, and introducing into the latter what is, after all, a pure fiction. We cannot, however, help feeling that the learned Baron's observations may have influenced the Allahabad High Court in 58 All. 644.[4] It is certainly true that this decision is irreconcilable with the Rangoon decision already cited and being a decision of a Bench is of higher persuasive authority. But we cannot, with great respect, agree that the fact that a particular event does not happen at point X is any evidence, or gives any ground for assuming that *AA*, who never was at point X at all, committed at that point an offence at all events one which by its definition consists in an act. Nor can we agree with the reasoning of the Court at p. 649 that S. 405, Penal Code, falls into two parts, one positive and the other negative. It seems to us that to "use" or to "dispose of" property is every bit as positive an act as to "misappropriate" or "convert" it. Once again, we think that evidence of an act has been confused with the act it evinces.

Similar views were expressed by a Bench of this Court in 41 C.L.J. 80[5] partly on the strength of a mistake as to exactly what Alderson B. said in (1855) 7 Cox. C. C. 158,[3] words being put into the learned Baron's mouth which in fact were those of the learned editor of the relevant article in Halsbury's Laws of England; and the doctrine that in the absence of positive evidence as to the real place of the offence it may be assumed to have occurred at that place where the accused ought to have accounted was also subscribed by a Bench of this Court in 35 C. W. N. 809.[6] This decision purported to follow 35 C. W. N. 320,[7] but in fact the exactly opposite opinion was expressed in that case, and a rule to quash proceedings in Calcutta was discharged merely because the Court was left quite uncertain at the stage at which the matter came before it, where the alleged offence took place. Consequently, it could not at that stage hold that there was no jurisdiction to try it in Calcutta; it did not decide that there was. For the reasons already given, we prefer the reasoning on the question before us in the latter to that in the former of the two last cited cases which on this point are quite irreconcilable. In this state of the authorities it is unfortunately impossible for us to emulate Pope's

> ". . Hare, who in a modest way
> Agreed with every one — like Gay"

and we must either make up our own minds about the matter or refer the matter to a Full Bench. Important as it is, the present question hardly

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3. (1855) 7 Cox.C.C. 158, Reg v. Davison.

4. ('36) 23 A.I.R. 1936 All. 193 : 160 I.C. 356 : 37 Cr.L.J. 284 : 58 All. 644 : 1936 A.L.J. 3, Emperor v. Mohru Lal.

5. ('25) 12 A. I. R. 1925 Cal. 613 : 86 I.C. 213 : 26 Cr. L. J. 725 : 41 C. L. J. 80 : 29 C. W. N. 432, Gunanda Dhone v. Santi Prakash Nandy.

6. ('31) 18 A.I.R. 1931 Cal. 528 : 134 I.C. 433 : 59 Cal. 92 : 35 C.W.N. 809 : 32 Cr. L. J. 1167, Paul De Flonder v. Emperor.

7. ('31) 18 A.I.R. 1931 Cal. 521 : 133 I.C. 703 : 32 Cr. L. J. 1042 : 35 C. W. N. 320, G. N. Pascal v. Raj Kishore Mathur.

seems to us to justify our inflicting on the parties the delay and hardship the latter course necessarily involves. With the assistance we have had from the Bar we have been able to form a clear opinion, which is that on the charge framed — and it is incurable by any amendment suggested to us — the learned Chief Presidency Magistrate has no jurisdiction to entertain the proceedings now in question. The rule to quash them must therefore be made absolute.

LODGE J.—I agree.

R.K. *Rule made absolute.*

A. I. R. (29) 1942 Calcutta 578

DERBYSHIRE C. J. AND NASIM ALI J.

In the matter of Light of Asia Insurance Co., Ltd.

Governor-General in Council and another — Appellants

v.

Sailendra Nath Mitra and others — Respondents.

Appeal No. 70 of 1941, Decided on 1st December 1941.

(a) Companies Act (1913), S. 153 — Scheme for reconstruction of insurance company involving transfer of money deposited under S. 7, Insurance Act, and reduction of contracts of insurance — Order sanctioning such scheme falls under S. 153 and is appealable.

Where the Court sanctions a scheme of reconstruction of an insurance company by its dissolution and creation of a new insurance company involving the transfer of the money deposited by the dissolved company under S. 7, Insurance Act, and the reduction of contracts of insurance it does so under S. 153, Companies Act, as the jurisdiction of the Court under S. 153, Companies Act, to sanction such scheme has not been in any way affected by any provision of the Insurance Act, though in the exercise of this jurisdiction the Court is to keep in view the provisions of S. 8, S. 36 and S. 61, Insurance Act, and the order sanctioning such a scheme is an order under S. 153 read with S. 153A, Companies Act, and is, therefore, appealable under cl. (7) of S. 153, Companies Act. [P 580*g,h*]

(b) Insurance Act (1938), Ss. 9, 61 — Orders passed by High Court under, are appealable.

Orders passed by the High Court in exercise of its ordinary civil jurisdiction under Ss. 9 and 61, Insurance Act, are appealable as the ordinary incidents of litigation including the right of appeal is also attached to such orders in the absence of a specific limitation to exclude it : 1913 A. C. 546 ; ('16) 3 A. I. R. 1916 P. C. 21 ; ('34) 21 A. I. R. 1934 P. C. 81 and ('36) 23 A. I. R. 1936 P. C. 93, *Rel. on.* [P 581*c,d,e,f*]

(c) Insurance Act (1938), S. 110 — Object of section explained—It does not exclude right of appeal under Cl. 15, Letters Patent.

The object of S. 110 is not to curtail the right of appeal under Cl. 15, Letters Patent, against orders of "the Court" under the Act but to extend the right of appeal against certain orders of officers under the Act which would not be otherwise appealable. This section does not contain any specific limitation to exclude the right of appeal against judgment of the "Court" under Cl. 15, Letters Patent. There is no provision in the Insurance Act which takes away this right of appeal from the judgment of a Single Judge of the High Court in matters arising out of the Insurance Act either expressly or by necessary implication. [P 581*e,f*]

(d) Letters Patent (Cal.), Cl. 15 — "Judgment" — Order under S. 9, Insurance Act, is judgment.

An order under S. 9 directing the refund of the deposits under S. 7 finally determines the right of the insurer to get refund and the liability of the Reserve Bank of India to refund the deposits under S. 7. It is therefore a "judgment" within the meaning of Cl. 15, Letters Patent. [P 581*f*]

C. P. C. —

('40) Chitaley, Let. Pat. (Cal.), Cl. 15, N. 2.

('41) Mulla, Page 1401, Note "Meaning of 'Judgment' as used in this clause — Calcutta High Court."

(e) Letters Patent (Cal.), Cl. 15 — "Judgment" — Order under S. 61, Insurance Act, is judgment.

An order under S. 61, cls. (1) and (2), Insurance Act, reducing the amount of the insurance contracts finally determines the rights of the policy-holders under policy contracts and the liability of the insurance company, under these contracts and is a "judgment" within the meaning of Cl. 15, Letters Patent. [P 581*g*]

C. P. C. —

('40) Chitaley, Let. Pat. (Cal.) Cl. 15, N. 2.

('41) Mulla, Page 1401, Note "Meaning of 'judgment' as used in this clause — Calcutta High Court."

(f) Insurance Act (1938), Ss. 9, 7 — Order under S. 9 — Governor-General though not party to proceedings in trial Court, can file appeal.

An appeal at the instance of a person not on the record is maintainable where his interest in the subject-matter of the dispute will be bound by the judgment or order. The deposit under S. 7, Insurance Act, with the Reserve Bank of India is for or on behalf of the Central Government, i. e., the Governor-General in Council. An order under S. 9 is binding on the Governor-General in Council. The latter has a statutory right to retain the deposit under S. 7 until and unless the events justifying an order under S. 9 have happened. He has therefore an interest in the deposit which entitles him to appeal against the order under S. 9. [P 581*h*; P 582*a*]

(g) Insurance Act (1938), Ss. 9, 61—Order under—Appeal.

The Superintendent of Insurance is entitled to appeal against an order under S. 9 or S. 61 : (1882) 30 W. R. 329 ; (1894) 2 Q. B. 805 and (1887) 19 Q. B. D. 174, *Rel. on.* [P 582*b*]

(h) Companies Act (1913), S. 153—Sanctioning scheme—What Court has to see explained.

In sanctioning a scheme under S. 153, the Court does not simply register a resolution passed by the majority of the creditors or the shareholders. It must look at the scheme and see whether the Act has been complied with and whether the scheme is a reasonable or whether there is such an objection to it that any reasonable man might say that he could not approve of it. If the creditors act on sufficient information, and act honestly they are much better judges of what is to their commercial advantage than the Court can be, but that is not conclusive because there might be some defect in the scheme which they did not notice : (1891) 1 Ch. 213 and (1893) 3 Ch. 385, *Rel. on.* [P 582*c*]

(i) Companies Act (1913), S. 153, cl. (1) — Reason for dividing creditors into different classes explained — "Class" — Meaning of explained—Policy-holders of insurance company whose policies have ripened and policy-holders whose policies have not ripened belong to different classes—Summoning joint meeting of all policy-holders is not proper.

The reason for dividing the creditors into different classes is that they have different interests. If different state of facts exists among different creditors which may differently affect their minds and their judgment they must be divided into different classes. The word "class" in cl. (1) has not been defined in the Act. It must be given such a meaning as will prevent the section being so worked as to result in confiscation and injustice and it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. [P 582*f*]

In an insurance company policy-holders whose policies have ripened into debts have a vested cause of action. They can sue the company for the money due which is an ascertained sum. Their interest is entirely different from that of those policy-holders whose policies might not ripen into debts for years to come and whose future is entirely uncertain. It is, therefore, not right to summon a joint meeting of the creditors and all policy-holders : (1892) 2 Q. B. 573, *Rel. on.* [P 582*f*,*g*]

(j) Companies Act (1913), S. 153, cl. (2) — "Value" — Insurance company — Scheme involving reduction of policy contracts—Nominal value of the policies is not real value.

Where the scheme involves the reduction of policy contracts of the insurance company the value of the liabilities of the company and of all claims in respect of the policies issued by it is to be ascertained by Court having regard to the rule contained in Sch. 6, Insurance Act (S. 55, cl. (2), Insurance Act). The nominal value of the policies is not the real value. Hence where the majority who voted for a resolution sanctioning a scheme represent three-fourths of the nominal value of the policies, the resolution cannot be said to have been passed by the majority as contemplated by S. 153 (2). [P 583*a*]

S. M. Bose and H. N. Sanyal — for Appellants.

J. C. Maitra ; *P. C. Ghose and A. C. Mitra* ; *and H. K. Bose and P. K. Dey* — for Respondents 1 ; 2, 3, 4 and 5 ; and 6 to 14; respectively.

NASIM ALI J. — The facts which are not in dispute in this appeal are these: The Light of Asia Insurance Co., Ltd. (hereinafter referred to as "the company") was incorporated in the year 1913 under the Companies Act with a capital of rupees 5,00,000 (5000 shares of Rs. 100 each) with the object inter alia of carrying on business as a Life Insurance Company. The capital of the company was reduced to Rs. 1,50,000 (5000 shares of rupees 30 each) by a resolution adopted and confirmed at extra-ordinary general meetings of the share-holders held on 7th August and 12th September 1933 respectively. This was confirmed by this Court on 15th January 1934 Of the authorised capital of Rs. 1,50,000 shares of the nominal value of rupees 36,750 were only subscribed for and issued and the whole sum was paid for in respect thereof. On or about 30th June 1939, a valuation of the assets and liabilities of the company as on 31st December 1938 was made by its actuary and a deficiency of Rs. 55,641 was found on such valuation.

The Insurance Act of 1938 came into force on 1st July 1939. On that date the securities which were deposited by the company with the Government of India prior to the Insurance Act came into force, were valued at Rs. 1,13,298-12-0 and were treated as the first deposit under S. 7 of this Act. In accordance with the provisions of this Act the company had to make a further deposit of Rs. 9638 on or before 31st October 1939. It, however, failed to make this deposit. On 27th November 1939, Mr. H. L. Humphreys, a practising actuary of Calcutta appointed to investigate and report on the affairs of the company under S. 33, Insurance Act, reported that there was a deficit of Rs. 89,666. In accordance with the provisions of the Insurance Act the company had to make a further deposit of Rs. 9638 on or before 31st November 1939 but it failed to make this deposit also. On 3rd February 1940, the shareholders of the company passed a resolution (a) directing the company to be wound up voluntarily for the purpose of effecting its reconstruction by converting it into a mutual insurance company; under S. 54, Insurance Act, and (b) appointing Mr. P. K. Mitra as liquidator for winding up and reconstruction of the company.

On 25th May 1940, registration of the company was cancelled for failure to pay two deposits of Rs. 9638 by 31st October and 31st December 1939. On 27th May 1940, a committee of inspection (Respondents 2 to 5) was appointed under S. 209 (C), Companies Act. On 8th June 1940, Maya Palit, (respondent 8) one of the policy-holders of the company whose policy had matured made an application to wind up the company compulsorily. This application was adjourned sine die. On 17th June 1940, Mr. S. N. Mitra (respondent 1) was appointed liquidator in place of Mr. P. K. Mitra.

On 27th August 1940, a scheme of reconstruction of the company was submitted to Court by respondents 2 to 5. On 28th August 1940, Lort-Williams, J. ordered the liquidator to convene a meeting of the creditors and policy-holders. On 27th September 1940, this scheme was passed at a meeting of the creditors and policy-holders of the company. On 15th November 1940, Mr. Humphreys made his report on this scheme. On 2nd December 1940, the learned Judge refused to sanction this scheme and directed a fresh meeting of the creditors and policy-holders for reconsideration of the scheme. On 31st March 1941, an application was made on behalf of the Superintendent of Insurance for winding up the company under S. 53 (2) (b), Insurance Act, 1938. On 3rd April 1941, a joint meeting of the creditors and policy-holders was held for consideration of the following scheme of reconstruction :

Requirements under the New Act (Insurance Act of 1938) for a mutual company.

A. Initial Security Deposit	...	Rs. 25,000
B. Balance Rs. 1,75,000 to be deposited by yearly instalments at 1/3 of the gross premium income	...	
C. Working Capital	...	Rs. 15,000
D. Registration fee	...	Rs. 100

.....

"II. Present position of the company.

A. Assets (tangible)		
Government Securities	...	Rs. 1,05,000
Cash with Reserve Bank	...	Rs. 6,000
		Rs. 1,11,000

a B. Policy Liabilities
(i) According to Mr. J. C. Sen's valuation ... Rs. 1,36,000
(ii) According to Mr. H. L. Humphrey's valuation ... Rs. 1,70,000
C. Deficit according, (i) Mr. Sen ... Rs. 22,500 i. e. 17%
(ii) Mr. Humphrey Rs. 56,500 i. e. 33½%

"III Procedure to be adopted (by order of Court).

1 . . . . To reduce the policy contracts, policy liabilities and sundry liabilities by 37½% (accepting Mr. Humphrey's valuation though his valuation has been made on a very stringent basis). If any policy-holder discontinue his policy within three years from the date of reconstruction, his benefit on the policy shall be further reduced by 12½%.

b 2 . . . . To withdraw from the Reserve Bank,

(a) Rs. 30,000 (approximately) to meet outstanding claims after reduction.

(b) Rs. 45,000 to provide for further claims to arise upto 1943.

(c) Rs. 5000 to pay to sundry creditors and law expenses.

The amount of Rs. 45,000 as per (b) will be kept invested in approved securities to keep more than 55 per cent. of policy liabilities invested in approved securities as required under the Act. But they will be lodged with the banker of the company as a deposit and not with the Reserve Bank as security deposit (statutory).

3 . . . To keep the balance as security deposit with the Reserve Bank (for new registration) . . . . . Rs. 30,000

c 4 . . . . It is assumed that the company will be managed by premium income and in case any emergency arises the management undertakes not to spend any amount from the reserved fund for the further claim but will raise necessary money to meet requirements."

"IV. Position after reconstruction.

A. Assets —

Deposit with the Reserve Bank. . . . Rs. 30,000

B. Liabilities —

According to Mr. Humphrey Rs. 1,11,000 less amount provided for in III.

After reconstruction the company will be solvent and sound.

In future if expenses are made according to suggestions of actuary there is no reason why the d company should not prosper.

MANAGEMENT.

The company will be managed by a board of directors which will be elected from policy-holders. The first board of directors will be nominated from the existing policy-holders, and election will be held in January after preparations have been made to meet the requirement of new Act and reconstruction."

The result of the voting at the meeting was, on the basis of the nominal value of the policies and of creditors' dues, in favour of the scheme 75.3 and against it 24.7 and on the basis of the paid-up value of the policies and of creditors dues, in favour of the scheme 67.8 and against it 32.2. On 19th May 1941 the liquidator (respondent 1) made an application to Court for sanction of this scheme of reconstruction. Notice of this application was given to the Superintendent of Insurance under S. 106A, Insurance Act.

On 16th and 23rd June 1941 the scheme passed at the joint meeting of the creditors and policy- e holders held on 3rd April 1941 came up for the consideration of Lort-Williams J. The Superintendent of Insurance and respondents 6 to 14 (some of the policy-holders of the company) opposed the scheme. The learned Judge overruled their objections and sanctioned the scheme subject to the modification that the liability of the policy-holders will be limited to Rs. 10 each. The application of the Superintendent of Insurance which was made on 31st March 1941 and the application which was filed by respondent 8 on 8th June 1940 were disposed of by the learned Judge thus :

"The application dated 31st March for winding-up is adjourned sine die. Both this application and the winding up application made in June 1940, which has already been adjourned sine die, will depend upon whether the sanctioned scheme is carried into effect. If and when that has been done, f both applications will stand dismissed."

The learned Judge gave liberty to the parties to apply for directions. On 30th June 1941, the learned Judge ordered the Reserve Bank of India to make over to the liquidator the securities held by it as deposit in the name of the company and gave certain other directions. On 28th July 1941 the Governor-General in Council and the Superintendent of Insurance filed the present appeal. A preliminary objection has been taken on behalf of the committee of inspection (respondents 2 to 5) to the competency of this appeal. The argument in support of this preliminary objection is two-fold : (1) The order appealed against is a composite order under S. 153, Companies Act, and Ss. 9 and 61 (1), Insurance Act, 1938. The portions of the order made under the Insurance Act are not appealable. The appeal, there- g fore, so far as it is against the orders under the Insurance Act is incompetent. (2) Assuming that the order appealed against is appealable the appellants have no right to maintain this appeal.

The effect of the order appealed against is that the original company limited by shares will be dissolved and a new mutual insurance company (i. e., a company which has no share capital and of which all policy-holders with limited liability will be created). If the Court under S. 153, Companies Act, sanctions the reconstruction of a company other than an insurance company by dissolution of the said company and creation of a new company it is not disputed that such an order is an order under S. 153 read with S. 153 (A), Companies Act, and is therefore appealable, even though the scheme involves the transfer of the properties of the dissolved h company to the new company and the reduction of the liabilities of the dissolved company. Where, as in the present case, the Court sanctions a scheme of reconstruction of an insurance company by its dissolution and creation of a new insurance company involving the transfer of the money deposited by the dissolved company under S. 7, Insurance Act, (a property within the meaning of cl. (a) of S. 153A, Companies Act) and the reduction of contracts of insurance it does so under S. 153, Companies Act, as the jurisdiction of the Court under S. 153, Companies Act, to sanction such scheme has not been in any way affected by any provision of the Insurance Act though in the exercise of this jurisdiction the Court is to keep in view the provisions of S. 8, S. 36 and S. 61, Insurance Act. I am, therefore, of opinion that the order sanctioning the scheme is an order under S. 153 read with S. 153 (A), Companies Act, and is therefore appealable under 1. (7) of S. 153, Companies Act.

a The contention of Mr. Ghosh on behalf of respondents 2 to 5 is that right of appeal must be conferred expressly by a statute and as Cl. 15 of the Letters Patent is not attracted to orders under S. 9 and S. 61, Insurance Act, and as the Insurance Act does not provide for any appeal against orders under S. 9 and S. 61 of the Act no appeal lies against orders under those sections. Orders under S. 9 and S. 61, Insurance Act, are made by "the Court" which includes the High Court in the exercise of its ordinary civil jurisdiction (S. 2 cl. (6), Insurance Act). Under Cl. 15 of the Letters Patent appeals to the High Court lie from the judgment of one Judge of the High Court or of one Judge in any Division Court in all cases except in the follwing instances, viz : (1) An order made in the exercise of revisional jurisdiction. (2) A sentence or order passed or made in the exercise of power by Superintendents. (3) A b sentence or order passed or made in the exercise of criminal jurisdiction. (4) A judgment passed in the exercise of the jurisdiction to hear appeals from appellate decrees made by Court subject to the superintendence of the High Court unless the Judge who passed the judgment declares that the case is a fit one for appeal. Clause 44 of the Letters Patent is in these terms :

"And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Legislative Council and also of the Governor-General in Council under S. 71, Government of India Act, 1915, and also of the Governor-General in cases of emergency under S. 72 of that Act, and may be in all respects amended and altered thereby."

It is argued by Mr. Ghosh that Clause 15 of the c Letters Patent does not apply to orders of a Judge of the High Court under the Insurance Act as it refers to judgment in matters over which supreme Court had jurisdiction before the Letters Patent. The Supreme Court had jurisdiction over company matters under Act 19 of 1857 and Act 7 of 1860. The Companies Act and the Insurance Act of 1938 simply enlarged the jurisdiction of the High Court "with all its incidents including a right of appeal to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law": *see* the observation of Lord Atkinson in 1913 A. C. 546[1] at p. 555. "When a question is stated to be referred to an established Court without more, it . . . . . imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decision likewise attaches": (Per Viscount Haldane L. C. d in 1913 A. C. 546[1] at p. 552). "Where by statute matters are referred to the determination of a Court of record with no further provision the necessary implication is. . . .that the Court will determine the matters as a Court. Its jurisdiction is enlarged but all the incidents of such jurisdiction including the right of appeal from its decision remain the same": (Per Lord Parker ibid p. 562). If the ordinary Courts of this country are seized of any dispute by virtue of the provisions of a statute it would require a specific limitation to exclude the ordinary incidents of litigation including the right of appeal from the decision of such Courts: 43 I. A. 192[2] at p. 198; 61 I. A. 158[3] and 63 I. A. 180[4] at p. 189.

e It is contended by Mr. Ghosh that the provisions of S. 110, Insurance Act, exclude the right of appeal under Cl. 15 of the Letters Patent. This section, however, does not deal with appeals from the orders of "the Court". It deals with appeals from the orders of certain officers under the Act. In the absence of any specific provision appeals against orders of officers under the Act to the Court would not be competent. It was therefore necessary to lay down in S. 110 of the Act that certain orders of officers under the Act would be appealable to "Court." In other words the object of S. 110 was not to curtail the right of appeal under Cl. 15, Letters Patent, against orders of "the Court" under the Act but to extend the right of appeal against certain orders of officers under the Act which would not be otherwise appealable. This section does not contain any specific limitation to exclude the right f of appeal against judgment of the "Court" under Cl. 15, Letters Patent. There is no provision in the Insurance Act which takes away this right of appeal from the judgment of a Single Judge of the High Court in matters arising out of the Insurance Act either expressly or by necessary implication. I am, therefore, of opinion that orders of the "Court" under the Insurance Act are appealable under Cl. 15, Letters Patent, in cases where such orders are "judgments" within the meaning of the said clause. An order under S. 9 directing the refund of the deposits under S. 7 finally determines the right of the insurer to get refund and the liability of the Reserve Bank of India to refund the deposits under S. 7. It is therefore a "judgment" within the meaning of Cl. 15, Letters Patent.

It cannot be disputed that an order under S. 61, g cls. (1) and (2), Insurance Act, reducing the amount of the insurance contracts finally determines the rights of the policy-holders under policy contracts and the liability of the insurance company, under these contracts. These orders, therefore, are also "judgments" within the meaning of Cl. 15, Letters Patent. Mr. Ghosh's contention is that the appellants have no right to appeal against an order under S. 153, Companies Act, as they are neither share-holders nor creditors. I am unable to accept this contention. My reasons are these: The whole foundation of the scheme is the withdrawal of the deposit under S. 7, Insurance Act. No order for refund of this deposit under S. 9, Insurance Act, can be made unless the liabilities of the insurance company have been provided for. The scheme in question purports to provide for the liabilities of the company from this h deposit. If the sanction of the scheme is not in accordance with law or if the scheme does not adequately provide for the liabilities of the company, the liabilities of the company cannot be said to have been provided for as required by S. 9, Insurance Act, and no order under that section can be made with the result that the whole scheme automatically fails. The deposit under S. 7, Insurance Act, with the Reserve Bank of India is for or on behalf of the Central Government, i. e., the Governor-General in Council. The Governor-General in Council was not a party to the proceedings in the trial Court. An appeal at the instance of a person not on the record is maintainable where his interest in the subject-

1. (1913) 1913 A. C. 546 : 82 L. J. K.B. 1197 : 109 L. T. 562 : 57 S. J. 661 : 15 Ry. & Can. Traff. Cas. 109 : 29 T.L.R. 637, National Telephone Co. Ltd. v. Postmaster-General (No. 2).
2. ('16) 3 A. I. R. 1916 P. C. 21 : 35 I. C. 902 : 39 Mad. 617 : 43 I. A. 192 (P.C.), Secretary of State v. Chellikani Rama Rao.
3. ('34) 21 A. I. R. 1934 P. C. 81 : 148 I. C. 1 : 12 Rang. 194 : 61 I. A. 158 (P.C.), Maung Ba Thaw v. Ma Pin.
4. ('36) 23 A.I.R. 1936 P. C. 93 : 161 I.C. 529 : 17 Lab. 146 : 63 I. A. 180 (P.C.), Hem Singh v. Basant Das.

matter of the dispute will be bound by the judgment or order : *see* Daniel's Chancery Practice, Edn. 7, Vol. 1, p. 1042, (1894) 2 Ch. 410[5] at p. 413. An order under S. 9 is binding on the Governor-General in Council. The latter has a statutory right to retain the deposit under S. 7 until and unless the events justifying an order under S. 9 have happened. He has, therefore, an interest in the deposit which entitles him to appeal against the order under S. 9.

The Superintendent of Insurance is an officer appointed by the Central Government to perform certain duties under the Insurance Act (S. 2, cl. (15)). By S. 106 (a), Insurance Act, when an application is made to the Court for the making of any order under S. 9 the Court is bound, unless the Superintendent of Insurance has himself made the application or has been made a party thereto, to send a copy of the application together with the intimation of the date fixed thereof and shall give him an opportunity of being heard. Notice under S. 106 (a) was served on him. He was made a party to the proceeding by service. He opposed the application and the decision was against him. I am, therefore, of opinion that he is entitled to appeal : (1882) 30 W. R. 329;[6] (1894) 2 Q. B. 805[7] at pp. 812, 813 and the observations of the majority of the Judges in (1887) 19 Q. B. D. 174.[8] Again, the Superintendent of Insurance before the orders under S. 9 and S. 61 were made, made an application for winding up the company under S. 53 (2) (b), Insurance Act, and asked the Court to proceed with his application for winding up. The effect of sanctioning the scheme is dismissal of his application. There is, therefore, no reason why he should not have also the right to appeal against the order complained of. For reasons given above I overrule the preliminary objection of respondents 2 to 5 to the competency of this appeal. The scheme in question was sanctioned by Lort-Williams J. under S. 153, Companies Act. The material provisions of this section are :

"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors, or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs. (2) If a majority in number representing three fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

In sanctioning a scheme under this section the Court does not simply register a resolution passed by the majority of the creditors or the shareholders. It must look at the scheme and see whether the Act has been complied with and whether the scheme is a reasonable one or whether there is such an objection to it that any reasonable man migh say that he could not approve of it : (1891) 1 Ch. 213[9] at pp. 238-39. It is true that if the creditors act on sufficient information, and act honestly they are much better judges of what is to their commercial advantage than the Court can be, but that is not conclusive because there might be some defect in the scheme which they did not notice : (1893) 3 Ch. 385[10] at pp. 408-09.

Section 153, cl. (1) contemplates the division of creditors into different classes. The reason for dividing the creditors into different classes is that they have different interests. If different state of facts exists among different creditors which may differently affect their minds and their judgment they must be divided into different classes. The word "class" in cl. (1) has not been defined in the Act. We must, however, give this word such a meaning as will prevent the section being so worked as to result in confiscation and injustice and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. In this case the learned Judge ordered a joint meeting of creditors and policy-holders. Policy-holders whose policies have ripened into debts have a vested cause of action. They can sue the company for the money due which is an ascertained sum. Their interest is entirely different from that of those policy-holders whose policies might not ripen into debts for years to come and whose future is entirely uncertain. It was, therefore, not right to summon a joint meeting of the creditors and all policy-holders: (1892) 2 Q. B. 573.[11] Clause (2) of S. 153 lays down that the majority must represent three fourths in value of the creditors or class of creditors. In this case the majority who voted for the resolution represented three fourths of the nominal value of the policies. The question is what is the meaning of the word "value'.' The learned Judge has observed :

"It seems to me ..... that neither the Chairman of the meeting nor the Court in the usual course of the proceedings can ascertain what is the real value of policies issued by an insurance company. Neither the paid-up value nor the nominal value appears to be the real value of the policies. The real value is the value of the reversion and it depends upon the life insured person's expectation of life. In these circumstances and in view of the fact that it is impracticable to try and ascertain the true or real value of the policies I have come to the conclusion that the nominal value of the policies must be accepted for the purpose of ascertaining majorities at meetings held to approve or disapprove of a scheme of compromise."

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5. (1894) 2 Ch. 410 : 63 L. J. Ch. 777 : 7 R. 217 : 70 L. T. 609 : 42 W. R. 465 : 1 Manson 289, In re Securities Insurance Company.
6. (1882) 30 W. R. 329, Crawcour v. Salter.
7. (1894) 2 Q. B. 805 : 64 L. J. Q. B. 71 : 9 R. 636 : 71 L. T. 312 : 1 Mans 37, In re Lam; Ex parte The Board of Trade.
8. (1887) 19 Q. B. D. 174 : 56 L. J. Q. B. 447 : 56 L. T. 876 : 35 W. R. 660 : 4 Morrell 225, Ex parte Official Receiver; In re Reed, Bowen & Co.
9. (1891) 1 Ch. 213 : 60 L. J. Ch. 221 : 64 L. T. 127 : 2 Meg. 377, In re Albama, New Orleans, Texas and Pacific Junction Railway Co.
10. (1893) 3 Ch. 385 : 62 L. J. Ch. 825 : 2 R. 574 : 69 L T. 268 : 42 W.R. 4, In re English Scottish, and Australian Chartered Bank.
11. (1892) 2 Q. B. 573 : 62 L. J. Q. B. 19 : 67 L.T. 396 : 41 W.R. 4, Sovereign Life Assurance Co. v. Dodd.

The scheme involves the reduction of policy contracts. In such a case the value of the liabilities of the company and of all claims in respect of the policies issued by it is to be ascertained by Court having regard to the rule contained in Sch. 6, Insurance Act (S. 55, cl. (2), Insurance Act). It is an admitted fact in this case that no attempt was made to ascertain the value of the policies with reference to the said rule. I am, therefore, of opinion that the resolution sanctioning the scheme was not passed by the majority as contemplated by S. 153 cl. (2), Companies Act.

The learned Judge has said that "the scheme is a fair one and that there is every possibility of the new company being and remaining solvent." The present position of the company is that it is insolvent. The object of reconstruction is to make it solvent. An examination of the scheme, however, will show that its position after reconstruction will be this : (a) assets Rs. 30,000 and (b) liabilities Rs. 31,000. In order to convert the company into a mutual insurance company a working capital of Rs. 15,000 and an initial security deposit of Rs. 25,000 would be necessary in view of the provisions of S. 97 and S. 98 (2), Insurance Act, respectively. In other words, in order to start the mutual company Rs. 10,000 more would be required. There is no provision in the scheme where this money is to come from. No provision has been made for payment of monies of policy-holders whose policies have ripened into debts. Their dues were Rs. 23,943-8-0 as on 31st December 1938. Reduction by 37½ per cent. would bring it down to Rs. 14,400. This blot in the scheme remained unobserved at the time when the resolution was passed. After reconstruction the new company will have to meet the expenses of management and to pay the amount which will fall due on account of policies after 1943. In the scheme it is stated : "It is assumed that the company will be managed by premium income and in case any emergency arises the management undertakes not to spend any amount from the reserve fund for the further claim but will raise necessary money to meet requirements." There is nothing in this case to indicate that at the time of the meeting the policy-holders had any information as regards the premium income of the new company. They had also no information as to how the money required for emergency expenses is to be raised. In the scheme it is also stated that "in future if expenses are made according to suggestions of the actuary there is no reason why the company should not prosper." There is nothing to show that the suggestions of actuary referred to in the scheme regarding expenses were placed before the meeting. The majority who passed the resolution apparently had no information on this point. It is, therefore, clear that the policy-holders had no sufficient information regarding important matters involved in the scheme. I am not at all satisfied that the policy-holders will benefit by the scheme. I am inclined to think that their position would be worse if the company is not now wound up.

The result, therefore, is that this appeal is allowed and the order appealed against and the directions given by the learned Judge in pursuance of the said order are set aside. The applications of respondents 2 to 5 and the liquidator for sanctioning the scheme are rejected. It is further directed that the application of respondent 8 and of the Superintendent of Insurance be heard as early as possible. The Superintendent of Insurance and the Governor-General will get their costs against respondents 2, 3, 4 and 5 but those costs will be limited to those of one day's hearing in the appeal. Respondents 6 to 14 will likewise get their costs as against respondents 2, 3, 4 and 5 also on the basis of one day's hearing. The liquidator will be entitled to take the taxed costs incurred by him in these proceedings out of the assets of the company other than the deposit made under S. 7, Insurance Act. No costs that have been ordered in any of these proceedings are to be paid out of the sum deposited with the Governor-General in the Reserve Bank. Certified for two counsel.

DERBYSHIRE C. J.—I agree. The position of the Court when it is asked to sanction a scheme of arrangement under S. 153, Companies Act is, I think, shortly summarised by Maugham J. in (1934) 1 Ch 635[12] at p. 657 as follows :

"What I have to see is whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

In this case, I think, the duty of the Court goes further, because in addition to observing the provisions of the Companies Act we must have regard to the provisions of the Insurance Act which was passed in order to protect the interests of policy-holders and those who derive benefits under them : and in my view the Court must be satisfied that the scheme proposed is under the circumstances prevailing for their benefit. In August last an application was made to a Bench over which I presided for stay of an order which had been made by the learned Judge pursuant to the scheme. That order inter alia directed the Reserve Bank of India to pay over to the liquidator the securities held by the Reserve Bank under the provisions of the Insurance Act and also that the liquidator should set aside part of the securities so handed over to meet certain liabilities to the amount of Rs. 8000 in respect of (inter alia) costs of litigation and other matters. It was further ordered that upon the formation of the new company and its registration under the Insurance Act the present company should be dissolved without the winding up being completed. That order, which was a necessary corollary to the sanctioning of the scheme, on the face of it ordered the payment of moneys which were directed by the Insurance Act to be deposited with the Reserve Bank as a security for the policy-holders, to be used for other purposes, and other purposes clearly contravening the provisions of S. 7 of the Act. The order was manifestly illegal and stay of it was made pending the hearing of this appeal. It was pointed out to the Bench at that time that the scheme which had been approved by the creditors had been sanctioned with an alteration by the Court. There had been previously reports upon the scheme by actuaries, but upon it appearing that the scheme had been modified by the order of the Court I directed that the scheme as sanctioned by the Court should be examined by an actuary on behalf of those who favoured the scheme and also an actuary on behalf of the Superintendent of Insurance. Those reports have been before us in these proceedings. Paragraph 7 of Mr. Sen's report made to the committee of inspection reads as follows :

"Granting that the present position is more or less unaffected, it is to be considered whether it is possible for the company to carry on independently after reconstruction. In able hands it may be possible to keep the concern going under the following condi-

12. (1934) 1 Ch. 635 : 103 L.J.Ch. 316 ; 151 L. T. 347 : 78 S. J. 12, In re Dorman, Long Company, Ltd.

tions : (1) The existing business should be run as a closed section and not more than 20 per cent. of the future premium collection of this section should be spent in expenses. This will mean that the position of the existing policy-holders will not deteriorate. (2) The new business should be financed entirely out of the new premium income. I would suggest that the premiums should be recast with proper loading for expenses and on basis of mortality and interest more likely to be experienced in future and the expenses should be strictly limited to the provisions for expenses contained in the premiums. (3) The company would thus be more or less in the position of a new mutual life insurance company and the task of running it would be similar. Of course much will depend on the future management of the company and if, by its efficiency, the company is kept going the interests of the policy-holders would in my opinion be better served than by a liquidation, for the simple reason that some of the policy-holders may have become uninsurable and would not get cover of life insurance, even for the reduced sums assured elsewhere. The only other alternative would be to transfer the business of the company to another sound concern after modification of the contracts in the light of a more up-to-date valuation."

There are many 'ifs' about that report and looking at it broadly it would appear that the actuary himself was in considerable doubt as to whether the reconstructed company with the reduced policies would be able to carry on the business of the present company in a solvent condition. On the other hand, in para. 6 of the report made by the actuary, Mr. Krishna Murty, deputy to the Suprintendent of Insurance, it is stated :

"It is therefore the considered conclusion of the Superintendent of Insurance that, even from a strictly acturial point of view, the reconstruction scheme will not make the company solvent and sound, assumptions made about future expenses cannot and will not be fulfilled in this case and that if the company is allowed to continue the policy-holders will not only lose what little they may get today in winding up out of the deposit held by the Reserve Bank but will be forced to lose more by way of the further premiums they would be bound to pay consequent on the scheme being accorded the sanction of the Court."

This sanction, as my brother Nasim Ali J. has pointed out, was given after a meeting of the creditors which was not convened in accordance with the provisions of the Act. The policy-holders did not have before them a proper valuation of each policy. They were not in a position to judge adequately for themselves what the outcome of the scheme would be. The Court before it can sanction a valid scheme must be satisfied that it is under the circumstances prevailing for the benefit of the policy-holders. Reading the two actuaries' reports there can be no doubt that the balance of expert opinion is against the scheme proposed. Looking at it broadly one could have very little confidence in a company which is to start from the foundation of an insolvent company without any reasonable certainty that it will be expertly managed. The matter will go back to the learned Judge who deals with company winding up and he will have the benefit of the reports of the actuaries and of the observations that have been made by this Court. There is one matter that might be taken into consideration by the liquidator and the policy-holders and that is the suggestion made by Mr. Sen, the actuary, that the business of this company might be transferred to another existing sound insurance company; but that is a very different matter from what has been proposed in this case, viz., the transfer of the business of the company and its liabilities to its policy-holders to a company not yet in existence whose solvency is problematical and whose management is unknown. I agree that this appeal must be allowed and the matter must go back to the winding up Court to be dealt with there by the learned Judge dealing with winding up matters.

K.S./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 584

B. K. MUKHERJEA AND BLANK JJ.

Sankari Debi and others — *Appellants*

v.

Co-operative Urban Bank, Serajganj and others — *Respondents.*

Appeal No. 27 of 1941, Decided on 26th February 1942, from original order of Dist. Judge, Pabna, D/- 26th November 1940.

Provincial Insolvency Act (1920), S. 4— Proceeding under S. 4 can be conducted by receiver alone and not by creditor — Court cannot act suo motu under S. 4 — Procedure to be adopted by creditor wishing to move under S. 4 indicated.

A proceeding under S. 4 can be conducted by the receiver alone, and not by a creditor. If a claim is to be laid under S. 4 to a particular property on the ground that it forms a part of the insolvent's estate, it is the receiver and the receiver alone who is entitled to put forward that claim : ('27) 14 A. I. R. 1927 P. C. 108; ('24) 11 A. I. R. 1924 Cal. 827 and ('41) 28 A. I. R. 1941 Cal. 298, *Rel. on.* [P 585*d*]

The Court itself cannot initiate a proceeding under S. 4 and decide a question of title without being moved by anybody to do so. The proper procedure for a creditor wishing to move under S. 4 is to apply to the Court to direct the receiver to institute proceedings under S. 4 and the Court can pass a conditional order making it a condition precedent, that the creditor so applying should put the receiver in funds and properly indemnify him against the costs of the action. [P 585*f*,*g*]

Krishna Kamal Moitra and Amaresh Chandra Roy — for Appellants.

Chandra S. Sen, Jyotish Ch. Pal, Surajit Ch. Lahiri and Benode Lal Ghosh — for Respondents.

B. K. MUKHERJEA J.—This appeal is directed against a judgment of the District Judge of Pabna passed on 26th November 1940, in a proceeding under S. 4, Provincial Insolvency Act. The material facts lie within a short compass and may be stated as follows : One Annada Gobinda Chakravarty a medical practitioner at Serajganj in the district of Pabna was adjudicated an insolvent on his own application by the District Judge of Pabna on 7th January 1939; and respondent 6 was appointed a receiver on the same day. On 6th October 1939, the Co-operative Urban Bank of Serajganj, who is respondent 1 in this appeal, and was the principal creditor of the insolvent, filed an application before the receiver, stating inter alia that a house property within the Serajganj Municipality was owned and possessed by the insolvent, though the deed of purchase stood in the name of his first wife Labanya

Probha Debi. The receiver was asked to take steps with regard to that property under S. 4, Provincial Insolvency Act. The receiver after making enquiries submitted a report on 16th February 1940, in which he said, that on the evidence adduced on both sides he was satisfied that the property really belonged to the predeceased wife of the insolvent and not to the insolvent himself; and he declined to start proceedings under S. 4, Provincial Insolvency Act. The matter then came up before the Insolvency Court, and it appears from the order sheet, that on 6th March 1940, the District Judge made an order directing that a case might be started under Section 4, Provincial Insolvency Act, and notices served on all interested parties. The present appellants who are the three daughters of the insolvent by his first wife and succeeded to the property of their mother after her death appeared as opposite parties in the proceeding, while the respondent bank figured as the petitioner. The insolvency Court on taking evidence came to the conclusion, that the property in dispute really belonged to the insolvent and not to his wife. It is against this decision that the present appeal has been preferred.

Mr. Krishna K. Maitra, who appears on behalf of the appellant, has contended at the outset, that the proceedings before the Court below were wholly without jurisdiction, inasmuch as it was not the receiver but a creditor of the insolvent who made the application under S. 4, Provincial Insolvency Act. It is argued that the only person competent to start a proceeding under S. 4, Provincial Insolvency Act is the receiver, and as the receiver declined to take any action in the present case, the Court has no jurisdiction to decide the question of title at the instance of a creditor.

This point, it seems, was raised specifically in the written objection of the appellant, though the learned Judge has not dealt with it in his judgment. The Provincial Insolvency Act of 1907 had no provision corresponding to S. 4 of the present Act, and there was a conflict of authorities as to whether the Insolvency Court had any power to decide questions of title between the receiver and a stranger to the insolvency, or whether such questions could only be decided by a suit filed in the ordinary tribunal. To avoid this conflict, S. 4 was introduced in the Act of 1920, and the insolvency Court has now adequate powers under this section to decide all questions of title or priority, both on facts as well as on law, and such decision is final and conclusive between the debtor or debtor's estate on the one hand and the claimant against him on the other. The section itself does not lay down as to who is to initiate a proceeding under it; all that it says is that the Court will exercise its powers subject to the provisions of the Act.

If a question of title arises between the insolvent's estate on the one hand, and a stranger to the insolvency on the other, it goes without saying that the debtor's estate can be effectually represented by the receiver and by no one else. Under S. 28 (2), Provincial Insolvency Act, the whole of the property of the insolvent vests in the receiver; and if a claim is to be laid to a particular property on the ground that it forms a part of the insolvent's estate, it is the receiver and the receiver alone, who is entitled to put forward that claim. Such powers to institute suits in respect to the insolvent's property are expressly conferred on the receiver by S. 59 (d), Provincial Insolvency Act. It was held expressly by a Division Bench of the Court in 51 Cal. 663[1] that a proceeding under S. 4, Insolvency Act, can be conducted by the receiver alone, and not by a creditor, and the view was approved of by Biswas and Roxburgh JJ. in F. M. A. No. 30 of 1939,[2] decided on 20th December 1940. In our opinion, these decisions are quite correct. It has been argued by Mr. Chandra Sekhar Sen, who appears for the respondent that in this case the records would show that the creditor was authorized by the Court to conduct the proceeding under S. 4 and at any rate the Insolvency Court is entitled to start an enquiry suo motu under that section.

From the order sheet of this case, it appears to us, that after the receiver declined to move in the matter, the application of the creditor and the report of the receiver were placed before the Court and the Court on 6th March 1940, ordered a miscellaneous case to be started under S. 4, Provincial Insolvency Act, on giving notice to all interested persons. Apparently, the action was taken on the application of the creditor, and in spite of the adverse report of the receiver. The records do not show that the creditor sought for permission of the Court to proceed in the matter, as the receiver was not willing to act, or that any permission was given by the Court in this respect. Hence, it is not necessary for us to consider whether it is a matter which at all comes within S. 28 (ii), Provincial Insolvency Act, and the creditor can take legal proceedings with the leave of the Court. It cannot also be suggested that the Court itself could initiate a proceeding under S. 4, Provincial Insolvency Act, and decide a question of title without being moved by anybody to do so. It is true that under S. 28 (ii), Provincial Insolvency Act, the property of the insolvent vests in the Court or in the receiver. But as was pointed by the Judicial Committee in 31 C. W. N. 741[3] with reference to S. 16 (4) of the old Act "the alternative in the section applicable to vesting in the Court was no doubt inserted to provide for the case of a receiver not being appointed at the same time as the adjudication of insolvency was made and to foreclose an argument that vesting was suspended until the actual appointment of a receiver. . . The Court only acts through a receiver."

The procedure to be followed in such cases is for the creditor to apply to the Court to direct the receiver to institute proceedings under S. 4, Provincial Insolvency Act, and the Court can pass a conditional order making it a condition precedent, that the creditor so applying should put the receiver in funds and properly indemnify him against the costs of the action. We hold that the procedure that has been followed in this case is not one in conformity with law, and consequently the order made in this case should be set aside. We express no opinion on the merits of this case, and our order will not stand in the way of the receiver's taking any further action in the matter if he is so advised. The appeal is accordingly allowed and the judgment of the District Judge set aside. There will be no order as to costs.

BLANK J. — I agree.

G.N./R.K. *Appeal allowed.*

1. ('24) 11 A.I.R. 1924 Cal. 827 : 79 I. C. 326 : 51 Cal. 663, Ram Sundar Ram v. Ram Charit.

2. *Reported in* ('41) 28 A.I.R. 1941 Cal. 298 : 199 I. C. 412 : 73 C. L. J. 225, Mt. Gariba Bibi v. Mathura Prosad.

3. ('27) 14 A.I.R. 1927 P.C. 108 : 101 I.C. 442 : 54 Cal. 595 : 54 I.A. 190 : 31 C.W.N. 741 (P.C.), Kala Chand v. Jagannath Marwari.

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NASIM ALI AND BLANK JJ.

Prosanna Kumar Roy Choudhury — Defendant — Appellant

v.

Smt. Adya Sakti Dasi w/o Hari Kishore Das — Plaintiff — Respondent.

Letters Patent Appeal No. 2 of 1941, Decided on 7th August 1942, from appellate decree of Sen J., in A. F. A. D. No. 1623 of 1938, D/- 2nd December 1940.

(a) Bengal Tenancy Act (8 of 1885), S. 26F — Holding described as occupancy holding in sale deed — Pre-emption suit allowed — Suit by purchaser that holding is not occupancy is not barred by res judicata by order in pre-emption proceeding — Scope of pre-emption proceeding explained.

In a proceeding under S. 26F, the purchaser is not entitled to raise the question as to whether the holding is an occupancy holding, or a raiyati holding at fixed rent, because the foundation of the proceedings under S. 26F, is the admission of the purchaser in his deed of purchase that the holding is an occupancy holding. The purchaser in a proceeding under S. 26F, is not entitled to say that he made the admission under a mistake or that he was ignorant about the real nature of the holding at the time of his purchase and that in fact the holding purchased by him is a mourashi mokorari holding. Such questions, therefore, cannot be submitted for determination and cannot be determined in a proceeding under S. 26F. Therefore, where an application for pre-emption by the landlord is allowed, and the purchaser files a suit that the holding is not an occupancy one, it cannot be said that the plaintiff might and ought to have raised that question in the proceeding under S. 26F, and the order in the proceeding under S. 26F would not operate as res judicata to the subsequent suit. [P 587c, d]

C. P. C. —
('40) Chitaley, S. 11, N. 73 Pts. 1, 2.
('41) Mulla, Page 72 Pt. (j).

(b) Practice — Appeal — Point relating to estoppel raised in written statement not pressed in trial Court — It cannot be raised in appeal.

Where the defendant raised a plea of estoppel under S. 115, Evidence Act, in his written statement and an issue was framed on that point by the trial Court, but at the time of the hearing of the suit this issue was not pressed by the defendant :

Held that the defendant was not entitled to raise this question in appeal. [P 587e]

C. P. C. —
('40) Chitaley, O. 41 R. 1, N. 12 Pt. 2.
('41) Mulla, Page 1154, Note "Grounds of objection."

Abinash Chandra Ghosh — for Appellant.

S. N. Banerjee (Sr.), Gopendra Nath Das, Kshetra Mohan Chatterjee and Shambhu Nath Banerji (Sr.) — for Respondent.

JUDGMENT. — The facts which are not in dispute in this appeal are these : The respondent purchased a portion of a raiyati holding from one Govinda Chandra Modak on 27th March 1934, by a registered kobala (Ex. 1). In this kobala the holding was described as an occupancy holding. After this purchase, notice was given to the appellant landlord under the provisions of S. 26C (3), Bengal Tenancy Act. On 22nd August 1934, the appellant landlord made an application under S. 26F, Ben. Ten. Act, for pre-emption of the portion of the raiyati holding purchased by the respondent. On 4th February 1935, the record of rights of the village in which this holding is situated was finally published. In this record the holding was recorded as an occupancy holding. The application of the appellant landlord under S. 26F, Ben. Ten. Act, was put up for hearing on 1st January 1935. In April 1935, Govinda Chandra Modak filed a suit under S. 106, Ben. Ten. Act, to correct the record of rights by recording him as a mokorari raiyat. To this suit both the respondent and the appellant were parties. The application of the landlord for pre-emption under S. 26F, Ben. Ten. Act, was allowed on 26th November 1935. On 27th March 1936, the suit instituted by Govinda Chandra Modak under S. 106, Ben. Ten. Act, was decreed. An appeal against this decree was dismissed by the first appellate Court on 20th August 1936. On 25th March 1937, the respondent raised the present suit in the second Court of the Munsif at Katwa for declaration that the land purchased by her on 27th March 1934 is part of a raiyati holding at fixed rent, that the order for pre-emption under S. 26F, Ben. Ten. Act, was void and without jurisdiction and for confirmation of her possession of the land purchased by her. The second appeal to this Court in the suit under S. 106, Ben. Ten. Act filed by Govinda Chandra Modak was dismissed on 26th April 1937. The present suit was dismissed by the trial Court. The plaintiff appealed to the lower appellate Court. The learned District Judge who heard the appeal allowed it and decreed the plaintiff's suit. The landlord defendant preferred a second appeal to this Court. This appeal was heard by my learned brother Sen J. The learned Judge has dismissed the appeal. Hence this appeal under Cl. 15, Letters Patent, by the landlord defendant. Three points were urged by Mr. Ghosh on behalf of the appellants in this appeal : (1) That the order under S. 26F, Ben. Ten. Act, prevents the Court from trying the present suit; (2) that the plaintiff is estopped under S. 115, Evidence Act, from asserting in the present suit that the land which he has purchased is part of a raiyati holding at fixed rent and (3) that the suit is barred by limitation.

First point : Section 40, Evidence Act, is in these terms :

"The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial."

Mr. Ghosh conceded that the order for pre-emption was not a bar to the trial of the present suit under S. 11, Civil P. C. His contention, however, is that the present suit is barred by the general principles of law, viz., that there should be an end of litigation and that no one should be twice vexed for the same cause. The issue in the present suit is whether the defendant landlord has the right to pre-empt the lands purchased by the plaintiff. If the land which the plaintiff has purchased is part of a rayoti holding at fixed rent the defendant landlord has no right to pre-empt. If not, the defendant landlord is entitled to pre-empt. The question as to whether the holding of which the disputed land is a part is an occupancy holding or a rayoti holding at fixed rent was admittedly not raised or decided in the proceedings under S. 26F, Ben. Ten. Act. The

a contention of Mr. Ghosh, however, is that although Expln. 4 of S. 11, Civil P. C., does not apply to the proceeding under S. 26F, Ben. Ten. Act, the principle underlying that explanation ought to be applied to that proceeding. Section 44, Evidence Act, provides :

"Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The competency of a Court means its jurisdiction to hear and determine a cause. In 2 C. L. J. 241[1] at pp. 244 and 245, Rampini and Mookerjee JJ. in their order of reference to the Full Bench said :

"Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudi- b cate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself under three broad heads, namely (1) with reference to the subject-matter, (2) the parties and (3) the particular question which calls for decision. . . . . As regards jurisdiction in relation to the particular question which a Court assumes jurisdiction to decide, it can pass judgment only upon a matter which has been submitted to its determination and which, under the statute, it has authority to decide; for instance, if it has authority to decide a question of possession only, it cannot decide a question of title."

"The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect; but it is otherwise where the order is good on its face and the Court adjudicating has jurisdic- c tion to determine the existence or not of the condition, and the party denying its existence has neglected his opportunity of raising the objection at the hearing . . . . . (Halsbury's Laws of England, Hailsham Edition, Vol. 13, at p. 439.)"

An examination of the provisions of Ss. 26C (2), (3) and 26F (5), (6) (i) (ii) (iii) and (7), Ben. Ten. Act, would go to show that in a proceeding under S. 26F, Ben. Ten. Act, the purchaser is not entitled to raise the question as to whether the holding is an occupancy holding, or a raiyati holding at fixed rent, because the foundation of the proceedings under S. 26F, Ben. Ten. Act, is the admission of the purchaser in his deed of purchase that the holding is an occupancy holding. The purchaser in a proceeding under S. 26F, Ben. Ten. Act, is not entitled to say that he made the admission under a mistake, or that he was ignorant about the real d nature of the holding at the time of his purchase and that in fact the holding purchased by him is a mourashi mokorari holding. Such questions, therefore, cannot be submitted for determination and cannot be determined in a proceeding under S. 26F, Ben. Ten. Act. It cannot be said, therefore, that the plaintiff might and ought to have raised the issues in the present suit in the proceeding under S. 26F. Assuming, therefore, that the rule of constructive res judicata embodied in Expln. 4 to S. 11, Civil P. C., can be extended to the general principles of law, viz., the finality of litigation on which Mr. Ghosh relies, the order in the proceeding under S. 26F, in the present case does not operate as res judicata to the present suit. The holding of which the disputed land is a part is not an occupancy holding but is a raiyati holding at fixed rent. The condition precedent to the assumption of jurisdiction for making the order under S. 26F, Ben. Ten. Act, was absent at the time when the e proceeding under that section was started and the order thereunder was made. If the defendant wants to rely on the order under S. 26F to show that it operates as res judicata on the footing that it involves constructively the final determination of the issues raised in the present suit he cannot do so because the determination of the issues on that order must then be taken to have been made by a Court not competent to try and determine the issues raised in the present suit. In other words, the order being void and inoperative, cannot operate as res judicata.

Second point : The defendant landlord raised the plea of estoppel under S. 115, Evidence Act, in his written statement. An issue was framed on that point by the trial Court, but at the time of the hearing of the suit this issue was not pressed by the f defendant. The defendant therefore is not entitled to raise this question now.

Third point : In view of our finding on the first point the suit is not barred by limitation. The appeal accordingly fails and is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

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SEN AND PAL JJ.

Sree Sreejut Maharaja Sir Bir Bikram Kishore Manikya Bahadur —
Decree-holder — Appellant

v.

Tafazzal Hossain and others —
Respondents. g

Appeal No. 287 of 1941, Decided on 13th July 1942, from appellate order of Dist. Judge, Noakhali, D/- 12th August 1941.

(a) Government of India Act (1935), S. 107 — Diversity and repugnancy are not same thing (Per *Sen J.*).

Diversity and repugnancy are not the same thing. Repugnancy implies a conflict. Two provisions of the law may be diverse or dissimilar but nevertheless there may be no conflict between them. Conflict arises when two diverse elements meet in seeking to occupy the same field. Where they do not meet there is no conflict. [P 589*d*]

(b) Bengal Tenancy Act (8 of 1885, as amended by Act 18 of 1940), S. 168A — Interpretation of (Per *Sen J.*). h

Section 168A lays down in general terms the judicial procedure to be followed in suits under the Bengal Tenancy Act between landlords and tenants as such; in doing so it says that the procedure shall be the same as that laid down in those provisions and those provisions only of the Civil Procedure Code as have been made applicable to suits between landlords and tenants as such by the Bengal Tenancy Act itself or by the rules made thereunder.

[P 589*f*]

(c) Government of India Act (1935), S. 107 (1) — Words "law with respect to one of the matters" refer both to substantive and procedural law (Per *Sen J.*).

The words "law with respect to one of the matters" in S. 107 (1) cannot reasonably mean the substantive law only relating to that matter. The word "law" embraces both substantive and procedural law and a "law with respect to one of the matters"

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1. ('05) 33 Cal. 68 : 2 Cr.L.J. 618 : 2 C.L.J. 241 : 9 C.W.N. 1046 (F.B.), Sukh Lal v. Tara Chand Ta.

would include the special procedural law, if any, relating to that matter. [P 590*a*,*b*]

(d) Government of India Act (1935), Sch. 7, List III, Item 4 — Words "civil procedure" in Item 4—Meaning of *(Per Sen J.)*.

The words "civil procedure" in Sch. 7, List III, Item 4 are used in a general sense as the procedure applicable to litigation generally; they do not include a special law of procedure which is applicable only to litigation regarding a special matter. [P 590*b*]

(e) Government of India Act (1935), S. 107 — Expressions "provincial law" and "existing Indian law" in S. 107 do not necessarily mean and refer to any entire statute but refer also to any provision therein *(Per Pal J.)*.

The expressions "provincial law" and "existing Indian law" in S. 107 do not necessarily mean and refer to any entire statute. Any provision of a "provincial Act" or of a "provincial law" will also be a "provincial law." Similarly, a provision of an existing Indian law will also be "an existing Indian law." [P 591*c*]

(f) Government of India Act (1935), S. 107 (1) and (2)—S. 107 (1) and (2) must be read together —S. 107 analysed and explained *(Per Pal J.)*.

The two sub-sections of S. 107 must be read together. In order to fall within the mischief of S. 107 (1) both the provincial law and the existing Indian law must be with respect to the same matter and that matter must be "one of the matters enumerated in the Concurrent Legislative List." Section 107 (1) declares a provision to be void subject to the provisions of S. 107. The invalidity imposed by S. 107 (1) will not attach to the provision if the provincial law in question is passed in the manner contemplated by S. 107 (2). Therefore, only that kind of the provincial law is contemplated by S. 107 (1) as is covered by S. 107 (2) which clearly contemplates only a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List. [P 591*c*,*d*]

(g) Government of India Act (1935), S. 107 — To determine "with respect to" what matter legislation deals substance of entire subject-matter for legislation must be looked into and not every detailed provision *(Per Pal J.)*.

In order to see "with respect to" what matter the Legislature is exercising its legislative function the Court must look into the pith and substance of the entire subject-matter for legislation and not to every detailed provision severed from the context. [P 591*f*]

(h) Government of India Act (1935), Sch. 7, List II, Item 21 — Words "land that is to say rights in or over land . . . . collection of rents" in Item 21—Scope *(Per Pal J.)*.

The words "land, that is to say, rights in or over land, land tenure, including the relation of landlord and tenant, and the collection of rents" in Item 21, are comprehensive enough to cover the remedial as well as the procedural provisions concerning the reliefs in respect of the rights and liabilities admittedly covered by the item. The words "collection of rent" are comprehensive enough to include "the recovery" thereof, and it will be within the competence of the Legislature to make incidental remedial provisions while legislating with respect to land, land tenure, the relation of landlord and tenant, and the collection of rent : ('41) 28 A. I. R. 1941 F. C. 16, *Rel. on.* [P 591*h*; P 592*a*]

(i) Bengal Tenancy Act (8 of 1885 as amended by Act 18 of 1940), S. 168A — Bengal Tenancy Act is law with respect to Item 21, Provincial Legislative List of Government of India Act — No provision of it can be void under S. 107, Government of India Act—S. 168A is not repugnant to S. 51, Civil P. C. — S. 168A is valid piece of legislation and is not void to any extent *(Per Division Bench)*.

The Bengal Tenancy Act is not a law with respect to one of the matters enumerated in the Concurrent Legislative List but a law with respect to Item 21, Provincial Legislative List of the Government of India Act, and consequently no provision of it including S. 168A can be void under S. 107 (1), Government of India Act, nor is the special procedure laid down in S. 107 (2), Government of India Act, at all called for in its case : ('42) 29 A. I. R. 1942 Cal. 429, *Rel. on.* [P 591*f*; P 592*a*]

Section 168A is not in conflict with or repugnant to Ss. 51 and 60, Civil P. C. Consequently, S. 168A is a valid piece of legislation and is not void to any extent : ('42) 29 A. I. R. 1942 Cal. 429 and ('42) 29 A. I. R. 1942 Cal. 470, *Rel. on.* [P 592*f*,*h*]

(j) Civil P. C. (1908), S. 51—Nature of decree-holder's right and how it arises explained — Civil Procedure Code does not create that right but simply gives procedure in execution and ways in which execution may be ordered.

The right of the decree-holder is the result of the jural relation constituted by the decree itself. A new right in personam in favour of the decree-holder arises out of this jural relation and the legal advantages of the dominus (the decree-holder) involved in this right are available against the personality of the servus (the judgment-debtor). This personality extends over portions of the physical world over which the power of the person is extended. This is how the property belonging to the judgment-debtor becomes available to the decree-holder for the realization of the judgment-debt. The provisions in the Civil Procedure Code do not create this right or its attendant advantages. These either only limit this right or the legal advantages by withdrawing some of the properties from their extent or only prescribe the mode of realization of this right or these advantages. Section 51 does not contain the law giving such a right. It simply gives the procedure in execution and enumerates in general terms the various ways in which the Court may order execution of a decree: ('42) 29 A.I.R. 1942 Cal. 470 and ('42) 29 A. I. R. 1942 Cal. 429, *Rel. on.* [P 592*d*,*e*]

C. P. C. —
('40) Chitaley, S. 51, N. 1.

(k) Interpretation of statutes — Whether two provisions of law are repugnant — Test.

The one test of repugnancy between two provisions of law is to see if the two can co-exist. [P 592*g*]

C. P. C. —
('40) Chitaley, Preamble N. 7.

Dr. N. C. Sen Gupta and Ajit Kumar Dutt — for Appellant.

Syed Farhat Ali for A. Quasem (for Deputy Registrar) — for Respondents.

SEN J. — The appellant obtained a decree for arrears of rent against the respondents and in execution thereof sought to attach and sell their properties moveable and immovable other than the land which was in arrears. That land had already

been sold in execution. The judgment-debtors contended that by reason of the provisions of S. 168A, Ben. Ten. Act, no property other than the land in arrears was liable to be sold in execution of this decree for arrears of rent. This contention was given effect to by both the Courts below and the execution case was dismissed. The decree-holder appeals. Several arguments were raised in the Courts below by the appellant but here he gives up all his contentions except one: and that is that S. 168A, Ben. Ten. Act, to the extent that it limits sales in execution of decrees for rent to the property in arrears is void, inasmuch as, it is repugnant to S. 51, Civil P. C., which says that a decree may be executed by the sale and attachment of any property of the judgment-debtor. Reliance is placed on S. 107, Government of India Act, the relevant portions of which are in these terms :

"*107.* (1) If any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provisions repugnant to the provisions of an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter."

There can be no doubt that S. 168A is a provision of a Provincial law. It has been enacted by the Provincial Legislature established under the Government of India Act : *vide* S. 311. There can also be no doubt that the Civil Procedure Code is an existing Indian law inasmuch as it is a law made before the commencement of Part 3, Government of India Act, by a Legislature having power to make such law : *vide* S. 311. Further, it is a law relating to a matter enumerated in the Concurrent list being item 4 (Civil Procedure) of that list. Lastly, it is a fact that no assent of the Governor-General or of His Majesty the King has been received for the enactment of S. 168A, Ben. Ten. Act. If therefore S. 168A, Ben. Ten. Act, is repugnant to the Civil Procedure Code then it must be void to the extent to which it is so repugnant. The question for determination therefore is whether it is repugnant. In my opinion it is not. True, S. 168A, Ben. Ten. Act, differs from S. 51, Civil P. C. Section 168A, Ben. Ten. Act, prohibits the sale, in execution of a decree for arrears of rent, of any property of the judgment-debtor other than the land in arrears, whereas S. 51, Civil P. C., states that a decree may be executed by the sale of any property belonging to the judgment-debtor. But diversity and repugnancy are not the same thing. Repugnancy implies a conflict. Two provisions of the law may be diverse or dissimilar but nevertheless there may be no conflict between them. Conflict arises when two diverse elements meet in seeking to occupy the same field. Where they do not meet there is no conflict. I shall endeavour to show that there is no conflict between S. 168A, Ben. Ten. Act, and S. 51, Civil P. C., because these two diverse provisions occupy different fields. Section 168A, Ben. Ten. Act, does not touch the Code of Civil Procedure at all. It is a provision of the Bengal Tenancy Act and it seeks to alter the procedure laid down in that Act. No doubt, most of the provisions of the Code of Civil Procedure have been incorporated in the Bengal Tenancy Act but it is quite clear that the Civil Procedure Code, as such, does not apply to the Bengal Tenancy Act *ex proprio vigore*. The Bengal Tenancy Act provides its own procedure. Chapter 13 of that Act deals generally with the judicial procedure to be followed in suits between landlords and tenants as such and Chap. 14, in which S. 168A appears, deals specifically with sales in execution of decrees for arrears of rent. Section 143 which is the first section in Chap. 13 says this :

"*143.* (1) The High Court may, from time to time, with the approval of the Provincial Government, make rules, consistent with this Act, declaring that any portions of the Code of Civil Procedure, 1908, shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules. (2) Subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure, 1908, shall apply to all such suits."

As I interpret this section it lays down in general terms the judicial procedure to be followed in suits under the Bengal Tenancy Act between landlords and tenants as such; in doing so it says that the procedure shall be the same as that laid down in those provisions and those provisions only of the Code as have been made applicable to suits between landlords and tenants as such by the Bengal Tenancy Act itself or by the rules made thereunder. To me it is quite clear that the Bengal Tenancy Act provides its own special procedure although most of it has been borrowed from the Code of Civil Procedure. Section 168A is merely an item of that special procedure and does not in any way encroach upon the domain in which S. 51, Civil P. C., functions. The two sections do not meet and so they cannot be in conflict. There is accordingly no repugnancy. The view that I have taken is supported by the provisions of S. 4, Civil P. C., the relevant portion of which is in these terms :

"(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force."

Under this section, not only is any special law existing at the time of enactment of the Code left unaffected, but the section goes on to say that any special form of procedure that may be prescribed by any other law for the time being in force will also not be affected by the Code. In other words, if a subsequent law lays down any special form of procedure such special procedure will not be affected by the Code of Civil Procedure. Now, as I have said before, Chaps. 13 and 14, Ben. Ten. Act, lay down a special form of procedure. That procedure therefore is unaffected by the Code of Civil Procedure. There can consequently be no conflict or repugnancy between any provision of the Code of Civil Procedure and S. 168A, Ben. Ten. Act, which is a section dealing with the special form of procedure under the Bengal Tenancy Act. It was argued, though faintly, that S. 168A was repugnant to the Bengal Tenancy Act as it stood at the time of amendment and therefore it must be held to be void to the extent of its repugnancy inasmuch as the Bengal Tenancy Act is itself an existing Indian law. This argument, how-

ever, cannot be supported. Section 107, Government of India Act, says that the provisions of a Provincial law will be void if it is repugnant to a provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent List. Now the Bengal Tenancy Act is not a law with respect to a matter enumerated in the Concurrent List; it is a law with respect to Item 21, Provincial Legislative List, which is in these terms :

"*21.* Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization, Court of Wards; encumbered and attached estates; treasure trove."

The words "law with respect to a matter" cannot reasonably mean the substantive law only relating to that matter. The word 'law' embraces both substantive and procedural law and a 'law with respect to a matter' would include the special procedural law, if any, relating to that matter. I am not unmindful of the fact that 'civil procedure' is an item in the Concurrent list being Item 4 of List III Part 1. But there ' civil procedure ' is used in a general sense as the procedure applicable to litigation generally; it does not include a special law of procedure which is applicable only to litigation regarding a special matter. The Bengal Tenancy Act when it deals with procedure does not deal with civil procedure generally but it deals with the procedural law applicable to a special class of suits dealing with matters included in Item 21 of the Provincial List. Therefore even when it deals with procedure it is not an existing Indian law with respect to a matter enumerated in the Concurrent list but it is a law with respect to a matter in the Provincial list. Section 168A although it alters the existing Bengal Tenancy Act in respect of sales in execution of decrees for arrears of rent cannot therefore be said to be repugnant to the provisions of an existing Indian law with respect to any matter enumerated in the Concurrent list. This question came up for decision in two cases viz., 46 C. W. N. 540[1] and 46 C. W. N. 628[2] where it was held that S. 168A, Ben. Ten. Act, is valid law. I respectfully agree with those decisions for the reasons stated above. The appeal is accordingly dismissed; there will be no order as to costs. A certificate under S. 205, Government of India Act, is granted.

PAL J. — I agree that this appeal should be dismissed. The only point urged in this appeal is that S. 168A, Ben. Ten. Act, in so far as it lays down that 'a decree for arrears of rent . . . . . shall not be executed by the attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree . . . . relates', is void to that extent under S. 107(1), Government of India Act, 1935. Section 107 (1), Government of India Act, provides as follows :

"If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void."

"Provincial law" is defined by S. 311 of the Act thus :

" 'Provincial Act' and ' Provincial law ' mean, subject to the provisions of this section an Act passed or law made by a Provincial Legislature established under this Act."

Section 168A, Ben. Ten. Act is " a Provincial law" or "a provision of a Provincial law", it having been inserted in the Bengal Tenancy Act by Act 18 of 1940, passed by the Bengal Provincial Legislature established under the Government of India Act, 1935. The expression 'existing Indian law' is defined by the same section thus :

"'Existing Indian law' means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part 3 of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation".

Dr. Sen Gupta contends that 'the existing Indian law' in question here is : (1) Section 51, Civil P. C., as it is; or (2) Section 51, Civil P. C., as adopted by the Bengal Tenancy Act S. 143 (2) ; or (3) the law wherever to be found giving the decree-holder a right to execute his decree against all the properties of the judgment-debtor.

Admittedly, the Bengal Act 18 of 1940, which enacted S. 168A, Ben. Ten. Act, was not passed following the procedure laid down in S. 107 (2), Government of India Act. If therefore, the provision in the Provincial law in question and the provision in the existing Indian law in question satisfy the requirements of S. 107 (1), Government of India Act, and if there be repugnancy between the two provisions in any extent the Provincial law will be void to the extent of the repugnancy. Reading the S. 107 (1) Government of India Act 1935 by itself there is some difficulty in seeing the exact bearing of the words "with respect to one of the matters enumerated in the Concurrent Legislative List". As the section stands, these words may be taken with (1) 'an existing law' or (2) any provision of an existing Indian law or (3) 'repugnant'. In sub-section (2) of the Section, however, these words are taken with " a Provincial law " and "an existing Indian law". The sub-section runs thus :

" Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter."

According to this sub-section, the Provincial law in question must itself be "with respect to one of the matters enumerated in the Concurrent Legislative List," and the existing Indian law must also be with respect to that matter. The repugnant provisions need only be contained in such 'Provincial law' and 'the existing Indian law;' and beyond being contained in them these provisions themselves are not required by the sub-section to be 'with respect to' any particular matter. Taking the two sub-sections together it appears to me that the following

1. ('42) 29 A. I. R. 1942 Cal. 429 : 201 I.C. 24 : 75 C. L. J. 190 : 46 C. W. N. 540, Satish Chandra Hui v. Sudhir Krishna Ghose.
2. ('42) 29 A.I.R. 1942 Cal. 470 : 46 C. W. N. 628, Satish Chandra Bandopadhya v. Bishnupada Pal.

possible sets of requirements might have been within the contemplation of the section:

1. (a) the Provincial law must be with respect to one of the matters enumerated in the Concurrent list; (b) the existing Indian law must also be with respect to the same matter; (c) a provision in (a) must be repugnant to a provision in (b), (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must also be with respect to one of the matters enumerated in the Concurrent Legislative List;

2. (a) the Provincial law need not be with respect to one of the matters enumerated in the Concurrent List; (b) the existing Indian law must be with respect to one of the matters enumerated in the concurrent list; (c) a provision in (a) must be repugnant to a provision in (b); (i) these provisions themselves are not required to be with respect to any particular matter; or (ii) these provisions must be with respect to one of the matters enumerated in the Concurrent Legislative List or (iii) the provision in the existing Indian law must be with respect to one of the matters enumerated in the Concurrent Legislative List, the provision in the Provincial law is not required to be with respect to any such matter;

3. (a) the Provincial law is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (b) the existing Indian law also is not required to be with respect to any of the matters enumerated in the Concurrent Legislative List; (c) a provision in (a) must be repugnant to a provision in (b), the repugnancy being with respect to one of the matters enumerated in the Concurrent Legislative List. This can happen only when the provisions are with respect to the same matter and that matter is one of those enumerated in the Concurrent Legislative List.

It should be noticed here that the expressions "Provincial law" and 'existing Indian law' do not necessarily mean and refer to any entire statute. Any provision of a 'Provincial Act' or of a 'Provincial law' will also be a Provincial law. Similarly, a provision of an existing Indian law will also be 'an existing Indian law.' In the above analysis, however, we have kept them distinct, in view of a particular contention raised by the learned advocate for the appellant, as will appear later. In my opinion the two sub-sections must be read together. In order to fall within the mischief of S. 107 (1), Government of India Act, 1935, both the Provincial law and the existing Indian law must be with respect to the same matter and that matter must be 'one of the matters enumerated in the Concurrent Legislative List'. Sub-section (1) declares a provision to be void 'subject to the provisions of this section'. The invalidity imposed by sub-s. (1) will not attach to the provision if the Provincial law in question is passed in the manner contemplated by sub-s. (2). In my opinion, therefore, only that kind of the Provincial law is contemplated by sub-s. (1) as is covered by sub-s. (2). Sub-section (2) clearly contemplates only a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List. The Provincial law in question in the present case is a provision contained in the Bengal Council Act 18 of 1940. The question, therefore, is whether this Act can be said to be 'with respect to one of the matters enumerated in the Concurrent Legislative List.' In 46 C. W. N. 540,[1] a Division Bench of this Court, of which I was a member, observed that this enactment in pith and substance was one with respect to 'land-tenure' and consequently with respect to item 21 of the matters enumerated in the Provincial legislative list. I see no reason to differ from the view which we took in this respect in that case.

It is contended on behalf of the appellant that as every provision in this Act is 'a Provincial law' as defined by the Government of India Act, 1935, we are to see not the pith and substance of the entire enactment, but the matter for legislation in the particular provision. Here it is contended, the particular provision is S. 168A, Ben. Ten. Act, and the subject-matter for legislation in this particular section is 'a matter included in the Code of Civil Procedure' in 1935—is the matter included in S. 51, Civil P. C. This is item 4 of the Concurrent Legislative List. Consequently, it is contended that section 168A, Ben. Ten. Act, is "a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List, or is 'a provision of a Provincial law' with respect to one of the matters enumerated in the Concurrent Legislative List, within the meaning of S. 107, Government of India Act, 1935." I am unable to accept this contention. In my opinion, it is opposed to the very doctrine of 'pith and substance.' In order to see "with respect to" what matter the Legislature is exercising its legislative function we are to look to the substance of the entire subject-matter for legislation and not to every detailed provision severed from the context. It is further contended that item 21, Provincial Legislative List, does not cover the matter provided for by S. 168A, Ben. Ten. Act. The relevant portion of item 21, Provincial Legislative List stands thus: "land, that is to say, rights in or over land, land tenure, including the relation of landlord and tenant, and the collection of rents...."

Dr. Sen Gupta contends that these words comprehend only the substantive rights and liabilities relating to land and land tenure and do not cover any remedial provisions in relation to such rights and liabilities. According to him the use of the word "collection" in the item is significantly narrow and it does not comprehend even 'recovery' of rent. He refers to item 2 of the List in order to show that the matter of jurisdiction and powers of Courts with respect to any of the matters in this List was kept as a distinct subject-matter so as to indicate that the other items in the List could not cover such matters even incidentally. Dr. Sen Gupta then contends that even item 2 is not comprehensive enough to cover the matter dealt with in S. 168A, Ben. Ten. Act. According to him it is only item 4 of the Concurrent Legislative List which embraces the provisions contained in this section. In my opinion, the words in item 21 of the Provincial list are comprehensive enough to cover the remedial as well as the procedural provisions concerning the reliefs in respect of the rights and liabilities admittedly covered by the item. The law relating to landlord and tenant has always been understood to be comprehensive enough to include such matters. The Bengal Tenancy Act, for example, which professes to give the law relating to landlord and tenant, contains provisions like its Ss. 143, 148, Chap. 14. The matter, I believe, has been set at rest by the Federal Court in (1941) C. W. N. (F. C.) 27.[3]

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3. ('41) 28 A. I. R. 1941 F. C. 16 : 192 I. C. 138 : I. L. R. (1941) Kar. F. C. 72 : 1940 F. C. R. 110 : 45 C. W. N. (F. C.) 27, United Provinces v. Atiqa Begum.

a The same case is also an authority for saying that the words "collection of rent" are comprehensive enough to include "the recovery" thereof, and that it will be within the competence of the Legislature to make incidental remedial provisions while legislating with respect to land, land-tenure, the relation of landlord and tenant, and the collection of rent. Provisions in curtailment of the decree-holder's right to execute his decree for arrears of rent were not unknown even before this S. 168A, Ben. Ten. Act, and such provisions were always made in statutes relating to the matters enumerated in item 21 of the Provincial list. Section 148 (o), Ben. Ten. Act, may be referred to as an instance of such a provision. The Provincial law in question in the present case was not, therefore, with respect to one of the matters enumerated in the Concurrent Legislative List and consequently the special procedure laid down in S. 107 (2), Government of India b Act, was not at all called for in its case. As I have stated above, "the Provincial law" in sub-s. (1) of S. 107 also must be 'with respect to one of the matters enumerated in the Concurrent Legislative List. The Provincial law in question in the present case not being with respect to such a matter the law does not at all come within the mischief of S. 107 (1), Government of India Act, 1935, and consequently no provision of it can be void under that section.

In the above view it is unnecessary to enquire which is the rival existing Indian law and whether there is any repugnancy between its provision and the provisions contained in S. 168A, Ben. Ten. Act. Dr. Sen Gupta himself contends in the alternative that S. 51, Civil P. C., was not by its own operation the law in the field. It was S. 51, Civil P. C., as c adapted by S. 143 (2), Ben. Ten. Act, for the purposes of the suits between landlord and tenant. If so, then even this provision as contained in the Bengal Tenancy Act will, in pith and substance, be a part of the law relating to landlord and tenant. In such a case even the provision of the existing Indian law will not be 'with respect to one of the matters enumerated in the Concurrent Legislative List' within the meaning of S. 107, Government of India Act, 1935. Whether the Provincial law need or need not be with respect to one of the matters enumerated in the Concurrent Legislative List, there can be no doubt that the rival provision of the existing Indian law must be with respect to such a matter. If the existing Indian law be taken to be the law, wherever to be found, giving the decree-holder a right to execute his decree against all the d properties of the judgment-debtor, then again it is not "with respect to one of the matters enumerated in the Concurrent Legislative List." This right treated as a right of the decree-holder is certainly not a matter of jurisdiction and powers of Courts. Dr. Sen Gupta contends that such a right was also a matter included in the Code of Civil Procedure at the date of the passing of the Government of India Act, 1935, and therefore, is covered by item 4 of the Concurrent Legislative List. Dr. Sen Gupta points out S. 51 of the Code as providing for this right. The right of the decree-holder is the result of the jural relation constituted by the decree itself. A new right in personam in favour of the decree-holder arises out of this jural relation and the legal advantages of the dominus (the decree-holder) involved in this right are available against the personality of the servus (the judgment-debtor). This personality extends over portions of the physical world over which the power of the person is extended. This is how the property belonging to the judgment-debtor becomes available to the decree-holder for the realization of the judgment-debt. The provisions in the Civil Procedure Code do not create this right or its attendant advantages. These either only limit this right or the legal advantages by withdrawing some of the properties from their extent or only prescribe the mode of realization of this right or these advantages. e

It was pointed out in 46 C. W. N. 540[1] and 46 C. W. N. 628,[2] that the provision in S. 51, Civil P. C., did not contain the law giving such a right. It simply gives the procedure in execution and enumerates in general terms the various ways in which the Court may order execution of a decree. Assuming now that in order to attract the operation of S. 107 (1), Government of India Act, 'the Provincial law' need not be with respect to any of the matters enumerated in the Concurrent Legislative List, or that the words 'with respect to' do not refer f to the pith and substance of the entire legislation but mean and refer to the matter that is being dealt with in the particular provision, then the provision contained in Section 168A (1), Ben. Ten. Act, is in apparent rivalry with the provisions contained in Ss. 51 and 60, Civil P. C. The question is whether there is any repugnancy between the provisions. In 46 C. W. N. 540[1] it was held by a Division Bench of this Court, of which I was a member, that between Ss. 51 and 60, Civil P. C., on the one hand and S. 168A (1), Bengal Tenancy Act, on the other, there was no repugnancy and that accordingly S. 168A (1), Bengal Tenancy Act, though a Provincial law not assented to by the Governor-General or His Majesty, was not rendered void by S. 107 (1), Government of India Act. The same view was taken by another Division Bench in 46 C. W. N. 628.[2] g

I see no reason to differ from the view taken in those cases. Dr. Sen Gupta contends that even assuming that S. 168A, Bengal Tenancy Act, purports only to deal with matters of jurisdiction or power of Courts, or with matters of procedure, its provisions do not amount to conferring 'any special jurisdiction or power' or prescribing any special form of procedure within the meaning of S. 4, Civil P. C., and consequently the repugnancy shall not be withdrawn by the automatic operation of that section. His contention is that S. 168A (1) does not at all confer any power; on the other hand, it curtails the existing power of the Court. In my opinion, even without the help of S. 4, Civil P. C., there will be no repugnancy between the provision contained in S. 168A (1) Bengal Tenancy Act, and that in S. 51, Civil P. C. The one test of such repugnancy is to see if the two can co-exist even h without the assistance of S. 4, Civil P. C. In my opinion they can. Some of the recognised rules of construction of the statutes are: (1) *Generalia specialibus non derogant*—General things do not derogate from special; (2) *Generale tentum valet in generalibus quantum singulare in singulis*—What is general prevails as much amongst things general as what is particular amongst things particular.

Had there been these two apparently rival provisions in the field, the general provision of the Code of Civil Procedure would have withdrawn itself, (even without its provision in S. 4, but by reason of these rules of construction), from the particular portion of the field and would have given space to the particular or the special provision contained in S. 168A, Bengal Tenancy Act, designed to cover only the particular field of jural relations relating to land, land tenure, etc. In my judgment therefore, S. 168A, Bengal Tenancy Act, is a valid piece of legislation and is not void to any extent.

The case certainly involves a question as to the interpretation of S. 107, Government of India Act, 1935, and, in our opinion, it is a question of law and is a substantial question. We accordingly certify, as required by S. 205 (1) of the Act, that it involves a substantial question of law as to the interpretation of the Government of India Act, 1935.

G.N./R.K. *Appeal dismissed.*

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* A. I. R. (29) 1942 Calcutta 593

LODGE AND PAL JJ.

Naresh Chandra Das and another Accused — Petitioners

v.

Emperor.

Criminal Revn. Petns. Nos. 595 and 646 of 1941, Decided on 28th August 1941.

(a) Criminal trial—Conviction—Mere suspicion not sufficient.

Conviction on a mere suspicion, however strong, cannot be supported. [P 595*e*]

Cr. P. C. —

('41) Chitaley, S. 290, N. 5, Pt. 6.

(b) Criminal P. C. (1898), S. 162—Scope and applicability of the section explained.

The prohibition of this section extends to (1) all statements—(a) the statement need not be confessional : it applies equally to all statements, confessional or otherwise; (b) the statement need not be reduced into writing: it applies equally to all statements whether reduced into writing or not; (2) by whomsoever made: (i) the prohibition applies equally to statements made by any person, whether accused or not: (ii) the person making the statement need not be in the police custody while making the statement. But (1) the statement must be made to police officer; and (2) must be made in the course of an investigation under Chap. 14, Criminal P. C. [P 596*g*,*h*]

Cr. P. C. —

('41) Chitaley, S. 162, N. 2, Pts. 1, 2; N. 3, Pt. 1a; N. 3a, Pts. 1, 3; N. 4, Pt. 13; N. 7, Pt. 1.

('41) Mitra, Page 481, N. 500A : "Object and scope of section;" Page 482, N. 500A : "In the course of an investigation;" Page 486, N. 501 ; "Oral statement;" Page 488, N. 501a; Page 494, Notes 502a, 502b.

(c) Criminal P. C. (1898), Chap. 14 — Applicability to cognizable and non-cognizable cases.

Chapter 14, Criminal P. C., applies equally to cases, cognizable and non-cognizable; only in non-cognizable cases the police officer is not to take up investigation without the order of a Magistrate. But when he does take up the investigation in non-cognizable cases, the investigation which he holds becomes an investigation under this Chap. 14, provided the requirements of S. 155 (3), Criminal P. C., are complied with. [P 597*a*,*b*]

Cr. P. C. —

('41) Chitaley, S. 154, N. 2.

('41) Mitra, Page 459 : Introduction to Chap. 14.

(d) Criminal P. C. (1898), S. 155 (3)—Investigation by police in non-cognizable case—When investigation under Chap. 14 stated.

Section 155 (3) is the only provision by virtue of which an investigation in non-cognizable cases shall come under Chap. 14 and it is limited in its application to a 'police officer receiving such order (the order of a Magistrate). If a police officer is otherwise authorized to investigate a non-cognizable case that power of investigation will not by itself attract the provisions of this chapter. Thus, a police officer may be authorized to investigate non-cognizable cases under the Opium Act. But this power of investigation does not necessarily bring the investigation itself under Chap. 14, Criminal P. C. [P 597*c*]

Cr. P. C. —

('41) Chitaley, S. 154, N. 2 ; S. 155, N. 4, Pt. 3; N. 5, Pt. 1.

('41) Mitra, Page 459 : Introduction to Chap. 14; Page 468, N. 485.

(e) Criminal P. C. (1898), S. 162 — How far overrides S. 27, Evidence Act — History of sections not helpful.

In considering the question as to how far S. 162, Criminal P. C., overrides S. 27, Evidence Act, no legitimate inference can be drawn from the history of the two sections. The fact that the sections of the Evidence Act are sometimes expressly mentioned, and sometimes not, does not render any assistance to the solution of that problem. [P 598*f*]

Cr. P. C. —

('41) Chitaley, S. 162, N. 5.

('41) Mitra, Page 488, N. 501a.

(f) Criminal P. C. (1898), S. 1 (2) — "In the absence of any specific provision to the contrary" — Meaning of.

The words "in the absence of any specific provision to the contrary" in S. 1 (2) mean and contemplate a provision specific in affecting the special or local law. This specific provision to the contrary need not be in the Criminal Procedure Code itself. It may be in the special or local law also. These words cannot be read as referring to any possible contrariety between a specific provision in the Criminal Procedure Code and a provision in a special statute. In order that one provision can be said to be 'a specific provision to the contrary' it must completely cover the field of operation of the other and must lay down a contrary rule for the entire field so as altogether to nullify the other. [P 601*g*,*h*; P 602*a*]

Cr. P. C. —

('41) Chitaley, S. 1, N. 3, Pt. 1: S. 162, N. 5, Pts. 4a, 5, 6.

('41) Mitra, Page 19, N. 5 ; Pages 489-490, N. 501a.

*** (g) Criminal P. C. (1898), S. 162—How far affects S. 27, Evidence Act, explained.**

Section 162 is not a "specific provision to the contrary," i. e., contrary to the provision contained in S. 27, Evidence Act, as the two can certainly coexist. Section 162, Criminal P. C., applies only to statements made (1) to the police and (2) in course of an investigation under Chap. 14, Criminal P. C. To this extent such statements though leading to discovery may not be evidence and the operation of S. 27, Evidence Act, may be affected. But outside this limit there still remains a wide field left for the application of the section. [P 601*h* ; P 602*a*]

Section 27, Evidence Act, no doubt makes a special provision for statements leading to discovery. But this special provision applies to a much wider field. It is not limited in its operation, like S. 162, Criminal P. C., to a particular investigation. This fact alone should suffice to allow S. 162, Criminal P. C., to override S. 27, Evidence Act. Further, S. 27, Evidence Act, containing this general provision was already there when S. 162, Criminal P. C., was

enacted providing for a special case of investigation and laying down how much of the fruit of this investigation can be used and for what purposes, and the rule '*leges posteriores priores contrarias abrogant*'—when two statutes are contrary in matter, the latter abrogates the former—will apply to this case, and, to the extent indicated above, S. 162, Criminal P. C., will abrogate S. 27, Evidence Act. The Evidence Act itself certainly is not 'special' in relation to the rules of evidence contained in the Criminal Procedure Code for the purposes of criminal proceedings. Therefore, S. 27, Evidence Act, is also not 'special law' in relation to the rules regarding statements made in course of a particular class of investigation conducted under the special provisions of Chap. 14, Criminal P. C. The prior enactment here is not therefore 'special' and subsequent enactment 'general' within the meaning of the maxim '*generalia specialibus non derogant*': ('39) 26 A.I.R. 1939 P. C. 47, *Expl.*; *Case law discussed.*

[P 602*c*, *d*, *e*, *f*]

Cr. P. C. —

('41) Chitaley, S. 162 N. 5.

('41) Mitra, Page 488 N. 501A.

(h) Evidence Act (1872), S. 27—Information causing discovery — Mere existence of other information by which discovery was facilitated does not make the information inadmissible under S. 27 *(Per Pal J.)*.

An information received from accused which has led to discovery does not cease to be the information causing the discovery simply because such discovery was facilitated by other assistance as well. When a fact is once discovered in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. The mere plurality of information received before discovery shall not necessarily take any of these informations out of the section. In a suitable case it is possible to ascribe to more than one accused the information which leads to the discovery. [P 603*c*, *d*]

(i) Evidence Act (1872), S. 27—Section must be strictly construed *(Per Pal J.)*.

In order to apply S. 27 it is necessary to know exactly what the statements were; because they are admissible only in so far as they lead to the discovery of the fact and no further. The section must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safeguard provided in S. 27 are not rendered nugatory by a lax interpretation. The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information. [P 603*g*]

(j) Evidence Act (1872), S. 27 — Principle underlying S. 27, explained *(Per Pal J.)*.

Section 27 is enacted as an excepting or qualifying rule of evidence, being framed as a proviso upon the preceding Ss. 25 and 26. The principle upon which the rejection of confession made by an accused person to a police officer or whilst he is in the custody of a police officer is founded is that a confession thus made or obtained is untrustworthy. If circumstances, however appear, which rebut the presumption of its being false and demonstrate its truth, the confession should be allowed. When, in consequence of information furnished by the accused, a fact is discovered, then the discovery of that fact supplies a guarantee of the truth of the information which may amount to a confession. The confession in so far as it is confirmed by the discovery should be deemed to be true. [P 603*g*; P 604*a*]

Cr. P. C. —

('41) Chitaley, S. 162 N. 5.

('41) Mitra, Page 489 N. 501A.

(k) Evidence Act (1872), S. 27—Applicability —Information when admissible against accused stated *(Per Pal J.)*.

The word 'thereby' in "fact thereby discovered" in S. 27 refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order thus to be admissible against the accused under S. 27, (1) the information must be the one given by the accused—the statement conveying the information must be his own statement in his own language and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible. [P 605*a*]

***(l) Criminal P. C. (1898), S. 162—Statement by accused to police officer in course of investigation under Chap. 14 is inadmissible even if it relates to fact thereby discovered.**

A statement by the accused to a police officer in the course of an investigation under Chap. 14 is inadmissible under S. 162 even if such statement relates to fact thereby discovered. [P 597*h*; P 606*d*]

Accused made the following statement to the police in the course of an investigation under Chap. 14 "I had thrown the opium on the roadside at *S*" which led to the discovery of the opium :

Held that the statement was inadmissible under S. 162, Criminal P. C. [P 606*d*]

Held further that even if it was not barred by S. 162,

(Per Pal J.)—That portion of the alleged statement which purported to ascribe the authorship of the "act of throwing" to the accused himself was not admissible in evidence under S. 27, Evidence Act. The admissible portion of the information must be to the effect that gunny bag was thrown into *S*. [P 606*c*, *d*]

(Per Lodge J.)—If evidence were given that the accused stated "I threw the opium into the spot" the whole of that statement would be admissible under S. 27, Evidence Act. [P 606*e*]

Cr. P. C. —

('41) Chitaley, S. 162 N. 4 Pt. 1.

('41) Mitra, Page 488 N. 501A.

J. C. Gupta and Sudhansu Bhusan Sen — for Petitioners.

Hamidul Huq and J. N. Banerjee — for the Crown.

PAL J.—These two rules were issued by this Court on the petition of the two accused persons calling upon the Deputy Commissioner of Lakhimpur to show cause "why the order of conviction and sentence complained of in the petition should not be set aside or such other or further orders made as to this Court may seem fit and proper." The petitioner in Criminal Revision No. 595 of 1941 is Naresh Das who has been convicted under S. 9 (c), Opium Act, and sentenced to undergo rigorous imprisonment for six months. The petitioner in Criminal Revision No. 646 of 1941 is Sundar Singh who has been convicted under S. 9 (a), Opium Act, and sentenced to undergo rigorous imprisonment for one year. The prosecution case is that on 5th September last at about 10-30 p. m. the officer-in-charge of Tinsukia Police Station B. B. Dam,

happened to be on patrol duty at Bansbari on his way back from Panitola. He saw taxi cab No. A.S.L. 168 proceeding towards Tinsukia from the direction of Dibrugarh. According to previous information he suspected that opium might be carried in that taxi cab. Accordingly he returned to the thana and proceeded in the direction of Makum accompanied by A. S. I., G. C. Das, and two constables. On the way he met one Bangshi Nai and asked him to follow with his car. The officer-in-charge on arrival near Khemani Rice Mill which is situated near the Trunk Road leading to Makum noticed the taxi cab in question in the mill premises. Meanwhile Bangshi Nai arrived with his car with one Lachmi Narayan. The officer-in-charge told the members of his party that he would search the taxi for opium and left A. S. I., G. C. Das, near the car with a constable and Bangshi on the Trunk Road at some distance to the east of the gate of the Rice Mill and he himself proceeded with Lachmi Narayan and the constable Gyasuddin towards the gate to stop the car as it would come out. In the meantime the taxi started and came out of the gate and proceeded towards Makum (eastward). The officer raised his hand and shouted out to the driver to stop the taxi—but disregarding the signal, it ran ahead. The officer then shouted out to the A. S. I. to stop the car. The A. S. I. and the constable who was with him stood on the middle of the road, shouted out to the driver and raised their hands by way of signalling to stop the car. As the car did not stop they placed their lathis across the road but the driver of the car ignoring these signals and obstructions drove ahead though one of the head lights was smashed in consequence.

The officer-in-charge then got into Bangshi's car with A. S. I., G. C. Das, and chased the taxi which was being driven at a break-neck speed and the back light could only be seen from a distance of 2½ miles. The officer arrived at Makum and met one Darjey Lama and his brother Ganga Bahadur on the road and from the information furnished by them traced the taxi in Durgabari Lane which adjoins the Trunk Road. Accused Naresh was found in the car. He was questioned by the police officers as to whether he with another had carried opium in his taxi cab. After being repeatedly questioned he made a statement. Then on the information given by Darjey Lama, a search was made for the second man and accused Sundar Singh was found sitting on the varandah of a sweets shop. Sundar Singh was questioned and confronted with Naresh and in consequence he stated that he had thrown the opium at Sukan Pukhuri and offered to show it. Then he led the police party to Sukhanpukuri where a gunny bag containing the opium was discovered lying under water on the road side. This gunny bag was found to contain 16 cakes of opium weighing 8 srs. 3 chataks. The opium was seized and both Naresh and Sundar Singh were sent up under the Opium Act. The charge against Sundar Singh is that he possessed the opium, and that against Naresh is that he knowingly permitted his taxi cab to be used for the transport of opium by accused Sundar Singh, which is an offence under the Opium Act. The exact charge framed against Naresh Chandra Das, the petitioner in Criminal Revision No. 595 of 1941, ran as follows :

"That you on or about the 5th day of September 1940 at Sukan Pukhuri being the owner or occupier of taxi cab No. ASL168 knowingly permitted it to be used for transport of opium by accused Sundar Singh, which is an offence under S. 9, Opium Act, and thereby committed an offence punishable under S. 9C, Opium Act, as amended in 1933."

The accused Naresh Chandra Das pleaded not guilty to this charge and denied that he made the statement attributed to him to the police. He did not, he said, knowingly or otherwise carry any passengers with opium in his taxi. Both the trying Magistrate and the learned Additional Sessions Judge on appeal could refer only to the conduct in refusing to stop his taxi though signalled by the police to do so, as the evidence against this accused person. Beyond this no other evidence establishing his guilt could be pointed out in this case. His conduct no doubt raises a strong suspicion against him. But conviction on a mere suspicion, however strong, cannot be supported. We have gone through the entire evidence in this case and, in our opinion, the charge against this accused has not at all been established by the evidence on record including his suspicious conduct. The result is that the rule in Crim. Rev. Case No. 595 of 1941 is made absolute. The conviction of accused Naresh Chandra Das and the sentence passed against him are set aside and he is acquitted. The order of confiscation of taxi cab No. ASL 168 under S. 11, Opium Act, is also set aside. Accused Naresh Chandra Das should be set free forthwith and the taxi cab No. ASL 168 should be restored to him immediately. As regards Sundar Singh, the petitioner in Cr. Rev. Case No. 646 of 1941, the charge framed against him ran as follows:

"That you on or about the 5th day of September 1940 at Sukanpukhuri possessed 8 seers 12 chataks of opium and thereby committed an offence punishable under S. 9 (a), Opium Act."

Section 9 (a), Opium Act, runs as follows :

"Any person who, in contravention of this Act, or of rules made and notified under S. 5 or S. 8 possesses opium . . . . shall on conviction before a Court, be punished . . . . with imprisonment . . . . ."

The accused pleaded not guilty to this charge and denied that he possessed opium or pointed it out to the Police Officers as alleged by the prosecution. To establish this charge against the accused the prosecution relied on the evidence of six witnesses examined by it, also on the confession alleged to have been made by the accused to the police leading to the discovery of the opium at Sukhanpukhuri. None of the witnesses examined could depose to the factum of possession of the opium by the accused. The entire evidence is directed to establish three facts, first, that the accused made certain statement to the police, secondly, that in consequence of that statement the police moved to discover the opium, and thirdly that the opium was discovered as a result of this move and with further assistance of the accused.

On this evidence the learned Magistrate who tried the case found: (1) (a) that the accused Sundar Singh did make a statement to the police while in the custody of the police; (b) that the said statement was not obtained by any threat or inducement; (c) that the statement made by him to the police was to the following effect: "I had thrown the opium on the road-side at Sukhanpukhuri;" (d) that he also offered to show the place where he had thrown the opium; (2) (a) that Sundar Singh not only made the above statement but actually led the police party to the spot and pointed out the place where the opium was actually found; (b) that Sundar Singh had the exclusive knowledge of the place where the opium was and pointed it out himself.

On these findings and being of opinion that the statement made by Sundar Singh to the police was evidence against him under Ss. 27 and 24, Evidence

Act, the learned Magistrate found the charge under S. 9 (a), Opium Act, as established against the accused and consequently convicted him of the offence. On appeal by the accused the learned Additional Sessions Judge found: (1) (a) that Sundar Singh was in the car driven by Naresh Chandra Das; (b) that the car was chased by the police; (c) that Sundar Singh got down from the car and ran towards a shop from the verandah of which he was arrested by the police; (2) (a) that Sundar Singh being questioned by the police officer-in-charge informed him that he had thrown the opium at Sukhanpukhuri; (b) that accordingly the police party with Sundar Singh and Naresh Das came in three cars to Sukhanpukhuri; (c) that at Sukhanpukhuri Sundar Singh, who was coming in one car with A. S. I., G. C. Das, pointed out a place where on a search by torch light the gunny bag containing opium was found lying in water about two feet from the edge of the road; (d) that the car was stopped near the place at the instance of Sundar Singh; (e) that torch lights were flashed and the gunny bag was seen and was picked up by Sundar Singh himself. The learned Judge further held that "the statement of Sundar Singh to the police officer to the effect that 'he had thrown the bag at Sukhanpukhuri' is an information leading directly to discovery of the opium in question and is therefore perfectly admissible in law."

The learned Judge therefore held that the Magistrate was justified in his conclusion that Sundar Singh was in illegal possession of the opium and upheld the conviction and sentence. Mr. Gupta appearing in support of this rule urges the following points: (1) That the statement alleged to have been made by the accused to the police was not admissible in evidence and could not be used against him for any purpose under S. 162, Criminal P. C.; (2) That there is absolutely no evidence to show what the exact statement is that was made by the accused and that unless and until the exact statement made by the accused is established nothing can be proved against him under S. 27, Evidence Act; (3) (a) That the statement in question did not come within S. 27, Evidence Act, at all inasmuch as the discovery of the opium took place not 'by' and 'in consequence' of any portion of the information conveyed by the alleged statement but by the act of the accused in pointing out the place; (b) that in any case the portion of the statement which purports to ascribe the act of throwing of the opium to the accused is not covered by S. 27, Evidence Act; (4) (a) That beyond the alleged statement, there is no other evidence on the record which would establish the charge against him; (b) that the alleged confession, if confession it was, having been retracted, the accused could not be convicted on it without independent corroborative evidence on the material point; (5) That even assuming all the facts found against the accused, his possession of the opium has not been established and hence the conviction under S. 9 (a), Opium Act, cannot be maintained.

The findings of fact arrived at by the learned Additional Sessions Judge, viz., (1) that the accused Sundar Singh was in the car driven by Naresh Chandra Das, (2) that the said car was chased by the police from Khemani to Makum, and (3) that Sundar Singh got down from the car and ran towards a shop from the verandah of which he was arrested by the police—are amply supported by the evidence on record and we see no reason to interfere with these findings. The factum of discovery of the opium at Sukhanpukhuri underneath the water is also amply established by the evidence on record and this evidence is certainly admissible in law. The evidence as to the part taken by the accused in the matter of discovery of opium other than the alleged statement made by him to the police is certainly admissible in law and the evidence on this point amply supports the finding that the accused led the police party from Makum to Sukhanpukhuri and there pointed out the exact spot where the gunny bag containing the opium was lying and himself brought out the bag.

These findings standing by themselves, however, would not justify the conclusion that the accused possessed the opium at any time and would not therefore suffice to support the conviction under S. 9 (a), Opium Act. If along with the above facts we take the statement of the accused alleged to have been made to the police (viz., that he it was who threw the opium bag there from the car), then the chain of evidence will be complete from which it will be perfectly legitimate for a Court of fact to find (1) that the opium bag was in the car, (2) that it was under the control of the accused, and (3) that the accused threw it from the car (which was being chased by the police). These, in our opinion, would justify a Court of fact in finding possession of the opium with the accused. The learned Additional Sessions Judge did arrive at that conclusion and sitting in exercise of our revisional jurisdiction we shall not be justified in disturbing this conclusion unless we find that the statement was not admissible in evidence either wholly or in part. The relevant portion of S. 162, Criminal P. C., which occurs in Chap. 14 of the Code, runs as follows:

"No statement made by any person to a police officer in the course of an investigation under the chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made....."

The prohibition of this section extends to (1) all statements: (a) the statement need not be confessional: it applies equally to all statements, confessional or otherwise; (b) the statement need not be reduced into writing: it applies equally to all statements whether reduced into writing or not; (2) by whomsoever made: (a) the prohibition applies equally to statements made by any person, whether accused or not: 66 I. A. 66;[1] (b) the person making the statement need not be in the police custody while making the statement; but (1) the statement must be made to a police officer; and (2) must be made in the course of an investigation under Chap. 14, Criminal P. C.

In the present case the statement in question admittedly fulfils all the above requirements of the section excepting the last. Mr. Gupta appearing for the accused contends that it also fulfils the last requirement, viz., the requirement of having been made in course of an investigation under Chap. 14, Criminal P. C. Chapter 14 of the Code relates to "Information to the police and their powers to investigate", and comprises Ss. 154 to 176. Section 154 relates to the recording of information in cognizable cases and S. 155, in non-cognizable cases. Section 155 (2) lays down that:

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1. ('39) 26 A. I. R. 1939 P. C. 47 : 180 I. C. 1 : 18 Pat. 234 : I. L. R. (1939) Kar. P. C. 123 : 40 Cr. L. J. 364 : 66 I. A. 66 : 1941 R. L. R. 789n (P. C.), Pakala Narayanaswami v. Emperor.

"No police officer shall investigate a non-cognizable case without the order of a Magistrate of the First or Second Class having power to try such case or commit the same for trial, or of a Presidency Magistrate."

Section 156 authorizes an officer-in-charge of a police station to investigate any cognizable case without the order of a Magistrate. Section 157 lays down the procedure to be followed where from the information received an officer-in-charge of a police station suspects a cognizable case. It thus appears that Chap. 14, Criminal P. C., applies equally to cases, cognizable and non-cognizable; only in non-cognizable cases the police officer is not to take up investigation without the order of a Magistrate. But when he does take up the investigation in non-cognizable cases, the investigation which he holds becomes an investigation under this Chap. 14, provided the requirements of S. 155 (3), Criminal P. C., are complied with. Chapter 14, Criminal P. C., thus applies to (1) investigation in cognizable cases, (2) investigation in non-cognizable cases only when the requirements of S. 155 are satisfied. Section 155 of the Code comprises three sub-sections. Sub-section (1) simply empowers the officer-in-charge of a police station to record the information and enjoins that the informant shall be referred to the Magistrate. Sub-section (2) expressly prohibits the police-officer from investigating a non-cognizable case without the order of a Magistrate. Sub-section (3) then lays down how the police officer should proceed in case he gets the order of the Magistrate. Sub-section (3) runs as follows:

"Any police officer receiving such order may exercise the same powers in respect of the investigation ..... as an officer-in-charge of a police station may exercise in a cognizable case."

This sub-section is the only provision by virtue of which an investigation in non-cognizable cases shall come under Ch. 14, and it is limited in its application to a police officer receiving such order (the order of a Magistrate). If a police officer is otherwise authorized to investigate a non-cognizable case that power of investigation will not by itself attract the provisions of this chapter. Thus a police officer may be authorized to investigate non-cognizable cases under the Opium Act. But this power of investigation does not necessarily bring the investigation itself under Chap. 14, Criminal P. C. In the Bengal Opium Act in S. 20B added by the amending Act of 1933 (B. C. Act 5 of 1933), a special provision is made for such investigations. In the Assam Act there is no such corresponding provision. Section 4 (f), Criminal P. C., defines "cognizable offence" and "cognizable case." For our present purposes we are concerned with the definition of "cognizable case" which expression means "a case in which a police officer .... may .... under any law for the time being in force arrest without warrant." Section 9 (a), Opium Act, is an offence for "possession" of the opium. For such an offence the offender can be arrested without warrant under the Assam Opium Act. Section 15, Opium Act, being amended by the Assam Opium (Amendment) Act, 1933 (Assam Act 1 of 1933) stands as follows:

"Any officer of any of the said departments .... may .... detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if the search confirms such belief, arrest him and any other person in his company."

In this particular case it is the case of the prosecution that as a matter of fact the police officer arrested Sundar Singh before he made any statement. In my opinion, therefore, when Sundar Singh is alleged to have made the statement to the police, the police was in seisin of a cognizable case within the meaning of the Code of Criminal Procedure. The investigation by the police, namely, by the officer-in-charge of the Police Station Tinsukia in the present case was therefore one under Chap. 14, Criminal P. C. At least from 6th September 1940 the police officer expressly purported to hold the investigation under that chapter of the Code. On 6th September 1940, the officer purports to record what he styles as the first information of a cognizable crime reported under S. 154, Criminal P. C., at Police Station Tinsukia. He records the date and hour of occurrence as 5th September 1940 at 12 midnight and the date and hour when reported as 6th September 1940 at 2-40 A.M. The place of occurrence is given as Sukhanpukhuri, the informant being the police officer himself. The information recorded runs as follows:

"I was on patrol duty in Panitola centre. I saw taxi No. ASL 168 coming from Dibrugarh side to Tinsukhia side at about 10-30 P.M. near Banshbari. I followed the same after picking up more officers and men from the police station on my way. I noticed that the taxi was waiting inside the Rice Mill compound of Gobardhan Das Kherani of Sakhanpukhuri. I was then waiting ahead towards Makum, with my party, watching its movement. Suddenly the taxi started off and proceeded towards Makum. We at once parted in two batches keeping at a distance of about 100 yards from one another. Both of our parties gave signals to stop. But the driver disobeyed the signals and rushed away towards Makum. We chased the taxi in another car and caught the taxi with driver Khuka alias Naresh Chandra Das and one Sundar Singh Rajput after hot chase. The driver Khuka and Sunder Singh admitted that they were carrying opium in the taxi and Sundar Singh produced one gunny bag, on our way back containing 16 bundles of opium, weighed 8¾ seers from the water on the north side of the Trunk Road near Sukhanpukhuri. I therefore take up a case, against them under S. 9 (a), Opium Act."

It is contended on behalf of the prosecution that the investigation commenced on and from the point of time when the officer-in-charge recorded the so-called first information under S. 154, Criminal P. C. We are unable to accept this contention, specially in the facts and circumstances of the present case where the officer in charge himself was the informant. The salutary provisions like those contained in S. 162, Criminal P. C., cannot be allowed to be evaded in this way. The statement in this particular case must be taken to have been made in course of an investigation under Chap. 14, Criminal P. C., and it prima facie comes within the prohibition of S. 162, Criminal P. C. The question is how far this section is controlled by S. 27, Evidence Act, and how these two provisions in the two statutes mutually operate upon each other. There has been a good deal of divergence of judicial opinion as to the question how far S. 162, Criminal P. C., overrides the provisions of S. 27, Evidence Act. Before proceeding to notice this divergence of opinion it will be better to notice the history of the sections inasmuch as the majority of the Judges relied on this history in support of their views. The entire history of these provisions may roughly be divided into six periods:

1. In the Criminal Procedure Code of 1861 (Act 25 of 1861) Chap. 9 corresponded to Chap. 14 of the present Code. That Chap. 9 itself contained provisions corresponding to both S. 162, Criminal P. C.,

and Ss. 25 to 27, Evidence Act. Its Ss. 145 and 147 corresponded to S. 162 of the present Criminal Procedure Code. Its Ss. 148 to 150 corresponded respectively to Ss. 25 to 27, Evidence Act. Consequently, there the position was clear. The provision in S. 150 of the Code corresponding to that in S. 27, Evidence Act, controlled Ss. 145 and 147 of that Code which corresponded to S. 162 of the present Criminal Procedure Code. (a) This state of affairs continued till 1872.

2. In 1872 the Evidence Act (Act I of 1872) and the Criminal Procedure Code (Act 10 of 1872) were enacted, (though on different dates), both coming into force on 1st September 1872. (a) Provisions corresponding to those contained in Ss. 148 to 150, Criminal P. C., 1861, were enacted in the Evidence Act as its Ss. 25, 26 and 27. (b) But the provision contained in Ss. 145 and 147 of the Code of 1861 was retained in the Criminal Procedure Code of 1872 as its S. 119 and 121. This Criminal Procedure Code of 1872 did not contain any saving provision corresponding to that contained in S. 1 (2) of the present Criminal Procedure Code. The Evidence Act, on the other hand, contained a saving clause in its S. 2 which laid down :

"But nothing herein contained shall be deemed to affect any provision of any statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."

(c) The law stood thus up to 1882. It may be that by reason of S. 2, Evidence Act, the provisions in Ss. 25 to 27 of the Act could not affect the application of Ss. 119 and 121, Criminal P. C., 1872. Though not so pertinent for the present purpose it may be noticed here that the provisions in Ss. 119 and 121, Criminal P. C., were much narrower than those in S. 162 of the present Criminal Procedure Code.

3. In 1882 a new Criminal Procedure Code was enacted, being Act 10 of 1882. (a) In this Act S. 162 corresponded to Ss. 119 and 121 of the Code of 1872. This S. 162 ran as follows :

"No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing be signed by the person making it, or shall be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of S. 27, Evidence Act, 1872."

(b) In its S. 1 this Act also contained a saving provision corresponding to S. 1 (2) of the present Criminal Procedure Code. The section ran as follows:

"This Act extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law now in force, or shall apply to . . . . . ."

(c) It may be noticed here that the expression 'special law' was hitherto defined in the Criminal Procedure Code itself as meaning "a law applicable to a particular subject" (*vide* S. 4 of the Code of 1872). From this Act 10 of 1882 this definition was omitted and, instead, the definitions given in the Penal Code were adopted by its S. 4.

(d) This was roughly the state of law up to 1898. Remembering S. 2, Evidence Act, it seems that from 1872 to 1882 the provisions of the Evidence Act could not affect the provisions of the then Criminal Procedure Code. The Criminal Procedure Code of 1882 intended, it seems by express provision to extend the operation of S. 27, Evidence Act, to cases otherwise covered by S. 162, Criminal P. C. This necessity for express provision might have been felt because of the saving clause in S. 2, Evidence Act.

4. In 1898 the present Criminal Procedure Code was enacted (Act 5 of 1898). Section 1 (2) remained substantially the same as in the Code of 1882 for our present purpose. Section 162 ran as follows :

"No statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence :

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof ; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of S. 32, cl. (1) of the Indian Evidence Act, 1872."

5. The section stands in its present form after amendment by the Code of Criminal Procedure (Amendment) Act, 1923 (Act 18 of 1923), S. 34.

6. Section 2, Evidence Act is now repealed by the General Repealing Act of 1938 (Act 1 of 1938).

In my opinion no legitimate inference can be drawn from this history as to the question under consideration. The fact that the sections of the Evidence Act are sometimes expressly mentioned, and, sometimes not, does not render any assistance to the solution of the present problem. In 66 I. A. 66[1] the Judicial Committee noticed the two provisions and their possible mutual relations thus :

"In this case the words themselves declare the intention of the Legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on Ss. 25, 26 and 27, Evidence Act, 1872. Section 25 provides that no confession made to a police officer shall be proved against an accused. Section 26—No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. Section 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer so much of such information whether it amounts to a confession or not may be proved. It is said that to give S. 162 of the Code the construction contended for would be to repeal S. 27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that two sections can in some circumstances stand together. Section 162 is confined to statements made to a police officer in course of an investigation. Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e. g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by S. 162. Whether to give to S. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is

contemplated by S. 27 it does not seem necessary to decide.

In the present case the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of S. 162 are in their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore pro tanto repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27, Evidence Act, is a "special law" within the meaning of S. 1 (2), Criminal P. C., and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to S. 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on S. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under S. 164."

Since then different High Courts have been taking different views of the question expressly left open by the Judicial Committee in the above case. Thus a Full Bench of the Allahabad High Court has held that S. 27, Evidence Act, has been repealed pro tanto by S. 162, Criminal P. C.: *see* I. L. R. (1940) All. 396=A. I. R. 1940 All. 263[2]—Collister, Allsop and Braund JJ. (decided on 23rd February 1940). In this case there were three accused persons who were convicted on 18th August 1939 under S. 302, I.P.C. Their names were Baldeo, Lakhan and Tirmal. Evidence was admitted at the trial to the effect that Tirmal, while in the custody of the police, stated to the second officer that the knife with which he and the other two appellants had murdered the deceased was at his house and that he could give it to the Police Officer if he were taken to the house. It was in evidence that Tirmal was thereafter escorted to his house and he unearthed a knife from under a heap of straw. The knife had stains of blood on it which was subsequently found to be of human origin. The following question was referred to the Full Bench:

"What portion, if any, of the statement to the effect that "the knife with which he and Baldeo and Lakhan, had murdered Maharaj Singh was at his house under a heap of pyal" alleged to have been made by the appellant Tirmal, to the Sub-Inspector of Police, Rafiq Ahmad, is admissible in evidence under S. 27, Evidence Act."

It was held by the Full Bench that no part of the statement was admissible in evidence, it being hit by S. 162, Criminal P. C. This result was arrived at by the Full Bench on the construction of S. 1 (2), Criminal P. C. The learned Judges held that S. 162, Criminal P. C., contained a "specific provision to the contrary" within the meaning of S. 1 (2), Criminal P. C. From this as well as from the history of the section the learned Judges arrived at the conclusion that S. 27, Evidence Act, was repealed pro tanto by S. 162, Criminal P. C. Referring to the observations of the Judicial Committee in 66 I. A. 66[1] Collister J. observed:

"It was argued before their Lordships that to give S. 162, Criminal P. C., this construction would be to repeal S. 27, Evidence Act. In this connexion it was observed that the words of S. 162 '. . . . may therefore pro tanto repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27, Evidence Act, is a 'special law' within the meaning of S. 1 (2), Criminal P. C., and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on the topic, for whatever be the right view, it is necessary to give to S. 162 the full meaning indicated.'

Thus, it has now been authoritatively laid down that S. 162, Criminal P. C., excludes from evidence a statement made by a person who is subsequently put on his trial; and this will apply equally to a person who at the time is actually in custody of the police. It seems to me that this pronouncement of their Lordships creates a new situation in respect to S. 27, Evidence Act, at least so far as this High Court is concerned. In the light of that decision we have to determine the question which their Lordships mentioned but did not decide, namely whether S. 27, Evidence Act, is or is not saved from the application of S. 162, Criminal P. C., by S. 1 (2) of the Code, which enacts that:

'It (the Code) extends to the whole of British India; but in the absence of any specific provision to the contrary nothing herein contained shall affect any special or local law now in force . . .'

What we have to see, therefore, is whether a "special provision to the contrary" is or is not contained in S. 162.

It seems as if Collister J., proceeded on the footing that though the Judicial Committee did not decide the question whether S. 162, Criminal P. C., repealed pro tanto S. 27, Evidence Act, yet the observations made by their Lordships on the point should be taken as indicating the only possible way in which the mutual relations of the two sections can be determined. With due respect it seems to me that there is no reason why the scope of enquiry into the matter should be taken as thus narrowed down by the above observations of their Lordships of the Judicial Committee. The whole question was expressly left open by their Lordships and it would not, in my judgment, be a fair reading of the observations made by their Lordships if we take them as laying down that 'the words of S. 162, Criminal P. C., pro tanto repeal the provisions of S. 27, Evidence Act, unless S. 27, Evidence Act, is a special law within the meaning of S. 1 (2), Criminal P. C., and then unless S. 162 is not a specific provision to the contrary.' Dalip Singh J. in I.L.R. (1940) Lah. 242[3] seems to have taken the same view of the observations as Collister J. Collister J. found support of his view of the mutual relations between the two sections also in the history of the sections. His reasoning from the history seems to be this: In the Criminal Procedure Code of 1882 (Act 10 of 1882), it was enacted in S. 162 that:

"No statement other than a dying declaration made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of S. 27, Evidence Act, 1872."

Thus, under that section the provisions of S. 27, Evidence Act, were expressly saved. Section 1 of the Act of 1882 enacted that nothing in this Act should affect any special law in the absence of a specific provision to the contrary. Notwithstanding this the

2. ('40) 27 A.I.R. 1940 All. 263 : 188 I. C. 562 : 41 Cr. L. J. 627 : I. L. R. (1940) All. 396 : 1940 A. L. J. 241 (F.B.), Baldeo v. Emperor.

3. ('40) 27 A. I. R. 1940 Lah. 129 : 188 I. C. 498 : I.L.R. (1940) Lah. 242 : 41 Cr. L. J. 591 (F. B.), Hakam Khuda Yar v. Emperor.

a Legislature deemed it necessary to except S. 27, Evidence Act, in express terms in S. 162, Criminal P. C. This, according to the learned Judge, suggests that if there were no such express proviso, S. 27, Evidence Act, would have been affected by S. 162, Criminal P. C. Therefore, he concludes that either S. 27, Evidence Act, is not a special law, or in the Criminal Procedure Code (S. 162) there is a specific provision to the contrary affecting S. 27, Evidence Act. In the present S. 162, Criminal P. C., there are two references to the Evidence Act—Ss. 145 and 32 (1), Evidence Act. But for such provisos, therefore, the Evidence Act is affected by S. 162, Criminal P. C. Consequently, S. 27, Evidence Act, is affected by S. 162, Criminal P. C. Similarly, S. 157, Evidence Act, regarding corroboration is affected by S. 162, Criminal P. C. Coming next to the question whether there is any specific provision to the
b contrary within the meaning of S. 1 (2), Criminal P. C., the learned Judge says : Section 162, Criminal P. C., is intended to include statements by accused persons : 66 I. A. 66.[1] The logically inescapable conclusion according to the learned Judge is that S. 162, Criminal P. C., contains provisions plainly and directly, and therefore specifically affecting S. 27, Evidence Act, *quoad* statements made under that section by an accused person to a police officer in the course of an investigation. There is a specific provision to the contrary within the meaning of S. 1 (2), Criminal P. C.

According to Allsop J.:—The Evidence Act is special law dealing with the subject of the admissibility of evidence. Section 162, Criminal P. C., if it means anything at all, must mean that statements which would be admissible as evidence under the
c Evidence Act must be excluded if made to a police officer in the course of an investigation. The exceptions mentioned show that the Legislature had the provisions of the Evidence Act in mind. The proposition to be derived from the maxim *generalia specialibus non derogant* is the same as that set forth in S. 1 (2), Criminal P. C.

According to Braund J. :— Section 27, Evidence Act, is a "special law." Therefore, it would remain unaffected by S. 162, Criminal P. C., unless there is 'a specific provision to the contrary.' Section 162, Criminal P. C., contains a specific provision to the contrary—contrary to the provisions in S. 27, Evidence Act, and consequently, S. 27 is affected by S. 162, Criminal P. C.

The Lahore High Court has also taken the same view : *see* A.I.R. 1940 Lah. 129,[3] (Young C. J., Tek
d Chand, Dalip Singh, Monroe, Bhide, Din Mohammad and Ramlall JJ., decided on 8th March 1940 —Sessions Judge, 20th April 1939).

In this case Young C. J., observed : (1) the Judicial Committee have made it perfectly clear that the words of S. 162 are wide enough to exclude any confession made to a police officer whether a discovery is made or not, (i) unless S. 27, Evidence Act, is a special law within the meaning of S. 1 (2), Criminal P. C.; (ii) even if S. 27 be special law, it would be pro tanto repealed if S. 162 is a specific provision to the contrary. (2) It is unnecessary to consider whether S. 27, Evidence Act, is a 'special law' within the meaning of S. 1 (2), Criminal P. C. —a point not free from difficulty. (3) Section 162, Criminal P. C. is a 'specific provision to the contrary'. The learned Chief Justice also referred to the history of the sections and from that arrived at the conclusion that the Legislature intended to affect S. 27, Evidence Act, by S. 162, Criminal P. C.

According to Tek Chand J. — The whole of the Evidence Act is not special law as defined in S. 4 (2), e
Criminal P. C., read with S. 41, Penal Code. Section 27 contains the 'law on a particular subject' and is therefore 'special law' as so defined. The particular subject is the admissibility of information received from a person accused, etc. He refers to the comprehensive phraseology of the section (S. 162, Criminal P. C.) and says that this being the latest expression of the will of the Legislature must prevail—*leges posteriores priores contraries abrogant* —later laws abrogate the prior contrary ones; *generalia specialibus non derogant* — a later general law cannot be taken by implication to repeal an earlier special law.

Dalip Singh J., held that S. 162, Criminal P. C. does not override S. 27, Evidence Act. According to him 'it is always a question whether an Act or a particular section of the Act is a special law dealing with a particular subject or not by comparison with f
the law with which there is an apparent conflict'. The question is entirely relative. The question is not whether the Evidence Act is special law but whether S. 27 is special law. According to him it is not possible to hold that S. 162 is a specific provision to the contrary. The question 'whether S. 27 is to be regarded as the special law dealing with statements leading to discovery or whether S. 162 is to be regarded as special law excluding statements made to the police' is difficult of solution.

According to Bhide J. :— The Evidence Act is special law, so S. 27 is special law, being its part. Provision to the contrary means any provision of a general character which comes into conflict with another provision. The word 'specific' is stronger than "express". There is nothing in S. 162, Criminal P. C., to show that the attention of the Legislature was directed to the subject of 'discovery' g
which is dealt with in S. 27. Had there been any provision in the Criminal Procedure Code dealing with the procedure of the police relating to discovery made in consequence of information given by an accused person . . . the provision might have been held to be a 'specific provision' to the contrary. *Generalia specialibus non derogant.* Section 1 (2), Criminal P. C. governs the case and in view of it, S. 27 is not repealed either wholly or in part.

According to Din Mohammad J.—(1) Section 162, Criminal P. C., and S. 27, Evidence Act, so far as it relates to statements made to police officers cannot be reconciled. (2) Section 162, Criminal P. C., was enacted subsequent to S. 27, Evidence Act. (a) The later abrogates the former (Craies on Statute Law, p. 316). (3) The Evidence Act and S. 27 are not special law, the Evidence Act is a general Act, h
but being earlier is abrogated by S. 162, Criminal P. C. Though not necessary—(4) Section 162, Criminal P. C. is a "specific provision to the contrary." He also refers to S. 2, Evidence Act, which saves the provisions contained in other statutes from being affected by the provisions of the Evidence Act. The Bombay High Court, on the other hand, has taken a contrary view : *see* I. L. R. (1941) Bom. 333[4] (Sir John Beaumont C. J. and Sen J., 27-11-1940). Sir John Beaumont C. J. observed : "Section 1 (2), Criminal P. C., reads :

'In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force.'

(1) Most . . . of the learned Judges agree that S. 27, Evidence Act, is a special law in force at the date

4. ('41) 28 A. I. R. 1941 Bom. 146 : 194 I.C. 122 : 42 Cr. L. J. 519 : I. L. R. (1941) Bom. 333 : 43 Bom. L. R. 157, Emperor v. Biram Sardar.

of the passing of the amended S. 162 and that point seems to me beyond question. It is a law applicable to a particular subject within S. 41, Penal Code. (2) 'Specific provision to the contrary' requires much more than a prohibition expressed in the most clear and emphatic terms. (3) Section 1 (2) enacts a rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a . . . special law, the special law is to prevail in the absence of a specific provision to the contrary. But the provision must be to the contrary of the rule of construction, and not merely of the special law. The section presupposes a conflict and a conflict is none the less a conflict because it is clear for all to see. . . . 'Specific provision' is stronger than 'express provision.' . . . The language of the two sections is quite distinct and to a large extent the respective subject-matters are not identical."

He criticised the Lahore and Allahabad views so far as these were based on the history of the sections. Omission to save section 27 may have been due to a just appreciation by the Legislature of the true effect of section 1 (1) and to a reluctance to insert an unnecessary saving clause in respect of S. 27. The Madras High Court also takes the same view and holds that S. 27, Evidence Act, is not affected by S. 162, Criminal P. C.: *see* I.L.R. (1939) Mad. 947=A.I.R. 1939 Mad. 856[5]: Burn and Stodart JJ. (19-4-1939, Sessions Judge 10-2-1939). *See also* 51 Mad. 967;[6] 55 Mad. 903.[7] The Patna High Court follows the Madras view: *see* A. I. R. 1939 Pat. 577 = 18 Pat. 450[8] (Varma and Rowland JJ.—16-3-1939; Sessions Judge, 17-1-1939). According to Rowland J.: Section 27, Evidence Act, is a special law within the meaning of S. 1 (2), Criminal P. C., and is not specifically repealed by S. 162, Criminal P. C. The divergence of judicial opinion on the question may be summarised thus:

1. Whether S. 27, Evidence Act, is 'special law' within the meaning of S. 1 (2), Criminal P. C.: (a) Yes: I.L.R. (1941) Bom. 333,[4] I.L.R. (1939) Mad. 947,[5] 18 Pat. 450,[8] I. L. R. (1940) All. 396,[2] Per Allsop and Braund JJ., I. L. R. (1940) Lah. 242,[3] Per Tek Chand and Bhide JJ.; (b) No: I.L.R. (1940) Lah. 242,[3] Per Din Mohammad J.; (c) Doubtful: I.L.R. (1940) Lah. 242,[3] Per Dalip Singh J.

2. Whether S. 162, Criminal P. C., can be said to be a "specific provision to the contrary" within the meaning of S. 1 (2), Criminal P. C.: (a) Yes: I.L.R. (1940) All. 396,[2] Per Collister and Braund JJ., I. L. R. (1940) Lah. 242,[3] Per Young C. J. and Din Mohammad J.; (b) No: I.L.R. (1940) Lah. 242,[3] Per Dalip Singh J., I.L.R. (1941) Bom. 333.[4]

3. Whether by the rules of construction of the statutes, S. 162, Criminal P. C., controls *pro tanto* the provisions of S. 27, Evidence Act: (a) Yes: I. L. R. (1940) All. 396,[2] I. L. R. (1940) Lah. 242;[3] (b) No: I.LR. (1941) Bom. 333,[4] I.L.R. (1939) Mad. 947,[5] 18 Pat. 450.[8]

In our opinion: (1) The Judicial Committee in 66 I. A. 66[1] pointed out the comprehensive nature of S. 162, Criminal P. C. It must now be taken to have been settled that the language of S. 162, Criminal P. C., is wide enough to cover some of the cases coming within S. 27, Evidence Act: (2) The Judicial Committee completely left the question open as to how far the two sections mutually operate on each other: Their Lordships did not decide that S. 162, Criminal P. C., overrides pro tanto S. 27, Evidence Act, unless (a) section 27 is 'special law' (b) and then S. 162, Criminal P. C., is not a specific provision to the contrary, or in the other words, it is not correct to read the observations made by their Lordships as amounting to this: (1) Section 162, Criminal P. C., must be taken to override pro tanto the provisions of S. 27, Evidence Act, (a) if S. 27 is not 'special law' within the meaning of S. 1 (2), Criminal P. C.; (b) if S. 27, Evidence Act, is 'special law' within the meaning of S. 1 (2), Criminal P. C.; (i) then if S. 162 is 'a specific provision' contrary to the provision contained in S. 27. (2) Section 162, Criminal P. C., may not override S. 27, Evidence Act, only (i) if S. 27 is 'special law' and (ii) S. 162, Criminal P. C., is not specific provision contrary to the provision in S. 27, Evidence Act.

If this be the effect of the observations of the Judicial Committee in 66 I. A. 66[1] then the only questions left open by their Lordships would be (1) whether S. 27, Evidence Act, is 'special law' and (2) whether S. 162, Criminal P. C., is a specific provision contrary to the provision contained in S. 27, Evidence Act. In our opinion this is not the effect of the observations contained in 66 I.A. 66.[1] (3) The questions to be decided by us are: Whether the operation of S. 162, Criminal P. C., in the field covered by S. 27, Evidence Act, (i) is prevented by S. 1 (2), Criminal P. C., (ii) is prevented by any general rule of construction apart from that section, (iii) is prevented or attracted by S. 2, Evidence Act. In our opinion S. 1 (2), Criminal P. C., does not help the solution of the question. Section 1 (2), Criminal P. C., means to lay down (1) that nothing in the Code of Criminal Procedure shall affect any special of local law, (2) that the above saving provision shall be effective only 'in the absence of a specific provision to the contrary' i. e., only in the absence of a provision specifically withdrawing the saving.

In our opinion the words "in the absence of any specific provision to the contrary" in S. 1 (2), Criminal P. C., mean and contemplate a provision specific in affecting the special or local law. The section when analysed would stand thus: 1. Nothing herein contained shall affect any special or local law. . . . . 2. The above prohibition applies in the absence of a specific provision to the contrary—contrary to this prohibition; or in other words, 2. The special or local law shall be affected if there is any provision specifically providing for such affecting.

It seems clear that this specific provision to the contrary need not be in the Criminal Procedure Code itself. It may be in the special or local law also. We cannot read the words "in the absence of a specific provision to the contrary" in S. 1 (2), Criminal P. C., as referring to any possible contrariety between a specific provision in the present statute and a provision is a special statute. Even if S. 1 (2) be read in that way, in our opinion S. 162, Criminal P. C., shall not be a "specific provision to the contrary" i. e. contrary to the provision contained in S. 27, Evidence Act, as the two can certainly co-exist. Section 162, Criminal P. C., applies only to statements made (1) to the police and (2) in course of an investigation under Chap. 14, Criminal P. C. To this extent such statements though leading to discovery may not be

5. ('39) 26 A. I. R. 1939 Mad. 856 : 184 I. C. 593 : 41 Cr. L. J. 41 : I.L.R. (1939) Mad. 947 : (1939) 2 M.L.J. 455, In re Subbiah Tevar.
6. ('28) 15 A.I.R. 1928 Mad. 1028 : 112 I. C. 682 : 29 Cr. L. J. 1098 : 51 Mad. 967 : 55 M. L. J. 351 (FB), Chinna Thimmappa v. Talukunta Thimmappa.
7. ('32) 19 A. I. R. 1932 Mad. 391 : 137 I.C. 9 : 33 Cr.L.J. 418 : 55 Mad. 903 : 62 M. L. J. 742 (FB), In re Syamo Maha Patro.
8. ('39) 26 A.I.R. 1939 Pat 577 : 181 I.C. 1001 : 40 Cr.L.J. 625: 18 Pat. 450: 20 P.L.T. 420, Emperor v. Mayadhar Potha.

evidence and the operation of S. 27, Evidence Act, may be affected. But outside this limit there still remains a wide field left for the application of the section. In our opinion, in order that one provision can be said to be 'a specific provision to the contrary' it must completely cover the field of operation of the other and must lay down a contrary rule for the entire field so as altogether to nullify the other. That, however, is not the relative position of the provisions contained in S. 162, Criminal P. C., and S. 27, Evidence Act. In our opinion (1) the provision contained in S. 27, Evidence Act, is not 'special law' within the meaning of S. 1 (2), Criminal P. C. (2) Answer to the question whether or not a particular law is 'special law' depends upon in relation to which other law the question is asked.

In this particular case the Evidence Act gives the general rules of evidence, such rules being applicable to all proceedings, civil or criminal. The Criminal Procedure Code gives rules of procedure in criminal cases and may give rules of evidence also. Such rules will be 'special law,' special for the purpose of criminal cases only and special in relation to the general rules contained in the Evidence Act. Again, while giving the general rules, Ss. 24 to 30 deal with a special subject, viz., confessional statements. These are 'special laws' in relation to other more general provisions of the same statute. Sections 25 and 27 again give still more special rules, specially dealing with statements made to the police or made while in police custody. Section 162, Criminal P. C., also provides for such statements and is in one respect more general inasmuch as it extends to all statements whether made by the accused or anybody else, but in another respect much restricted and special, inasmuch as it applies only to statements made to the police officer and that again only when such statement is made in course of an investigation under Chap. 14 of the Code.

In our opinion, S. 27, Evidence Act, is not a 'special law' in relation to S. 162, Criminal P. C. Section 1 (2), Criminal P. C., therefore, does not stand in the way of S. 162, Criminal P. C., affecting S. 27, Evidence Act. But the question still remains which of the two provisions is to prevail. The answer to a question like this, again is dependent on another question, viz., 'for what purposes'? In the present case we are examining the question for the purpose of seeing whether a statement made to the police in course of an investigation under Chap. 14, Criminal P. C., can be used in evidence. Chapter 14 of the Code makes special provisions for every thing happening in course of this investigation including the rules of use of the materials coming into light as the result of that investigation. The chapter contains provisions empowering the police to require attendance of witnesses and to examine them, and then in S. 162 lays down to what extent and for what purposes a statement made to the police in course of the investigation can be used. The investigation itself is certainly expected to bring to light the complete chain of evidence fixing the crime on the real criminal and necessarily to lead to the discovery of inculpating facts. Yet the relevant section makes no saving or excepting proviso like the one contained in S. 27, Evidence Act.

Section 27, Evidence Act, no doubt makes a special provision for statements leading to discovery. But as has already been pointed out, this special provision applies to a much wider field. It is not limited in its operation, like S. 162, Criminal P. C., to a particular investigation. In my opinion this fact alone should suffice to allow S. 162, Criminal P. C., to override S. 27, Evidence Act. To this we may add that S. 27, Evidence Act, containing this general provision was already there when S. 162, Criminal P. C., was enacted providing for a special case of investigation and laying down how much of the fruit of this investigation can be used and for what purposes. In our opinion, the rule '*leges posteriores priores contrarias abrogant*'—when two statutes are contrary in matter, the latter abrogates the former—will apply to this case, and, to the extent indicated above, S. 162, Criminal P. C., will abrogate S. 27, Evidence Act. The Evidence Act itself certainly is not 'special' in relation to the rules of evidence contained in the Criminal Procedure Code for the purposes of criminal proceedings. For the reasons given above, we are of opinion that S. 27 of the Act, is also not 'special law' in relation to the rules regarding statements made in course of a particular class of investigation conducted under the special provisions of Chap. 14, Criminal P. C. The prior enactment here is not therefore 'special' and subsequent enactment, 'general' within the meaning of the maxim '*generalia specialibus non derogant*'. In our opinion in enacting S. 162, Criminal P. C., the Legislature has given its attention to the special subject of investigation by the police and statements made to them in course of such investigation and made provision for it. In enacting Chap. 14 the Legislature had in its consideration the special powers given to the police officers and consequently provided for special safeguards.

It may also be noticed here that the saving clause contained in S. 2, Evidence Act, also operated to prevent its S. 27, from affecting the provisions contained in the Criminal Procedure Code. The clause enacted "But nothing herein contained shall be deemed to affect any provision of any statute, Act or Regulation in force in any part of British India and not hereby expressly repealed." After the pronouncement of the Judicial Committee in 66 I. A. 66[1] it is now beyond dispute that without any saving provisions anywhere S. 27, Evidence Act, is in partial conflict with S. 162, Criminal P. C. Section 2, Evidence Act, would, therefore, have operated so as to withdraw S. 27 of the Act from the field of operation of S. 162, Criminal P. C. Section 2, Evidence Act, however, has now been repealed by Act 1 of 1938. As we have taken the view that even apart from any such saving clause in the Evidence Act its S. 27 is overridden by S. 162, Criminal P. C., it is not necessary for us to examine how this repeal affects the position. Even assuming that S. 27, Evidence Act, is unaffected by S. 162, Criminal P. C., the question still will be how far the alleged statement is admissible in evidence under S. 27, Evidence Act. In order to see the exact scope of this section it should be read along with Ss. 25 and 26 of the Act. Section 25 lays down:

"No confession made to a police officer shall be proved as against a person accused of any offence."

Section 26 enacts:

"No confession made by any person whilst he is in the custody of a police officer ..... shall be proved as against such person."

Then S. 27 provides as follows:

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

'Fact' is defined in S. 3, Evidence Act, to "mean" and include (1) anything, state of things, or relation

of things capable of being perceived by the senses; (2) . . . . . "

The requirements of S. 27 are:

(1) Some fact is deposed to (a) as discovered, (b) discovered in consequence of information, (c) information received from a person accused of any offence, (d) the person being in the custody of a police officer; (2) (a) the information is received as a matter of fact, (b) it is received from a person accused of any offence, (c) the person being in the custody of a police officer; (3) (a) some fact is discovered, (b) the fact is discovered by (i) the whole information, or (ii) a portion of the information; (4) that portion of the information is evidence (a) by which the fact is discovered, and (b) which relates distinctly to the fact discovered. What has been deposed to in the present case will appear from the depositions of the P. Ws. 1, 2, 4 and 5. It is clear from their evidence that the fact deposed to as discovered in this case is "a gunny bag containing opium at Sukanpukhuri under the water." It has been deposed in this case that the fact was discovered in consequence of information received from Sundar Singh a person accused of an offence and in the custody of a police officer. It has been found that some information was received from the accused in the custody of the police. The witnesses could not give the exact information received from the accused. The learned Sessions Judge found the information to be to the effect : "I had thrown the opium on the road side at Sukanpukhuri." According to the finding of the learned Additional Sessions Judge the fact discovered is "a gunny bag containing opium at Sukanpukhuri under water." According to the prosecution case this fact has been discovered (1) by the information received from the accused Naresh, followed (2) by information received from Sundar Singh and (3) by the conduct of Sundar Singh, viz., by his leading the police party to the place, pointing out the exact spot and bringing out the gunny bag.

Mr. Gupta contends that in view of this plurality of the causes of the discovery no fact can be said to have been discovered by or in consequence of the information received from Sundar Singh and consequently his alleged statement cannot be given in evidence under S. 27, Evidence Act. In our opinion the information received from Sundar Singh did not cease to be the information causing the discovery simply because such discovery was facilitated by other assistance as well. When a fact is once discovered in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. But the mere plurality of information received before discovery shall not necessarily take any of these informations out of the section. In a suitable case it is possible to ascribe to more than one accused the information which leads to the discovery. Assuming that in spite of the earlier information received from the other accused and the subsequent further assistance rendered by Sundar Singh, it was the information received from Sundar Singh by which the discovery can be said to have been made within the meaning of the section, it still remains to be seen by how much of the information this discovery was made. That much of the information alone will be evidence provided it satisfies the further requirement of being such as relates distinctly to the fact discovered. In our judgment the exact information received from the accused must be established before S. 27, Evidence Act, can be resorted to. This view is supported by I. L. R. (1937) Mad. 695[9] where it was pointed out that "statements made by an accused person which are or may be provable under S. 27, Evidence Act, should be clearly and carefully recorded by the police officer concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously, if what a man says is to be used in evidence his own words should be used and not a rendering into third person of the purport of the statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section."

The observations are indeed of much weight. Apart from any other consideration there is always the weakness of testimony to oral utterances. One's assertion of what another said is subject to a special weakness, viz., the risk of defective perception of words uttered orally. The specific features of weakness in such a case are : (1) the perception of the words may be imperfect, either by perceiving words differently from the reality, or by perceiving a part of them only; (2) the memory of them may be imperfect; (3) the narration of them may be different; (4) no data are available for determining which of these is the source of error and for checking possible error. Then there is the illusion of recollection which may confuse facts with conjecture. When a man's fate is made to depend upon a statement on the ground that it is his own statement, such a statement should be provable after excluding as much as practicable all such possible sources of error.

In order to apply the section it is necessary to know exactly what the statements were; because they are admissible only in so far as they lead to the discovery of the fact and no further: A.I.R. 1930 Bom. 244[10] at p. 248. Section 27 must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safeguard provided in S. 27 are not rendered nugatory by a lax interpretation: 34 C. W. N. 106.[11] The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information : 10 Pat. 153[12] and A.I.R. 1936 Nag. 23.[13] Section 27 is enacted as an excepting or qualifying rule of evidence, being framed as a proviso upon the preceding Ss. 25 and 26. One cannot fail to discern the evil or mischief which it is the intention of the Legislature to meet by enacting Ss. 25 and 26, Evidence Act. Section 27 contemplates data which refute the possible discrediting circumstances in view of which Ss. 25 and 26 are enacted, by supplying material corroboration

9. ('37) 24 A. I. R. 1937 Mad. 618: 171 I. C. 245: 38 C. L. J. 1027: I. L. R. (1937) Mad. 695: (1937) 2 M. L. J. 60 (F. B.), Athappa Goundan v. Emperor.
10. ('30) 17 A.I.R. 1930 Bom. 244 : 126 I. C. 876 : 31 Cr. L. J. 1104 ; 32 Bom. L. R. 574, Emperor v. Shivputraya.
11. ('30) 17 A.I.R. 1930 Cal. 291 : 125 I. C. 733 : 57 Cal. 1062 : 34 C. W. N. 106, Supdt. and Remembrancer of Legal Affairs v. Bhajoo.
12. ('31) 18 A.I.R. 1931 Pat. 145 : 131 I. C. 797 : 32 Cr. L. J. 792 : 10 Pat. 153 : 12 P. L. T. 481, Sonaram Mahton v. Emperor.
13. ('36) 23 A.I.R. 1936 Nag. 23 : 161 I. C. 8 : 37 Cr. L. J. 460 : 31 N. L. R. 256, Phulua v. Emperor.

a in the facts discovered. The principle upon which the rejection of confession made by an accused person to a police officer or whilst he is in the custody of a police officer is founded is that a confession thus made or obtained is untrustworthy. If circumstances, however appear, which rebut the presumption of its being false and demonstrate its truth, the confession should be allowed. When in consequence of information furnished by the accused, a fact is discovered, then the discovery of that fact supplies a guarantee of the truth of the information which may amount to a confession. The confession in so far as it is confirmed by the discovery should be deemed to be true.

This, no doubt, is the rationale of the exception enacted by S. 27, but its exact scope must depend upon the actual language employed by the Legislature. It has often been pointed out by the Judicial b Committee that "where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded:" 55 I. A. 18.[14] There seems to be little difficulty in stating the meaning of the words used in S. 27. The real difficulty lies in applying them to the facts of a particular case, and the great divergence of judicial opinion that has arisen on this section really relates to this question of its application to a concrete case. Thus, in 56 Bom. 172[15] (Sir John Beaumont C. J. and Broomfield J.): the prosecution relied upon the evidence of Panch witness who stated, among other things, the following:

c "Every accused except No. 1 first gave us information that he would point out the place where his share of the property stolen in the Dahivadi dacoity case was buried and offered to produce the same. On that information we followed them to the several places. Properties were discovered in the places where he said it would be found."

It has held that only part of the statements which could be admitted under S. 27, Evidence Act, was a statement that they would point out the places where the property was buried. The word "his share of the property" and the words "stolen in the Dahivadi dacoity" must be excluded on the ground that they were not necessarily connected with and did not distinctly relate to the discovery of the property. Beaumont C. J. observed:

d "When the Judge gets the evidence of information he must before he records it as evidence or leaves it to the jury, divide the sentence into what are really its component parts, and only admit that part which had led to the discovery of the particular fact, namely the hidden property. I think the Judge must have regard to the fact that the information expressed as it is in a single sentence really involves, first, an admission that there was a dacoity secondly, an admission that the accused took part in it, thirdly, an admission that he got part of the property, and fourthly, a statement as to where the property is. The first three parts of the dissected sentence are not admissible in evidence, but the fourth part is. That seems to me to be the effect of Ss. 25 and 27 read together and I think that such a construction is justified by the decision of a Full Bench of this Court in 14 Bom. 260.[16]" e

Similarly, in 10 Lah. 283,[17] the accused was being tried for the murder of a boy who was wearing certain ornaments at the time of his disappearance, but the ornaments were not found on his corpse when it was recovered from a well. At the trial the Sub-Inspector of police deposed to the fact that in consequence of information received from the accused he had recovered from one Allah Din silver karas which were proved to be the karas which the boy was wearing when he was last seen alive. The Sub-Inspector stated that the prisoner had, during the investigation, made the following statement: "I had removed the karas, had pushed the boy into the well, and had pledged the karas with Allah Din." The question was whether any portion of this statement and if so, which portion, was admissible in evidence under S. 27, Evidence Act. f Shadi Lal C. J., observed that the fact discovered in this case was, not "the karas" simpliciter, but "the karas being found in the possession of Allah Din." The information to be admitted must relate distinctly, not to the karas, but to the karas in relation to their possession by Allah Din. According to him "the language of S. 27, when analyzed, shows that the Legislature has prescribed the following two limitations in order to define the scope of the information provable against the accused:

(1) the information must be such as has caused the discovery of the fact. This condition follows from the phrase "discovered in consequence of information" and also from the expression "thereby discovered" used by the Legislature with reference to the fact. In other words, the fact must be the consequence, and the information the cause of its g discovery. The information and the fact should be connected with each other as cause and effect. If any portion of information does not satisfy this test, it should be excluded;

(2) the information must 'relate distinctly' to the fact discovered. The word 'relate' means to "have reference" or 'to connect' and the word "distinctly" means clearly, unmistakably, decidedly or indubitably. To put it in a different language, the information must be clearly connected with the fact."

It was held in this case by the majority of the Full Bench including the learned Chief Justice that the statement that the accused had pledged with Allah Din the karas subsequently recovered from the latter is admissible under S. 27, Evidence Act, but the rest of the incriminating statement cannot be received in evidence. The statement that the accused removed the karas from the boy is also h inadmissible as this information cannot be regarded as the immediate cause of the discovery. The removal is not the proximate cause of the ornaments being found in the possession of Allah Din. Again in 22 C. W. N. 213,[18] it was held that under S. 27 so much of the information as relates distinctly to the fact thereby discovered may only be proved. Even if a single statement contains more information than what is necessary for the discovery, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is

14. ('28) 15 A.I.R. 1928 P. C. 2 : 107 I. C. 14 : 55 I. A. 18 : 7 Pat. 221 (P.C.), Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.
15. ('32) 19 A.I.R. 1932 Bom. 286 : 137 I. C. 174 : 33 Cr. L. J. 396 : 56 Bom. 172 : 34 Bom. L. R. 303, Ganu Chandra v. Emperor.
16. ('90) 14 Bom. 260 (F.B.), Queen-Empress v. Nana.
17. ('29) 16 A.I.R. 1929 Lah. 344 : 115 I. C. 6 : 30 Cr. L. J. 414 : 10 Lah. 283 : 30 P. L. R. 197 (F.B.), Sukhan v. Emperor.
18. ('18) 5 A.I.R. 1918 Cal. 88 : 44 I. C. 321 : 19 Cr. L. J. 305 : 45 Cal. 557 : 27 C. L. J. 148 : 22 C. W. N. 213, Amiruddin Ahmad v. Emperor.

the particular information given by the statement which led to the discovery. In our opinion the word 'thereby' in "fact thereby discovered" refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order thus to be admissible against the accused under S. 27; (1) the information must be the one given by the accused the statement conveying the information must be his own statement in his own language and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible. The Madras High Court, however, has adopted a somewhat extended meaning of this section. Thus, in I.L.R. (1937) Mad. 695[9] the following question was referred to the Full Bench.

Is the whole or any part of the following statement, "He said that about 11 P.M. on the night of 26th March 1936 himself and Gurunath Goundan, son of Kanda Goundan of Eran Gattur, together killed Senni Malai Goundan .... by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it .... that night .... they got two bottles of illicit arak by paying Rs. 2 to Gandhiranga Royan of Kallippatti who got it from some other place ... that a small quantity was left over in one bottle only, that .... (they) buried, (1) the empty bottle, (2) a rope and the cloth gag in a dunghill next to the cattle shed in the same compound and the other bottle with some arak in a heap of mud near a log of wood in a corner of the compound east to the Choultry at Kallipatti and that he would go and take them and produce them. This is known to us," alleged to have been made by accused 1 admissible against accused 1 under S. 27, Evidence Act, and if yes, how much of it.

The Full Bench practically held that the whole of the statement was admissible under S. 27, Evidence Act. In arriving at this decision Beasley, C. J. observed :

"The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged and not of anything else. Before the statement is given in evidence it must be shown that the fact discovered is a relevant fact and the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of a murder just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence aliunde and it can be made relevant by the statement of the accused itself. Suppose there is no evidence aliunde, what warrant is there for saying that part of the statement of the accused that makes it relevant must be excluded because it amounts to a confession? Is there any warrant for garbling the statement in order to make it innocuous to the accused and in the process causing it to be irrelevant and consequently inadmissible in evidence."

With due respect I feel some difficulty in following the exact force of these observations. If evidence is needed to make the fact discovered relevant it is for the prosecution to supply that evidence, and for this purpose the confessional statement to the police cannot be utilised because of the provisions of Ss. 25 and 26, Evidence Act. If any part of the statement is of some consequence in order to serve the purpose of connecting the fact discovered with the offence and not as cause of the discovery it is difficult to see why it is observed that there is no warrant for saying that that part of the statement is not admissible in evidence. Sections 25 and 26 clearly warrant this prohibition. If the prosecution cannot bring in any evidence aliunde connecting the fact discovered with the offence, the prosecution may have to fail. From this it does not necessarily follow that the statement of the accused shall have to prevent this disaster. Section 27, Evidence Act, does not say that so much of the information as is necessary to make the fact discovered relevant shall also be proved. I must confess I cannot read any such provision into the section as it now stands. Later on the learned Chief Justice says :

"It is undisputed that the information must set the police in motion, because it is in consequence of it that the discovery is made. Would the police be set in motion merely by the statement of the accused that he threw a bichuva into the back room of his hut if there is no evidence that it is the instrument of the crime ? If there is no evidence aliunde, then the police will not be set in motion unless the fact discovered is connected with the case under investigation and if it is the accused's statement which connects the fact discovered with the offence and makes it relevant, then even though that statement amounts to a confession of the offence, it must be admitted because it is that, that has led directly to the discovery of the fact."

With due respect I feel some difficulty in following the reasons given in the above passage. I do not know exactly whether the police would be set in motion merely by the statement of the accused that he threw a bichuva into the back room of his hut if there is no evidence that it is the instrument of the crime. Perhaps the police would not. To justify this surmise of police in action I would only quote a passage from the judgment of Straight C. J. in 6 All. 509[19] where the learned Chief Justice observed :

"My experience in this Court has conclusively satisfied my mind of two things : first, that in almost every case of serious gravity or difficulty, the primary object towards which police direct their attention and energies is, if possible, to secure a confession: secondly, that such confession if subsequently retracted, is, as an item of judicial proof, unless corroborated by strong and independent evidence, positively worthless. It requires no very vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly paid police officials are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. But, as I have more than once been constrained to remark from this Bench, the effect of this sanction given by S. 164, Criminal P. C., to a Magistrate recording in the course of the investigation the confessions of accused persons thus obtained not from the hands of the police, is not so beneficial to the elucidation of guilt as is supposed, for it continually happens that, while the police have been occupying themselves in getting the confession many of the traces of the crime, which, if at once followed up, would have produced valuable proof, have disappeared. To repeat a phrase

19. ('84) 6 All. 509 : 1884 A. W. N. 229 (F. B.), Queen v. Babulal.

I used on a former occasion, instead of working up to the confession, they work down from it."

The police, inclined to make a short cut to the elucidation of a difficult case, may not move. But an investigating police should perhaps be set in motion on an information which may lead to a discovery supplying some possible clue to further discovery. In any case, even assuming that for the purposes of the investigation the police would require more evidence or information before taking any move in the matter, it does not follow that such information therefore comes within the requirement of S. 27, Evidence Act. The police officer might require more. But eliminating all personal equations of the investigating police, the discovery itself might not require any further information and S. 27, Evidence Act, only allows so much of the information to be given in evidence as would suffice for the discovery itself and for nothing else. We have already noticed the principle underlying Ss. 25 and 26, Evidence Act. The possible discrediting circumstances which the Legislature seems to have had in view in enacting these sections should not altogether be lost sight of in construing these provisions. Corroboration by discovery no doubt offers some data which to a certain extent go to refute the discrediting circumstances in the particular case. But simply because a portion of the alleged statement finds corroboration in the discovery it does not follow that the other portion is also true and the reason why a statement to the police is excluded from evidence still applies to that other portion. To this if we add the natural desire of an investigating police, the risk of extending the scope of S. 27 at once becomes patent.

For the discovery of the fact in the present case the information that "the gunny bag containing opium was thrown from the car into Sukanpukhur" is sufficient. The discovery, therefore, can be said to have been made by this much of the information alone. The information as to who threw the bag is superfluous for the purposes of the discovery. In my judgment that portion of the information which was necessary for the discovery can alone be said to have caused the discovery. Certainly it also relates distinctly to the fact discovered. The other portion of the information, viz., who was the author of the act of throwing, may be said to relate to the fact discovered, but does not satisfy the requirement of having caused the discovery. In our judgment, therefore, that portion of the alleged statement which purports to ascribe the authorship of the "act of throwing" to the accused himself is not admissible in evidence under S. 27, Evidence Act. The admissible portion of the information must, therefore, be to the effect that "gunny bag was thrown into Sukhanpukhuri." Excepting the alleged statement by the accused there is no other evidence on record to show that the accused ever had any control over the bag in question. Other evidence on record along with the admissible portion of the information, if it is admissible at all, does not establish possession of the accused. In our opinion, however, no portion of the alleged statement is admissible in evidence in this case, it being hit by S. 162, Criminal P. C. In the result, this rule is made absolute. The conviction of the accused and the sentence passed are set aside, and the accused is directed to be set free. Our order will not in any way affect the order of confiscation of the opium made by the learned Magistrate.

LODGE J. — I agree with my learned brother that these two rules must be made absolute and the two petitioners acquitted. I agree also with the view expressed in his judgment that the effect of S. 162, Criminal P. C., is that S. 27, Evidence Act, is pro tanto repealed. I am unable however to agree with my learned brother as to the very limited scope which he assigns to S. 27, Evidence Act, when that section is applicable. In the present case it is not, strictly speaking, necessary to decide what is the scope of S. 27, Evidence Act. If it were necessary to decide this question I should be inclined to hold that if evidence were given that the accused stated 'I threw the opium into the spot' the whole of that statement would be admissible under S. 27, Evidence Act.

K.S./R.K. *Rules made absolute.*

A. I. R. (29) 1942 Calcutta 606

R. C. MITTER AND MOHAMAD AKRAM JJ.

Balchand Prohit — Appellant

v.

Sir Bejoychand Mahtab Maharajadhiraj of Burdwan — Respondent.

Letters Patent Appeals Nos. 3 and 4 of 1938, Decided on 21st August 1941, against judgment of S. K. Ghose J. in Appeals Nos. 365 and 387 of 1936, D/- 23rd June 1937.

(a) Letters Patent (Calcutta), Cl. 15 — Leave to appeal can be given ex parte.

Leave to appeal under Cl. 15 can be given ex parte. [P 607c]

C. P. C. —

('40) Chitaley, Let. Pat. Clause 15 Notes 11, 18.

('41) Mulla, Page 1408 Note "Declares that the case is a fit one for appeal."

(b) Letters Patent (Calcutta), Cl. 15—Single Judge of High Court hearing second appeal cannot entertain application for extension of time under section 5, Limitation Act for filing Letters Patent appeal — That is a matter for Division Bench constituted by Chief Justice.

A High Court Judge who hears a second appeal sitting singly has no jurisdiction to entertain an application under S. 5, Limitation Act, for the extension of the period of limitation for filing Letters Patent appeals. That is a matter for the Division Bench that may be constituted by the Chief Justice for the purpose of hearing Letters Patent appeals, and if there is no such Bench constituted, it would be for the Chief Justice to constitute a Division Bench to deal with the application for extension of time. [P 607d]

C. P. C. —

('40) Chitaley, Let. Pat. Cl. 15 N. 18.

(c) Letters Patent (Calcutta), Cl. 15—Application under S. 5, Limitation Act, for extending time for filing Letters Patent appeal under Cl. 15 — Order granting application without giving respondent opportunity to be heard is irregular.

An order granting an application under S. 5, Limitation Act, for extending the period of limitation for filing Letters Patent appeal under Cl. 15 without giving the respondent an opportunity to present his case with regard to the prayer of the appellant for extension of the period of limitation, is irregular. [P 607d,e]

C. P. C. —

('40) Chitaley, Let. Pat. Cl. 15 N. 15.

Jatindra Mohan Chaudhuri, Gopendra Nath Das and Sanat Kumar Chatterjee — for Appellant.

Sarat Kumar Mitra and Gopesh Chandra Chatterjee — for Respondent.

R. C. MITTER J. — These two appeals are on behalf of the defendant in a suit for ejectment. It is not necessary for us to enter into the merits of the appeals because of a preliminary point raised by the respondent's Advocate Mr. Mitra, which preliminary point we consider to be a sound one. The judgment in the second miscellaneous appeals to this Court was delivered by S. K. Ghose J. on 23rd June 1937. The memoranda of appeals filed under Cl. 15 of the Letters Patent were actually lodged in this Court on 17th February, 1938. Prima facie the appeals are barred by time. The last date for preferring the appeals expired on 23rd July 1937. It appears that when S. K. Ghose J. delivered his judgment there was no prayer made to him for leave to file appeals under the Letters Patent. An application for review of judgment was filed on 2nd November 1937. It was summarily rejected. Later on in the beginning of the year 1938, an application was put in by the appellant in person praying for leave to file appeals under Cl. 15 of the Letters Patent. As time for appealing under the Letters Patent had long passed a prayer was made under S. 5, Limitation Act, for extension of the period for filing the appeals. That application was moved before S. K. Ghose J. on 21st January 1938. No notice of the said application was given to the respondent, although by reason of the lapse of time he had acquired a valuable right. On the said date S. K. Ghose J. made an ex parte order which runs as follows :

"Leave is given to the petitioner to appeal under Cl. 15 of the Letters Patent read with S. 5, Limitation Act."

So far as the matter of leave is concerned, it could have been given ex parte, but according to our reading of this order Ghose J. also extended the period of limitation for filing Letters Patent appeals under S. 5, Limitation Act, without giving the respondent an opportunity to be heard on the point as to whether it was a fit case in which extension of the period of limitation should be granted or not. The memoranda of appeals were, however, not presented on 21st January 1938. They were presented on 17th February 1938, and on that date also another ex parte order was passed, ex parte in the sense without giving any opportunity to the respondent to oppose the said application. The order was in these terms :

"Petitioner in person. The petitioner is permitted to file the Letters Patent appeals to-day. Let the appeals be registered."

We have grave doubts as to whether the learned Judge who heard the second miscellaneous appeals sitting singly had any jurisdiction to entertain an application for the extension of the period of limitation for filing Letters Patent appeals. Our present view is that that would be a matter for the Division Bench that may be constituted by the Chief Justice for the purpose of hearing Letters Patent appeals, and if there was no such bench then constituted, it would be for the Chief Justice to constitute a Division Bench to deal with the application for extension of time. But we do not propose to rest our decision on this view. In this case the orders passed by Ghose J. on 21st January 1938, and 17th February 1938, are irregular orders, for no opportunity was given to the respondent to present his case with regard to the prayer of the appellant for extension of the period of limitation. Those orders must be vacated. The position, therefore, is that there is still the application under S. 5, Limitation Act, pending. If there had been any prima facie case made therein for extension of the period of limitation we would have directed the appellant to give notice of this application to the respondent's advocate in order to enable him to meet the allegations made in that application which were made grounds for extension of the period of limitation. But on reading that petition, even if the allegations made therein be established, they would not be sufficient for the purpose of extending the period of limitation. Even if the period during which the application for review was pending was excluded in computing the period of limitation, the appeals would still be hopelessly out of time. The only other allegation made is in para. 6 of the petition which says :

"That the petitioner being a petty clerk in service at Kurseong and with a view that his heavy grievance may get a proper redress if the case which is badly confused is comprehended by the Court beg to approach that the following records of the case be called for interest of justice. The petitioner is willing to pay any deficiency of court-fee and to comply with any orders made for him on being informed to that effect."

Then he mentions the documents which he required. There is no suggestion there that by reason of his poverty he was unable to procure the necessary court-fees which would be required on the memoranda of appeals. The allegations which he made therein although not couched in proper terms, were allegations which he made in support of his prayer for calling for further records. We accordingly uphold the preliminary point raised by the respondent's advocate and dismiss these two appeals on the ground that they are barred by time. We make no order for costs.

MOHAMAD AKRAM J.—I agree.

G.N./R.K. *Appeals dismissed.*

A. I. R. (29) 1942 Calcutta 607

BISWAS J.

Nagendra Chandra Lahiri and others — *Appellants*

v.

Probhat Chandra Deb and others — *Respondents.*

Appeal No. 1049 of 1939, Decided on 3rd March 1942, from appellate decree of Special Judge, Rangpur, D/- 22nd February 1939.

(a) Bengal Tenancy Act (8 of 1885, as amended by Act 6 of 1938), S. 75A—Proceedings under Chap. 10 for settlement of fair rent—Enhancement of rent is enhancement within S. 75A.

Enhancement of rent in proceedings for settlement of fair and equitable rents under Chap. 10 of the Act must be regarded as enhancement of rent in accordance with the provisions of the Act within the meaning of S. 75A. [P 608*h*]

(b) Interpretation of statutes—Principle that general cannot derogate from special is not in conflict with but recognises rule that earlier enactment must give place to later if inconsistent therewith — Implied repeal is never to be favoured — Earlier and later enactments so inconsistent that they cannot stand together

and effect cannot be given to both at same time —There must be implied repeal of earlier Act.

Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, the earlier and special legislation cannot be held to have been indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so: (1885) 10 A. C. 59 and (1861) 30 L. J. Ch. 777, *Rel. on.* [P 609*a*]

The above-mentioned rule that the general cannot derogate from the special is not only not in conflict with, but clearly recognises the existence of another rule of construction, equally well settled, that an earlier enactment must give place to a later, if inconsistent therewith. Repeal by implication is never to be favoured: it may be the necessary consequence of inconsistent legislation whenever it occurs, but must not be imputed to the legislature unless absolutely necessary. Where, however, the provisions of the later Act are so inconsistent with or repugnant to those of the earlier that the two cannot stand together, and effect cannot be given to both at the same time there must be of necessity an implied repeal of the provisions of the earlier Act: (1882) 9 Q. B. D. 151 and (1864) Bro. and L. 221, *Rel. on.* [P 609*c*,*d*]

C.P.C. —

('40) Chitaley, Preamble N. 7 Pts. 28 to 29b.

(c) Bengal Tenancy Act (8 of 1885, as amended by Act 6 of 1938), Ss. 75A and 110—Section 110 is subject to provisions of S. 75A.

Treating S. 110 as a special provision as to when a rent enhanced under Chap. 10 is to take effect, and S. 75A as a general enactment postponing the operation of all enhancements under the Act, the former must still be held to be subject to the provisions of the latter. In enacting under S. 75A that all the provisions of the Act relating to enhancement shall be suspended for a specified period, and that all decrees and orders for enhancement passed under any of those provisions shall be inoperative for such period, the legislature did in fact more than indicate a clear intention to affect all pre-existing provisions like those contained in S. 110 laying down or contemplating a different period for enhanced rents to come into force. [P 609*f*]

(d) Bengal Tenancy Act (8 of 1885, as amended by Act 6 of 1938), S. 75A — Section 75A coming into operation from 27th August 1937— Order for enhancement to take effect after ten years referred to in S. 75A (1) passed on 26th August 1937 is without jurisdiction *(Obiter)*.

Since S. 75A was made retrospective in operation with effect from 27th August 1937 an order for enhancement even though it was to take effect after the expiry of the 10 years' period referred to in S. 75A (1), passed on 26th August 1937 must be taken to be without jurisdiction, the power to enhance being non-existent on the date of the order. [P 609*g*]

(e) Bengal Tenancy Act (8 of 1885), S. 7 (3) — Computation of fair rent under S. 7 (3)— Question of allowance for collection charges or for profits of tenure holders is one of fact and cannot be interfered with in second appeal.

The question as to the proper allowance to be made for collection charges or for the profits of the tenure-holders in computing the fair and equitable rent under S. 7 (3) is a question of fact, which cannot be interfered with in second appeal. [P 609*h*]

Surajit Lahiri and Benoy Krishna Mookerjee —for Appellants.

JUDGMENT. — This is an appeal against the decision of the Special Judge of Rangpur, modifying that of the Assistant Settlement Officer, Gaibandha, in a proceeding under S. 105, Ben. Ten. Act. The plaintiff-appellants had applied for settlement of fair and equitable rent in respect of a tenure. The A. S. O's order shows that the matter had already once come up before the Special Judge, when he found that the rent was liable to enhancement, and he remanded the case in order that the enhancement might be determined under S. 7, Ben. Ten. Act. That gave rise to the further proceeding out of which the present appeal has arisen.

In the record of rights the existing rent was recorded as Rs. 258 per year, which the A. S. O. considered too low. He found the gross assets were Rs. 921-9-7 and deducting 15% thereof as collection charges, and allowing 60% of the balance as profit to the tenure-holders, he settled the fair rent at 40% of the net assets. He further directed that the enhancement was to take effect from 1st Baisakh, 1355 B. S. (April 1948). This order was made presumably under the new S. 75A which had just come into force. Against this decision, the plaintiffs took an appeal to the Special Judge both as regards the enhancement granted and the date from which it was to take effect. As to the first point, the Special Judge reduced the tenure-holders' profit to 40%, and assessed the fair rent at 60% of the net assets. On the other point, he upheld the order of the A. S. O. The only question argued on the present appeal is as to the effect of S. 75A. It is contended, in the first place, that settlement of a fair and equitable rent under Chap. 10, Ben. Ten. Act, is not enhancement of rent within the meaning of S. 75A, and secondly, that S. 75A being in the nature of a general provision, it cannot control the special provision contained in S. 110 as regards the date from which a rent settled under Chap. 10 is to take effect. In my opinion, both these contentions must be overruled.

As regards the first point, it will be seen that S. 105, sub-s. (4) expressly provides that in settling rents under this section, the Revenue Officer shall have regard to the rules laid down in the Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be. There is a similar provision in S. 104D for cases where a settlement of land revenue is being or is about to be made. This presupposes that in settling rents under Chap. 10, whether under Part 2 or under Part 3, the Revenue Officer has the power to alter the rents as recorded in the finally published record of rights either by enhancing or by reducing the same. This is in fact distinctly recognised under Part 2 in S. 104A, sub-s. (1), cl. (d), the proviso to the section making express reference to the provisions of the Act regarding enhancement, such as Ss. 6 to 9 (for tenure-holders), Ss. 27 to 36 (for occupancy raiyats) and S. 43 (for non-occupancy raiyats) besides Ss. 50 to 52 (alteration of rent for alteration in area). I do not see, therefore, why enhancement of rent in proceedings for settlement of rents should not be regarded as enhancement in accordance with the provisions of the Act within the meaning of S. 75A. Section 75A is quite general in its terms, and to limit its scope and effect in the way suggested would indeed be to defeat the express purpose of this provision. In my opinion, the first point raised on behalf of the appellants must, therefore, fail.

In support of the other point, namely, that Section 75A, though enacted later, cannot override the provisions of S. 110, Mr. Lahiri relies on the principle embodied in the well known maxim *generalia specialibus non derogant*, the general cannot derogate from the special, or as Lord Selborne put it in (1885) 10 A. C. 59[1] at p. 68:

"Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

It is said that S. 110, Ben. Ten. Act, which has been there from before the introduction of S. 75A under the amendment of 1938, is a special provision made by the Legislature as to the date from which rents settled under Chap. 10 (including enhancements) are to take effect, and that it cannot, therefore, be affected by the later legislation which only enacts a general suspension of all enhancements for a period of ten years. The reason of the rule is clear, and was thus stated by Wood, V. C. in (1861) 30 L. J. Ch. 777[2] at p. 782 :

"In passing the special Act the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case, and having done so, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated."

As any standard book on the interpretation of statutes will show, the principle has been re-affirmed in numerous cases, and may be taken as firmly established. It will be seen, however, that the rule as laid down is not only not in conflict with, but clearly recognises the existence of another rule of construction, equally well settled, which is expressed by the maxim *leges posteriores priores contrarias abrogant*, an earlier enactment must give place to a later, if inconsistent therewith. This follows in fact from the undoubted authority which exists in the legislature to change, modify or abrogate an existing law. The only question is, where there are no express words of repeal, whether there is such a contrariety or repugnance between the two enactments that an intention to repeal cannot but be implied. It is quite true, as pointed out in (1882) 9 Q. B. D. 151[3] at page 158, repeal by implication is never to be favoured : it may be the necessary consequence of inconsistent legislation whenever it occurs, but must not be imputed to the legislature unless absolutely necessary. Where, however, the provisions of the later Act are so inconsistent with or repugnant to those of the earlier that the two cannot stand together, and effect cannot be given to both at the same time, there must, I think, be of necessity an implied repeal. It is not necessary to multiply authorities, but I shall content myself with one quotation which puts the matter quite clearly:

"What words will constitute a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so, on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent statute; perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes that according to all ordinary reasoning the particular provision in the prior statute could not have been intended to subsist, and yet if it were subsisting no palpable absurdity would be occasioned." (1864) Bro. & L. 221 (224)=33 L. J. Ad. 193 (193-194)[4].

Applying these tests in the present case, it cannot in my opinion be doubted that treating S. 110, Bengal Tenancy Act, as a special provision as to when a rent enhanced under Ch. 10 is to take effect, and S. 75A as a general enactment postponing the operation of all enhancements under the Act, the former must still be held to be subject to the provisions of the latter. In enacting that all the provisions of the Act relating to enhancement shall be suspended for a specified period, and that all decrees and orders for enhancement passed under any of these provisions shall be inoperative for such period, the Legislature did in fact more than indicate a clear intention to affect all pre-existing provisions like those contained in S. 110 laying down or contemplating a different period for enhanced rents to come into force. This is not a case where the subsequent general enactment may be taken to have excluded from its operation the special provisions in the earlier legislation. To hold that S. 75A must be read subject to S. 110 would, in my opinion, be to defeat the object of the new provision. The second point urged on behalf of the appellants must consequently be also overruled.

In one sense it may be held that the A. S. O. had no jurisdiction in this case to make any order for enhancement, even though it was to take effect from after the expiry of the ten years' period referred to in sub-s. (1) of S. 75A. The order was made on 26th August 1938, and by virtue of the provisions of this section which were expressly made retrospective in operation with effect from 27th August 1937, the power to enhance must be deemed to have been non-existent on the date of the order. It is not necessary, however, to express any final opinion on this point. As regards the rate of enhancement granted, Mr. Lahiri recognised that the question as to the proper allowance to be made for collection charges or for the profits of the tenure-holders in computing the fair and equitable rent under sub-s. (3) of S. 7, was a question of fact, which could not be interfered with in second appeal. The result is that this appeal fails, and is dismissed. As the respondent did not appear, there will be no order as to costs. Leave to appeal under Cl. 15 of the Letters Patent is granted.

G.N./R.K. *Appeal dismissed.*

1. (1885) 10 A. C. 59: 54 L. J. P. 9: 52 L. T. 474: 33 W. R. 477 : 5 Asp. M. C. 386 : 49 J. P. 324, Seward v. Vera Cruz.
2. (1861) 30 L. J. Ch. 777 : 2 J. & H. 31 : 7 Jur. (N S) 1006 : 5 L. T. 233 : 9 W. R. 850, Fitzgerald v. Champneys.
3. (1882) 9 Q. B. D. 151 : 46 L. T. 817, Dobbs v. Grand Junction Waterworks Co.
4. (1864) Bro. & L. 221 : 33 L. J. Ad. 193 : 12 L. T. 316, The India.

Advocate High Court
Jammu & Kashmir
Srinagar.

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A. I. R. (29) 1942 Calcutta 610

HENDERSON J.

Purna Chandra Biswas s/o Biswamber Biswas — Judgment-debtor —
Petitioner

v.

Sm. Kshiroda Sundari Dutt w/o Upendra Chandra Dutt and others —
Opposite Party.

Civil Rules Nos. 1414, 1658 and 983 of 1941, Decided on 22nd June 1942, issued in the matter of application for setting aside order of Munsif, 2nd Court, Patiya (Chittagong), D/- 16th June 1941.

(a) Bengal Money-Lenders Act (10 of 1940), S. 36 — S. 36 does not abrogate S. 34, Civil b P. C. — Review application under S. 36 (6) — New decree passed — Court can allow interest for period between passing of original decree and new decree.

Section 36 does not abrogate S. 34, Civil P. C. There is nothing in S. 36, Bengal Money-Lenders Act, itself to justify an inference that the power of the Court under S. 34, Civil P. C., to allow interest for a period subsequent to the decree has been taken away. Consequently, when a new decree in a money suit is passed on an application for review under S. 36 (6) of the Act, the Court has jurisdiction to allow interest for the period between the passing of the original decree and the passing of the new decree. [P 610*e*, *f*]

(b) Bengal Money-Lenders Act (10 of 1940), S. 36 (6) — Application by judgment-debtor c under S. 36 (6) — That judgment-debtor is unscrupulous man is no reason for rejecting application.

The fact that the judgment-debtor is an unscrupulous man is no ground for rejecting his application under S. 36 (6). [P 610*g*]

(c) Bengal Money-Lenders Act (10 of 1940), S. 34—Court can grant instalments subject to condition.

In granting instalments under S. 34 the Court can impose conditions on the judgment-debtor : ('42) 29 A.I.R. 1942 Cal. 128, *Rel. on.* [P 610*h*; P 611*a*]

Jitendra Nath Guha and Anil Kumar Das Gupta — for Petitioner.

Chandra Sekhar Sen and Durgesh Prosad Das — for Opposite Party.

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ORDER. — The question common to all these rules is whether, when a new decree in a money suit is passed on an application for review under S. 36 (6), Bengal Money-Lenders Act, the Court has jurisdiction to allow interest for the period between the passing of the original decree and the passing of the new decree. There is nothing in S. 36 of the Act itself which confers any such power; but the solution of the question depends upon the extent to which S. 34, Civil P. C., has been affected by the Bengal Money-Lenders Act. On behalf of the debtors it was pointed out that both in an application for review under sub-s. (6), and in a suit under sub-s. (1) the substantial relief asked for is the reopening of an existing decree, and it was suggested that the data upon which such an order may be made is quite irrelevant for the purpose of calculating interest for the period subsequent to the filing of the suit. This argument would undoubtedly have had force, if S. 34, Civil P. C., only empowered the Court to order interest up to the date of the decree. It however specifically empowers the Court to order further interest from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. Thus, even though the date of the original decree be taken as the date of the decree referred to in S. 34, the Court has power to order interest on account of a subsequent period. e

It was conceded on behalf of the decree-holders that the wide powers conferred by the Code in this section have to some extent been cut down by the provisions of the Bengal Money-Lenders Act. But I have no hesitation in overruling the suggestion that there is anything in S. 36, Bengal Money-Lenders Act, which by implication abrogates S. 34, Civil P. C. On the contrary, S. 36 begins with the words: "Notwithstanding anything contained in any law for the time being in force." Hence the existing laws are only affected to the extent laid down in the f section. There is nothing in that section itself to justify an inference that the power of the Court to allow interest for a period subsequent to the decree has been taken away. I accordingly hold that the Court has power to order the payment of interest for the period in dispute. Speaking for myself, I should allow interest for the period at six per cent. per annum less any profit derived by the decree-holder from property taken in execution of the decree, subject to the provision of the Bengal Money-Lenders Act that the total interest paid is not to exceed the principal. It now remains to consider the application of this principle to the individual cases concerned.

Civil Revision Case No. 1414 of 1941.

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Civil Revision Case No. 1658 of 1941. — In this case the learned munsif rejected the application firstly on the strength of the argument put forward by Mr. Bose, with which I have already dealt, and secondly because he thought that the petitioner is an unscrupulous man. Neither of these reasons is a valid reason and the petitioner is undoubtedly entitled to relief. On the principle enunciated above the opposite party is entitled to Rs. 915 on account of principal, Rs. 247 on account of interest up to the date of the suit, Rs. 330 for subsequent interest, in addition to that costs of the suit in execution cases and the present proceedings Rs. 282. Mr. Sen has drawn my attention to the fact that out of the sale proceeds Rs. 449, Rs. 285 was paid to other creditors of the petitioner on rateable distribution. He has also paid a further sum of Rs. 21 on account of another debt of the petitioner. It is obviously right h that the opposite party should be reimbursed for these payments. It is clearly impossible to include them as part of the costs of the present proceedings. But I should not be prepared to help the petitioner in revision unless he consented to have these payments incorporated in the new decree. Mr. Guha gave the necessary consent on his behalf. When these sums are included the total inclusive of all costs comes to Rs. 2174. From this must be deducted Rs. 150 on account of the opposite party's share in the sale proceeds of the property purchased by opposite party 3.

Then in the second place Mr. Sen pressed me that instalments should only be granted on conditions. The case in 46 C. W. N. 153,[1] is an authority for

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1. ('42) 29 A. I. R. 1942 Cal. 128 : I.L.R. (1942) 1 Cal. 414 : 75 C.L.J. 174 : 46 C.W.N. 153, Promode Nath Sinha v. Sm. Raseshwari Dassi.

the proposition that conditions may be imposed. The petitioner is undoubtedly a thoroughly unscrupulous man and has resorted to every conceivable device to evade payment of his debts. But from the ensuing discussion I have been convinced of the difficulty of imposing any conditions that would be really effective. The best way to test the sincerity of the petitioner is to order fairly substantial instalments. The rule is made absolute. The petitioner's application for review will be allowed. There will be a new decree for Rs. 2074. This will be payable in four annual instalments of Rs. 500, and a fifth instalment of Rs. 74. The first instalment will fall due on 1st October 1942. The petitioner will be restored to possession of the property purchased by the decree-holder, opposite party 2, on 7th October 1939. In default of payment of any instalment opposite party 2 will be put into possession of this property, and the purchase price of Rs. 858 set off against so much of the new decree as remains unsatisfied.

Civil Revision Case No. 983 of 1941.

* * * *

G.N./R.K. *Order accordingly.*

A. I. R. (29) 1942 Calcutta 611

PAL J.

Maharaja Sashi Kanta Acharjya Bahadur — Defendant 1 — Appellant

v.

Nayjan Bewa w/o Anu Sheikh and others — Respondents.

Appeal No. 1458 of 1939, Decided on 2nd July 1942, from appellate decree of Sub-Judge, 3rd Court, Mymensingh, D/- 26th May 1939.

(a) Possession — Ingredients of.

Both occupation and intention are necessary to constitute possession. If either occupation or intention ceases, the possession is destroyed. [P 612*d*]

Limitation Act —

('42) Chitaley, Art. 142 & 144 N. 9: "Termination of possession."

(b) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3 — Dispossession by landlord under legal process comes within Art. 3.

Where a landlord after the purchase of a holding in execution of a money decree obtains possession through a Court, the tenant is said to be dispossessed by the landlord within Art. 3: *Case law discussed.* [P 613*e*]

(c) Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3 — Dispossession of cosharers heirs in possession is dispossession of all cosharers.

Where after a death of a Mahomedan tenant only some of cosharers heirs are recorded in the sherista of the landlord and are in actual occupation of the holding, the dispossession of such cosharers (heirs) amounts to dispossession of all other cosharers within Art. 3. [P 612*b*,*c*]

Gunada Charan Sen and Nagendra Nath Bose — for Appellant.

JUDGMENT. — This is an appeal by defendant 1 in a suit for confirmation of possession upon declaration of the plaintiff's title to suit land to the extent of seven annas and odd gandas share. Admittedly the suit land appertained to the jote of one Karim Sheik under defendant 1. Karim died in April 1927 leaving behind three sons, five daughters and a widow, Moson Bewa. After his death one of his daughters died; then died the widow Moson Bewa in 1933; and lastly another daughter died in the same year. Plaintiffs 1 to 3 are the surviving daughters; plaintiffs 4 to 7 are the heirs of the deceased daughters. There is no dispute that as the result of the several successive deaths narrated in the plaint the plaintiffs' share in the estate left by Karim would amount to -7-3-1$\frac{1}{11}$ kara. The case of the plaintiffs is that on the death of Karim Sheikh all his heirs were recorded as tenants in the place of Karim in respect of the holding in dispute in the present suit; but that the landlord defendant 1 started a certificate proceeding only against the three sons of Karim for the realization of the arrears of rent of the holding in 1933 and in that proceeding purported to purchase the holding on 30th October 1934; that by this purchase he acquired only the right, title and interest of the three sons of Karim; but that even to this extent he did not disturb the actual possession of the old tenants. On these allegations the plaintiffs seek the relief mentioned above.

Defendant 1 alone contests the claim. His case is that the three sons of Karim were the only tenants recorded in his sherista and that the certificate in question having thus been against all the recorded tenants, the tenancy was fully represented in that proceeding and consequently by the sale held therein the holding itself passed to defendant 1. His further case is that as he took possession of the holding on 10th July 1935, the old tenants became dispossessed thereby on that date and consequently (1) the present suit is not maintainable without a prayer for recovery of possession; (2) the suit for possession is barred by limitation under Art. 3, Sch. 3, Ben. Ten. Act, the suit having been instituted on 23rd April 1938, i. e., beyond two years from the date of dispossession.

The learned Munsif found that in the certificate proceeding the entire tenancy was not represented and that consequently defendant 1 by his purchase in that proceeding acquired only the right, title and interest of the three sons of Karim. As regards the plea of special limitation, the learned Munsif held that it did not apply (1) "because the sisters were not in actual possession of the land." According to the learned Munsif the possession of the daughters was a constructive one through their brothers. He held that in the absence of actual physical possession, there could not be any dispossession within the meaning of Sch. 3, Art. 3, Ben. Ten. Act, and that dispossession effected by the act of delivery of possession by the Court is not such dispossession as would bring the case within the article. The learned Munsif, therefore, decreed the plaintiffs' claim. On appeal by defendant 1 this decision was confirmed by the learned Subordinate Judge. On the point of limitation the learned Subordinate Judge observed:

"The sisters did not actually possess the lands. The sons of Karim Sheikh possessed the lands. The possession of the sons of Karim Sheikh was not adverse to that of the plaintiffs, who occasionally enjoyed the usufruct of the lands. It appears from Ex. A that defendant 1 took delivery of possession of the lands on 10th July 1935. A mere delivery of possession unaccompanied by any act of actual possession will not certainly bring a case under Art. 3 of Sch. 3, Ben. Ten. Act. It appears that shortly after taking delivery of possession defendant 1 settled the lands for three years with Kudrat Sheikh one of the sons of Karim Sheikh; the pos-

session of Kudrat, it does not appear, was at all disturbed after the delivery of possession. The possession of the plaintiffs was constructive. They possessed the lands through Kudrat Sheikh and others. Kudrat Sheikh and others never dispossessed the plaintiffs. Article 3 of Sch. 3, Ben. Ten. Act, does not apply when a person was not in actual possession of the land. As the plaintiffs were not actually dispossessed by Kudrat Sheikh the suit was not barred by limitation."

Mr. Sen appearing for the appellant contends that both the Courts below have gone wrong on the question of limitation. Strictly speaking the plaintiffs' case is not one of constructive possession through cosharers. Their case is one of actual possession through the agency of the three sons of Karim and by actual realization of the usufruct from them. The sale certificate (Ex. H) shows that defendant 1 purported to purchase the holding itself, though the legal effect of this purchase might have been limited to the shares of the three sons of Karim. The report of the delivery of possession (Ex. A) shows that on 10-7-1935 defendant 1 was given possession of the entire holding, plot by plot, and by entry on each plot by his agent. The report says : "*Protyek dager Bhumite nishandehike probesh koraiya oi bhumir modhye bansher Jhanda puntiya . . . . . ritimoto dakhal diyachhi.*"

This, in my opinion, constituted complete dispossession of all the then tenants including the present plaintiffs or their predecessors. It was a clear case of coming in of one person and driving out of another from possession. There is nothing constructive in the act of dispossession here. It is a case of actual ouster, at least of the persons in actual occupation of the land. Even if the plaintiffs were only in constructive possession through their cosharers, as these cosharers were completely ousted from the possession by this act, these cosharers and every one in possession through them, became dispossessed thereby. The purchaser here purported to purchase the entire holding and entered on the land in assertion of his exclusive right to the same. His claim to the entire sixteen annas was no doubt wrongful; but that was his claim in fact. There was thus no scope for his possession being also on behalf of the plaintiffs who happened to become his cosharers in lands.

In order to constitute dispossession of the person claiming to be in possession through somebody else, it is certainly not necessary that this last named person must dispossess the claimant. As possession may be acquired through agents, it may equally be lost through them. Possession involves a physical fact and a mental state. *Apiscimur possessionem corpore et animo; neque per se animo, aut per se corpore* : we gain possession with the body and mind; but not with the mind by itself, nor with the body by itself. Both occupation and intention are necessary to constitute possession. If either occupation or intention ceases, the possession is destroyed. Just as in the case of principal, so in that of an agent, possession may be lost (1) *corpore* or (2) *animo*. If the agent is ejected by a third party, a hostile occupation and possession at once arises, and the principal loses possession in the same way as if he had been personally evicted. But the question still remains whether this would amount to 'dispossession within the meaning of Art. 3, Sch. 3, Ben. Ten. Act. In order to attract the operation of this Article the "dispossession" must be by the 'defendant'—by the "landlord".

There has been some divergence of judicial opinion as to whether an ouster under a legal process at the instance of the landlord would be dispossession within the meaning of Art. 3, Sch. 3, Ben. Ten. Act, so as to attract its operation. One view is that the article would equally apply if the landlord took possession through Court after having purchased the holding in execution of a money decree, and thereby dispossessed the raiyat. This view finds support in 21 C. W. N. 976,[1] 21 C. W. N. 978,[2] 24 C.W.N. 1024,[3] 31 C.W.N. 634[4] and 40 C.W.N. 173.[5] The contrary view was taken in 40 C. W. N. 135[6] (Guha and Lodge JJ.) and also apparently in 27 C. L. J. 528[7] (Mookerjee and Walmsley JJ.) and 17 C. W. N. 817[8] (N. R. Chatterjee and Digambar Chatterjee JJ.). In 27 C. L. J. 528[7] (Mookerjee and Walmsley JJ.) it was held that where a landlord, in execution of a decree for arrears of rent, puts a holding to sale, purchases it himself and obtains delivery of possession through Court, such dispossession of the tenant is not dispossession within the meaning of Art. 3, Sch. 3, Bengal Tenancy Act. In this last named case Sir Ashutosh Mookerjee J. followed the decision in 17 C. W. N. 817[8] and, added as a reason for so holding, the following : "Indeed, so long as the sale remains in force, the possession of the landlord auction purchaser cannot possibly be challenged by way of suit." In 17 C.W.N. 817[8] one of the reasons in support of the view was given thus:

"The landlord (as purchaser) no doubt, moves the Court to deliver possession and possession is delivered to him at his instance, but he gets possession through the intervention of the Court. The delivery of possession by which the dispossession is effected is an act of the Court and when the landlord gets into possession by a process of the Court, we do not think it is an act of dispossession by the landlord within the meaning of the article, which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law."

In both these cases the plaintiff himself was the judgment-debtor and consequently the prior process of law was binding on him. With due respect to the learned Judges, I must say, the reasons given in these cases are indeed weighty reasons and the legal propositions laid down therein are of much inner value. The legal proposition laid down in the above cases has been accepted, if not *rationæ imperii* at least *imperio rationis*. Guha and Lodge JJ. followed this authority in 40 C. W. N. 135[6] and thought that the reasons given by N. R. Chatterjea J. in 17 C. W. N. 817[8] applied with full force in the case before them. Perhaps this was pouring of a new content into the rule. But then, there are the other series of cases and there is the decision of a Special Bench of three Judges of this Court in 31 C. W. N. 634[4] (Rankin C. J., C. C. Ghose and Mitter JJ.) in which the article was observed to be applicable even

1. ('17) 4 A. I. R. 1917 Cal. 465 : 35 I. C. 838 : 21 C.W.N. 976, Fani Bhusan v. Pulin Chandra.
2. ('18) 5 A. I. R. 1918 Cal. 699 : 40 I. C. 419 : 21 C. W. N. 978, Satis Chandra v. Nitya Gopal.
3. ('20) 7 A. I. R. 1920 Cal. 852 : 59 I. C. 719 : 24 C.W.N. 1024, Haris Chandra v. Nripendra Kumar.
4. ('27) 14 A. I. R. 1927 Cal. 488 : 54 Cal. 450 : 31 C. W. N. 634, Satish Chandra v. Hashem Ali.
5. ('36) 23 A. I. R. 1936 Cal. 299 : 163 I.C. 84 : 40 C. W. N. 173, Sheikh Alam v. Atul Chandra Roy.
6. ('35) 63 Cal. 503 : 40 C.W.N. 135, Gostha Bihari v. Amiya Kumar.
7. ('18) 5 A. I. R. 1918 Cal. 171 : 46 I. C. 221 : 27 C. L. J. 528, Ram Kinkar v. Shitiram Panja.
8. ('13) 17 C. W. N. 817 : 19 I. C. 545, Kamaldhar Thakur v. Rameshwar Singh Bahadur.

to a case where the plaintiffs were some of the judgment-debtors and consequently the process of delivery of possession was binding on them. The case as made out by the plaintiffs there was not the case of ouster by the machinery of a Court of law and, therefore, any observation with reference to cases of ouster by the machinery of a Court of law was mere obiter. But Rankin C. J. observed :

"It is therefore not a case of ouster by the machinery of a Court of law, and although I agree with Page J. in the opinion that the meaning of dispossession is satisfied when the defendant, landlord comes in against the will of the occupying tenant even by the machinery of a Court of law, the present case does not actually require us to decide that question."

The decision in 40 C. W. N. 135[6] of a Division Bench of this Court referred to above gives rise to some difficulty, and perhaps, to a certain extent, extends the principle underlying the decision in 17 C. W. N. 817[8] and 27 C. L. J. 528,[7] even to a case where the plaintiff is a person who was not bound by the process of delivery of possession. In this case the holding in question originally belonged to one Rajani Kanto Mukherjee. He sold the same to Jogendra Karmakar, who on his part, sold it to one Radhabinod Mandol in 1908. These transfers were not recognised by the landlords, and, in their Sheresta, Rajani continued as the tenant. Radha Binod subsequently in 1921 executed mortgages in favour of the plaintiffs and the plaintiffs in enforcement of these mortgages purchased the mortgaged property in 1927. In the meantime Jadu Nath Das, one of the cosharers of the landlords obtained a money decree against Rajani Kanto and in execution of that decree purchased the property in 1924. He took delivery of possession on 25th July 1924. The plaintiff instituted the present suit for recovery of possession from Jadu Nath in 1929. The defendant contended (1) that the holding was a non-transferable one and consequently the plaintiffs acquired no title to it by their purchase and (2) that in any case the plaintiffs' claim was barred by special law of limitation contained in Art. 3 of Sch. 3, Ben. Ten. Act. R. C. Mitter J. upheld the defence plea of limitation. On appeal under the Letters Patent, Guha and Lodge JJ. reversed this decision applying to this case the principle of the decision in 17 C. W. N. 817.[8] It was not decided whether the holding was transferable or not. If it was not transferable, then the plaintiffs' suit would fail for want of title, or they would succeed as regards the question of title only on the footing that their mortgagor Radha Binod acquired the tenancy right by adverse possession. Even then if the holding was a non-transferable one their purchase of 1927 would have been of no avail to them. The question of limitation could however arise only on the footing that the plaintiffs and their predecessor Radha Binod had acquired the raiyati interest. If so, the process of delivery of possession against Rajani was not binding on Radha Binod. Consequently, if by that process Radha Binod lost his possession it was not a dispossession 'in due course of law' and nothing would have prevented him to challenge the possession of the cosharer landlord Jadu Nath immediately by way of suit. Strictly speaking this was therefore not a case where the principle of the decision in 17 C. W. N. 817[8] would legitimately apply. It was however so applied by Guha and Lodge JJ. Their decision in my opinion is a projection of the earlier rule to a new case with dissimilar content. Their decision was given on 30th July 1935. But thereafter on 20th August of the same year our learned brothers Nasim Ali and Henderson JJ. gave their decision in 40 C. W. N. 173[5] wherein they upheld the plea of limitation in a case of the present type. I prefer to follow the last named decision which followed the earlier decisions of this Court noticed above.

In my opinion therefore the possession taken by defendant 1 in the present case on 10th July 1935 constituted a dispossession of the plaintiffs by the landlord within the meaning of Art. 3, Sch. 3, Ben. Ten. Act. The suit therefore must be held to have been barred by the special law of limitation. I therefore allow this appeal. The judgments and decrees of the Courts below are set aside and the plaintiffs' suit is dismissed. But I make no order as to costs.

R.K. *Appeal allowed.*

A. I. R. (29) 1942 Calcutta 613

SEN J.

Motilal Chhajulal

v.

Giridharilal Rameshwarlal.

Application, Decided on 24th July 1941.

(a) Civil P. C. (1908), O. 30 — O. 30 does not apply to joint family business.

Order 30 applies only to contractual firms and has no application to a joint family business and therefore the members of joint family carrying on a joint family business in a particular name cannot sue or be sued in that name under O. 30 : ('34) 21 A.I.R. 1934 Cal. 810, *Rel. on.* [P 615*a*]

C. P. C. —

('40) Chitaley, O. 30, R. 1, N. 1 Pt. 11.
('41) Mulla, Page 1003 Pt. (b).

(b) Civil P. C. (1908), O. 21, R. 50 and O. 30 — Applicability — Award against joint family business cannot be executed under O. 21, R. 50.

The word "firm" in O. 21, R. 50 is used in the same sense as that in which it is used in O. 30 because O. 21, R. 50 applies only to decrees passed in suits instituted under O. 30. Consequently, O. 21, R. 50 applies only to a decree passed against a contractual firm and not to a decree passed against a joint family business. And since a decree against a joint family business which is not a contractual firm cannot be executed with the aid of O. 21, R. 50 an award against such business is equally incapable of such execution : ('33) 20 A.I.R. 1933 Bom. 433, *Expl. and Disting.*; ('40) 27 A. I. R. 1940 Pat. 149, *Not approved.* [P 615*d*,*e*,*f*]

C. P. C. —

('40) Chitaley, O. 21, R. 50, N. 1.
('41) Mulla, Page 820 N. "Scope of the rule."

(c) Civil P. C. (1908), O. 21, R. 50 (2)—Scope —Question whether award is against firm at all —O. 21, R. 50 (2) does not apply.

Order 21, R. 50 (2) deals with a case where a person denies that he is a partner of the firm against which the decree has been passed. It does not contemplate a dispute relating to the question whether the award is against a firm at all and therefore the provision in the rule that the question of disputed liability may be set down for hearing as an issue in a suit does not apply to such a case. [P 616*b*]

C. P. C. —

('40) Chitaley, O. 21, R. 50, N. 5.
('41) Mulla, Page 822 N. "Issue to determine liability."

S. R. Das and A. K. Sarkar — for Applicants.
S. M. Bose, H. N. Sanyal and H. D. Bose — for Respondents.

ORDER. — This is an application under O. 21, R. 50, Civil P. C. The petitioner alleges that there were transactions between the petitioner and Messrs. Giridharilal Rameswarlal as a result of which a certain sum became due to the petitioner. Disputes arose and they were referred to the arbitration of the Bengal Chamber of Commerce under the old Arbitration Act. The parties to the arbitration as set out in the award are as follows: "Messrs. Motilal Chhajulal sellers and Messrs. Giridharilal Rameswarlal, buyers." An award was made against Messrs. Giridharilal Rameswarlal. The award was filed in Court and became enforceable as a decree. The petitioner now applies under O. 21, R. 50, sub-rule (2), Civil P. C., for leave to execute the award against three persons, viz., Lalchand Khendelwal, Kaluram Khendelwal and Benarasilal Khendelwal on the ground that they are partners of the firm of Messrs. Giridharilal Rameswarlal. Lalchand Khendelwal and Benarasilal Khendalwal are represented by Mr. H. D. Bose and Kaluram Khendelwal by Mr. S. M. Bose. The contentions on their behalf are the same. They say that there was no partnership firm called Giridharilal Rameswarlal and allege that Giridharilal Rameswarlal was the name of a joint family business which belonged to a joint Mitakshara Hindu family of which they are some of the members. They contend that inasmuch as Giridharilal Rameswarlal was not a contractual firm the award is a nullity and cannot be executed at all. In the alternative they contend that at any rate the award cannot be executed against them inasmuch as the provisions of O. 21, R. 50 are applicable to contractual firms only and not to joint family businesses.

The first question for determination is whether Messrs. Giridharilal Rameswarlal constitute a partnership firm. The evidence on this point is one-sided and I have no hesitation whatsoever in holding that the business of Giridharilal Rameswarlal does not constitute a co-partnership firm but that it is a joint family business belonging to a Mitakshara joint family of which the three respondents are members. The petition of the firm Motilal Chhajulal in this proceeding is verified by one Govindprosad who is the constituted attorney of the petitioner firm. In para. 5 of this petition it is stated: "that Lalchand Khendelwal, Kaluram Khendelwal and Benarsilal Khendelwal were and are some of the partners of the said firm of Giridharilal Rameswarlal." In the verification of the petition Govindprosad says that he has no personal knowledge of this fact and that it is based on information received and believed to be true. The source of the information is not given. After the affidavit in opposition had been filed stating that Giridharilal Rameswarlal was the name of a Hindu joint family business and denying the existence of any such co-partnership firm, Govindprosad swore another affidavit in opposition in which he denied that Giridharilal Rameswarlal is a joint family business and stated that it was a partnership firm. That is all the evidence given on behalf of the petitioner firm to prove the existence of a partnership firm called Giridharilal Rameswarlal. On behalf of the respondents certain materials have been placed before me which establish that there is no such firm. There are the affidavits of Kaluram and Lalchand to the effect that Giridharilal Rameswarlal is not a co-partnership firm but the name of a joint family business. A suit was filed regarding this very same matter by Kaluram Khendelwal against the petitioner and one Chandgiram Sharma. The cause title of the plaint is in the following terms:

"Kaluram Khendelwal for self and as karta of a Hindu joint family carrying on business under the name and style of Giridharilal Rameswarlal."

The cause title is verified as being true to the knowledge of the plaintiff. The petitioner made an application for the stay of the suit on the ground that the matter in suit had been referred to arbitration. That petition was sworn to by Radheyshyam, a partner of the petitioner firm of Motilal Chhajulal. In para. 9 of that petition the petitioner firm states as follows:

"Thereafter on or about 27th July 1940 the above suit was instituted by the plaintiff Kaluram Khendelwal abovenamed as the karta of the said firm of Giridharilal Rameswarlal which appears to be a joint family business, against your petitioners."

Radheysham states that this statement is true to his knowledge. The suit was stayed on the footing that the transactions between the members of this Hindu joint family and the petitioner were the same as those which formed the subject-matter of arbitration proceedings. In these circumstances I find it impossible to believe the statement now made by Govindprosad that Giridharilal Rameswarlal was a co-partnership firm. My attention was drawn by Mr. Das to a warrant of attorney filed by Kaluram Khendelwal in the present application. There Kaluram Khendelwal states as follows:

"I, Kaluram Khendelwal, one of the partners of the firm of Messrs. Giridharilal Rameswarlal judgment-debtors' firm abovenamed do hereby nominate and appoint Messrs. Nahar & Datta, attorney-at-law, etc."

Mr. Das contends that this amounts to an admission of the existence of a co-partnership firm named Giridharilal Rameswarlal and of the fact that Kaluram Khendelwal was a partner thereof. I do not think that any importance should be attached to the statement in the warrant of attorney in view of the fact that Kaluram Khendelwal after executing this warrant swears that there is no co-partnership firm called Giridharilal Rameswarlal and that 'Giridharilal Rameswarlal' is the name of a joint family business belonging to a Mitakshara joint family. The words 'one of the partners of the firm of Messrs. Giridharilal Rameswarlal' were used loosely. The words 'firm' and 'partner' are often inaccurately used to describe a joint family business and a member of such a joint family respectively. I hold that there is no partnership firm called Giridharilal Rameswarlal and that Giridharilal Rameswarlal is the name of the joint family business of a Mitakshara family of which the three respondents Kaluram Khendelwal, Benarsilal Khendelwal and Lalchand Kheldelwal are members.

The next question which arises is whether in these circumstances the award made against Giridharilal Rameswarlal can be enforced against these three persons by having recourse to the provisions of O. 21, R. 50. Under the general law if a person wishes to enforce a right by suit against anyone he must institute the suit against that person and in the name of that person. Where however two or more persons carry on business in co-partnership in a firm name they may sue or be sued in the name of the firm. This is allowed by O. 30, Civil P. C. The order makes an exception to the general rule for the sake of convenience; but the concession granted by the order is only in favour of contractual firms and not in favour of joint family businesses. This has

been clearly laid down by this Court in 61 Cal. 975.[1] In that case reference was made to another unreported case *Shivaprasad & Sons* v. *Ormerods (India) Ltd.*,[2] wherein it was also held that O. 30, Civil P. C., had no application to a joint family business and that the members of a joint family carrying on a joint family business in a particular name could not sue or be sued in that name under O. 30. It is clear, therefore, that if a suit had been filed by the firm of Motilal Chhajulal it would have had to have been filed against the respondents in their individual names. A suit filed against a defendant described as Giridharilal Rameswarlal would not be a suit against the members of the Mitakshara family which carried on a business named Giridharilal Rameswarlal and a decree passed in such suit against Giridharilal Rameswarlal would in my opinion be a nullity and incapable of execution inasmuch as Giridharilal Rameswarlal is neither a person in fact nor recognized as such by law even for limited purposes of O. 30.

Mr. Das on behalf of the petitioner argues that even if a decree passed in a suit such as has been described by me be not executable, an award made in similar circumstances would be executable because an award is not a decree. He says that something which may be bad as a decree is not necessarily bad as an award. He next refers me to S. 15, Arbitration Act, which lays down that when an award is made and filed in Court it becomes enforceable as if it were a decree of the Court and contends that even if the award be bad if looked upon as a decree once it is filed the Court has no option but to enforce it and for that purpose to treat it as a good decree. In support of this view he referred me to 58 Bom. 162.[3] With great respect to Mr. Das I must say that I am unable to appreciate how that case has any relevancy to the question which is now under discussion. In that case an award was made against a contractual firm. It was filed in Court and an application was made under O. 21, R. 50 to enforce the award against certain persons who were alleged to be partners of the firm. In opposition to the application it was contended that O. 21, R. 50 applied only to decrees and therefore it could not be availed of by persons seeking to enforce an award. It was held there that for the purposes of enforcement the award against a firm should be considered to be a decree and that therefore O. 21, R. 50 would be clearly applicable to the enforcement of such an award. It was said there that the award by a fiction became a decree of Court. The case decided no more than that. It was nowhere said that if the fictional decree was proved to be incapable of execution owing to certain defects, the defects should be ignored and the decree executed as a good decree with the help of some other fiction. The question which I am now considering is this: If a decree cannot be enforced under O. 21, R. 50 because it is not a decree against a contractual firm can an award of the same nature be enforced under O. 21, R. 50. The case relied upon by Mr. Das offers no solution to this question. It seems to me that once it is held that a decree against a joint family business which is not a contractual firm cannot be executed with the aid of O. 21, R. 50 it must necessarily follow that an award against such business is equally incapable of such execution. Section 15, Arbitration Act, lays down that the award when filed becomes enforceable as a decree of the Court in which it has been filed. In other words for the purposes of execution the award must be treated as a decree. If this award is so treated it becomes a decree against Giridharilal Rameswarlal which is the name of a joint family business and not of a contractual firm and it is subject to all the infirmities such a decree.

Mr. Das next argued that a decree against a joint family business could be executed by having recourse to the provisions of O. 21, R. 50 and he referred me to A. I. R. 1940 Pat. 149.[4] There is an observation of Cherjee J. in that case to the effect that O. 21, R. 50 applies to decrees against a joint family business but this is merely an obiter dictum inasmuch as the learned Judge expressly stated that it had not been proved that the business was not a co-partnership firm. All I need say is that I do not agree with the view expressed in that case. Order 21 rule 50 applies only to decrees passed against a firm. This is clear from the very words of the rule. The word 'firm' is used in this rule in the same sense as that in which it is used in O. 30 because the rule applies only to decrees passed in suits instituted under O. 30. That being so it must be held that O. 21, R. 50 applies only to a decree passed against a contractual firm and not to a decree passed against a joint family business. The matter may be looked at from another point of view. Order 21 R. 50 permits a decree passed against a firm to be executed with leave of the Court against a partner of the firm. Now the liability of a partner is very different from the liability of a member of a joint family business. The rule cannot therefore be employed to fix the liability of a partner upon a person who is not a partner.

After arguments on behalf of the respondents had been concluded Mr. Das suggested in the course of his reply that the question whether Giridharilal Rameswarlal was a contractual firm or a joint family business should be set down for hearing as a suit and he referred to the latter part of O. 21, R. 50 (2). This request came as a surprise. Throughout the very long arguments of Mr. Das which extended over two hours, no such suggestion was made and the matter was discussed on the footing that the Court should come to a decision on this point on the materials already before it. Mr. Das does not disclose what fresh materials there are to establish the fact that Giridharilal Rameswarlal was a partnership. I have already pointed out that Reshyam a member of the petitioner firm accepts the position that Giridharilal Rameswarlal is a joint family business; I have also pointed out that the petitioner firm obtained the stay of the suit of Sam on the footing that the transactions alleged in the suit to be between the members of the Hindu joint family and the petitioner were the transactions involved in the arbitration proceedings. These facts and the facts disclosed in the affidavits leave no doubt in my mind that to concede to Mr. Das's request would be to prolong these proceedings unless. Again I am of opinion that the provision in O. 21, R. 50 (2) to the effect that, where a person sought to be made liable as a partner denies such liability, the Court may have the issue of

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1. ('34) 21 A.I.R. 1934 Cal. 810 : 152 I. C. 991 : 61 Cal. 975 : 38 C. W. N. 914, Lalchand Amonmal v. M. C. Boid & Co.
2. Suit No. 1207 of 1925.
3. ('33) 20 A.I.R. 1933 Bom. 433 : 147 I. C. 587 : 58 Bom. 162 : 35 Bom. L. R. 941, Manilal Lallubhai v. Bharat Spinning and Weaving Co. Ltd.
4. ('47 A. I. R. 1940 Pat. 149 : 184 I. C. 701 : 21 P. T. 618, Nathuni Prasad v. Firm Radha Kisse Dutt Rai.

liability tried as a suit is one which oes not apply to this case. Order 21, R. 50 (2) runshus :

"Where the decree-holder claims) be entitled to cause the decree to be executed ainst any person other than such a person as is ferred to in sub-r. (1), cls. (b) and (c), as being a rtner in the firm, he may apply to the Court wh passed the decree for leave, and where the liabil is not disputed, such Court may grant such lee, or, where such liability is disputed, may order tt the liability of such person be tried and deteined in any manner in which any issue in a suay be tried and determined."

Order 21, R. 50 presupposes that th is a decree against a firm and lays down the ocedure for executing such decree against personlleged to be partners of the firm. The opening ws of O. 21, R. 50 make this clear. They are as fols: "Where a decree has been passed against a h, execution may be granted, etc." Sub-rule (2)als with a case where a person denies that he i partner of the firm against which the decree heen passed. The words used are "where such liity is disputed", i. e., liability by reason of be a partner. The present dispute does not relate toe question whether the respondents are partn of a firm against which an award has been de but it relates to the question whether the aw is against a firm at all. This dispute is not one ch is contemplated by O. 21, R. 50 (2) and refore the provision in the rule that the questiof disputed liability may be set down for hearing n issue in a suit does not really apply. For the e reasons I hold that the award is incapable of ution as a decree and that even if it is executablcannot be executed against the respondents by oking the aid of O. 21, R. 50. The application therefore, dismissed with costs.

G.N./R.K. *Applicationmissed.*

A. I. R. (29) 1942 Calcutt16

HENDERSON J.

Nirode Barani Debya and ther — Judgment-debtors — Petitirs

v.

Sisir Kumar Mukherjee—De.holder — Oppo Party.

Civil Rule No. 554 of 1942, Decion 20th August 1942.

Bengal Money-Lenders Act (10 o10), S. 2 (12) — Seller insisting on full paym— Purchase money paid partly in cash anartly by execution of pronote carrying intere Transaction is loan.

Where on the seller insisting upon fayment the purchase money is paid partly in casd partly by the execution of a hand-note carryinterest at a certain rate, the transaction amount a lnn within S. 2 (12). P 61[f]

Kumud Bandu Bagchi — for Petitio.

Bijan Behary Das Gupta — for Oppo Part.

ORDER. — This rule has been obtained by the judgment-debtor and it is directed against an order rejecting her application under S. 36 (b), Bengal Money-Lenders Act. Unfortunately it is not possible for me to make a final order here. There is no longer any dispute as to the facts. The original debt was incurred by the petitioners' husband and father. It was for Rs. 90 and represented the balance of the purchase money due by him to the decree-holder on the sale of land. The purchase money was discharged partly in cash and partly by a hand-note. This hand-note was renewed by another hand-note in the year 1928. This hand-note in its turn was renewed by another hand-note executed by the petitioners themselves and is the basis for the present claim. The contention of the opposite party was that the hand-note was not a loan within the meaning of the Act. He relied on the decision in 45 C. W. N. 734.[1] The learned Judges there had to deal with a bond which was for unpaid purchase money and they held that such a transaction was not in substance a loan. The present case appears to me to be quite different in nature. Apart from the fact that it is concerned with a renewed hand-note, there is the provision of interest. Mr. Das Gupta contended that other persons besides money-lenders can charge interest. I am bound to say that I have not known anybody other than money-lender charging interest at the rate of 37½ per cent. The real nature of the present transaction was that the purchase money was paid partly in cash and partly by the hand-note. If the real cause of action in the present case were merely the unpaid purchase money with a reasonable rate of interest it would have been paid off long ago. It is not the case of the seller being willing to take part-payment but the case of a seller insisting upon full payment partly in cash and partly in something else. I am therefore of opinion that this transaction was in substance a loan.

All the transactions are within a year of the date of the suit and the petitioners are entitled to go back to the original transaction. In view of the fact that the third bond was only for Rs. 93-6-0 it seems to me to be incredible that the opposite party did not realise a great deal more than Rs. 90 as interest between the dates of the two bonds. Mr. Das Gupta however says that this requires to be cleared up. The opposite party will therefore be entitled to Rs. 90 as interest less anything which was paid before the suit by the original debtors. This will have to be investigated by the learned Munsif. The opposite party will also be entitled to costs of the suit, execution case and the present application. The rule is accordingly made absolute, the order of the Munsif is set aside and he is directed to pass a new decree in accordance with law as indicated above. The petitioners will get their costs in this rule, the hearing-fee being assessed at two gold mohurs.

G.N./R.K. *Rule made absolute.*

1. ('41) 28 A.I.R. 1941 Cal. 538 : 196 I. C. 287 : 45 C. W. N. 734 : 73 C. L. J. 530, Saradindu Sekhar Banerjee v. Lalit Mohan Mazumdar.

Advocate High Ct.

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